THE
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1926

MADRAS SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF THE MADRAS HIGH COURT REPORTED IN

(1) I. L. R. 49 MADRAS
(2) 50 & 51 MADRAS LAW JOURNAL
(3) 23 & 24 MADRAS LAW WEEKLY
(4) 1926 MADRAS WEEKLY NOTES
(5) 27 CRIMINAL LAW JOURNAL
(6) 91 to 98 INDIAN CASES

WITH

EXTRA JUDGMENTS

S. N. DAR, B.A., LL.B.,
Vakil High Court,
SRINAGAR (Kashmir)

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1926

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THE

ALL INDIA REPORTER

1926 MADRAS

COMPARATIVE TABLES

(PARALLEL REFERENCES)

Hints for the use of the following Tables

Table No. I.—This Table shows serially the pages of INDIAN LAW REPORTS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. II.—This Table shows serially the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

Table No. III.—This Table is the converse of the **First** and **Second Tables.** It shows serially the pages of the ALL INDIA REPORTER with corresponding references of all the JOURNALS including the INDIAN LAW REPORTS.

TABLE No. I

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N. B.—Column No. 1 denotes pages of I. L. R. 49 MADRAS.
Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

I. L. R. 49 Madras=All India Reporter.

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TABLE No. II

Showing seriatim the pages of other REPORTS, JOURNALS and PERIODICALS for the year 1926 with corresponding references of the ALL INDIA REPORTER.

N. B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

50 Madras Law Journal=All India Reporter

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102	1926	"	18	228	"	"	569	377	"	"	449	514	"	"	752	674	"	"	530
107	1927	"	340	232	"	"	429	384	"	"	576	520	"	"	615	681	"	"	683
112	1926	"	283	234	"	"	464	387	"	"	687	535	"	"	661	689	"	"	457
114	"	"	567	237	"	"	510	391	"	*PC*	18	547	"	"	749	699	"	"	706
116	"	"	431	239	"	"	357	399	"	*M*	568	552	"	"	748				

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MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.			MLJ)	A. I. R.		
1	1926	*PC*	38	159	1926	*M*	633	309	1926	*M*	1016	451	1926	*M*	311	605	1927	*M*	19
6	"	"	52	161	"	"	813	311	"	"	1213	457	"	"	1150	610	"	"	80
10	"	*M*	573	165	"	"	755	313	"	"	609	464	"	"	1146	613	1926	"	1133
12	"	"	772	167	"	"	963	326	"	"	976	466	"	"	1184	621	1927	"	50
16	"	"	881	172	"	"	211	328	"	"	989	472	"	"	1176	630	1926	"	829
42	"	*PC*	46	182	"	"	936	331	"	"	1008	474	"	"	1159	633	1927	"	59
52	"	"	54	193	"	"	951	334	"	"	1026	475	"	"	1161	635	"	"	77
60	1927	*M*	175	194	"	"	911	338	"	"	1099	480	"	"	1178	637	"	"	60
62	1926	"	251	208	"	"	1035	349	"	"	899	489	"	"	1197	639	"	"	75
67	"	"	678	209	"	"	942	351	"	"	934	490	"	"	1131	641	"	"	85
69	"	"	648	211	"	"	974	354	"	"	1038	495	"	"	1165	648	"	"	84
73	"	"	692	215	"	"	932	358	"	"	1082	498	"	"	878	650	1926	"	1051
79	"	"	875	219	"	"	980	360	"	"	1032	500	"	"	1047	652	1927	"	50
82	"	*PC*	56	228	1927	"	58	366	"	"	1093	502	"	"	1097	658	1926	"	739
90	"	*M*	676	229	1926	"	699	373	"	"	720	506	"	"	1138	661	1927	"	67
95	"	"	903	239	"	"	1005	378	"	"	1061	510	1927	"	10	663	"	"	89
99	"	"	774	243	"	"	1021	387	"	"	1017	529	"	"	1	667	"	"	123
106	1925	"	1198	249	"	"	977	389	"	"	1079	545	1926	"	1203	671	"	"	166
112	1926	"	906	252	"	"	1015	391	"	"	1081	552	"	"	1202	678	"	"	148
119	"	"	900	254	"	"	1018	394	"	"	1089	554	"	"	1209	680	"	"	153
123	"	"	949	255	"	"	968	401	"	"	1143	557	"	"	1123	684	"	"	109
126	"	"	857	258	"	"	1012	403	"	"	1048	559	"	"	190	685	"	"	66
130	"	"	946	265	"	"	1001	410	"	"	1040	561	1927	"	192	687	"	"	78
131	1925	"	1046	269	"	"	994	414	"	"	827	563	1926	"	1193	690	1926	*J*	173
135	1926	"	834	282	"	"	991	418	"	"	1117	570	"	*PC*	34	692	1927	*M*	177
138	"	"	767	287	"	"	1019	426	"	"	916	577	"	"	73	695	"	"	140
139	"	"	623	290	"	"	971	436	"	"	1104	586	"	"	31	701	1926	"	947
143	"	"	966	295	"	"	1024	440	"	"	1183	587	"	"	79	704	1927	"	156
148	"	"	836	299	"	"	986	443	"	"	1141	598	1927	*M*	69	706	"	"	173
158	"	"	679	304	"	"	898	446	"	"	1084	602	"	"	18				

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MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.			MLJ	A. I. R.		
712	1927	*M*	124	734	1926	*M*	668	765	1927	*M*	99	804	1927	*M*	157	845	1926	*M*	1190
714	"	"	113	738	1927	"	93	781	1926	*PC*	93	809	1926	*PC*	119	849	1927	"	245
716	"	"	34	742	"	"	130	785	"	"	96	815	"	"	126	856	"	"	219
719	"	"	163	745	"	"	184	788	"	"	94	822	"	"	112	869	"	"	233
726	"	"	36	747	"	"	295	792	"	"	105	836	"	"	100	880	"	"	137
730	1926	"	1009	757	"	"	228	800	1927	*M*	199								

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MLW)	A. I. R.			MLW)	A. I. R			MLW)	A. I R.			MLW)	A. I. R			MLW)	A. I. R.		
1	1925	*PC*	305	168	1926	*J*	86	353	1926	*M*	228	521	1926	*M*	607	653	1926	*M*	829
3	"	"	290	172	"	*PC*	1	361	"	"	427	525	"	"	863	657	"	"	769
9	"	"	297	175	"	*M*	181	364	"	"	534	528	"	"	681	664	"	"	744
10	1926	*M*	338	178	"	"	141	367	"	"	594	533	"	"	687	675	"	"	743
13	"	"	234	182	1925	*PC*	232	373	"	"	464	537	"	"	354	678	"	"	452
16	"	"	367	186	1926	*M*	398	377	"	"	577	538	"	"	654	681	"	"	752
19	"	"	362	193	"	"	323	379	"	"	573	540	"	"	695	688	"	"	985
22	"	"	321	199	"	"	114	382	"	"	366	547	"	"	668	692	"	"	747
26	"	"	954	205	1925	"	894	384	"	"	570	551	"	"	683	693	"	"	690
29	"	"	384	210	1926	"	926	390	"	"	406	559	"	"	670	695	"	"	748
31	"	"	251	212	"	*J*	87	392	"	"	386	564	"	"	720	698	"	"	785
36	"	"	853	213	1925	*M*	1085	396	"	"	410	569	"	"	647	705	1927	"	294
46	1925	*PC*	211	215	1926	"	485	399	1925	*PC*	261	571	"	"	380	707	1926	"	377
51	"	"	124	219	"	"	345	406	1926	*M*	135	573	"	"	224	709	"	"	772
56	1926	*M*	420	220	1925	*PC*	264	407	"	*J*	133	575	"	"	643	714	"	"	535
58	"	"	849	227	1926	*M*	412	409	"	*M*	325	581	"	"	678	716	"	"	762
63	"	"	311	233	"	"	381	411	"	"	161	584	"	"	810	718	"	"	727
69	"	"	347	240	"	"	466	413	"	"	430	591	"	*J*	178	720	"	"	765
75	1925	*PC*	234	262	"	"	404	415	"	*J*	170	592	"	*M*	554	724	"	"	739
80	1926	*M*	360	265	"	"	539	418	1925	*M*	1210	596	"	"	641	728	"	"	407
81	"	"	236	267	"	"	462	420	1926	"	478	599	"	"	556	731	"	*J*	141
85	"	"	258	272	"	"	955	426	"	"	349	602	"	"	565	734	"	*M*	672
87	"	*J*	168	277	"	"	530	427	"	"	567	603	"	*J*	124	740	"	"	861
90	"	*M*	370	285	"	"	457	430	"	*J*	167	604	"	*M*	757	744	"	"	857
92	"	"	411	296	"	"	187	432	"	*M*	544	609	"	"	728	749	"	"	808
94	"	"	363	300	"	"	432	462	"	"	605	618	"	"	754	752	"	"	768
99	"	"	365	305	"	"	508	464	"	"	408	620	"	"	806	754	"	"	680
101	"	"	296	308	"	"	216	468	"	"	909	625	"	"	756	757*a*	"	"	620
103	"	"	246	311	"	"	429	472	"	"	385	628	1925	*PC*	257	757*b*	"	"	679
105	"	"	326	314	"	"	417	476	"	"	841	636	1926	*M*	657	758	"	"	667
138	1925	*PC*	181	319	"	"	558	496	"	"	609	642	"	"	722	760	"	"	624
145	1926	*M*	357	320	"	"	480	511	"	"	656	643	"	"	826	761	"	"	650
149	"	"	352	327	"	"	521	513	"	"	606	644	1927	"	175	765	"	"	834
151	"	*J*	86	336	"	"	945	515	"	"	623	647	1926	"	538	769	"	*J*	170
157	"	*M*	353	339	"	"	500	518	"	"	622	650	"	"	797	771	"	*M*	827
161	"	"	109	349	"	"	851	520	"	"	656	652	"	"	755				

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MLW)	A. I. R.			MLW)	A. I. R			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.		
1	1926	*PC*	22	102	1926	*M*	615	219	1926	*M*	494	298	1926	*M*	1018	387	1926	M	1145
9	"	"	18	115	"	*PC*	34	221	1925	*PC*	226	300	"	"	1005	389	"	"	1127
18	"	"	27	136	"	*M*	128	227	1926	*M*	1003	304	"	"	989	390	"	"	976
22	"	*J*	111	139	"	*PC*	110	231	"	"	648	309	"	*PC*	73	392	"	"	1129
25	"	*M*	586	142	"	*M*	628	235	"	"	749	318	"	*M*	1017	394	"	*PC*	93
35	1921	"	286	150	"	"	916	241	"	*PC*	85	320	"	*PC*	91	396	"	"	94
50	1926	*PC*	56	161	"	*J*	97	249	"	*M*	621	324	"	*M*	988	400	"	*M*	1124
58	"	"	64	163	"	"	165	252	"	"	962	326	"	"	975	404	"	"	945
66	"	*M*	878	167	"	*M*	601	254	"	"	968	328	"	*PC*	118	406	"	"	959
68	"	"	897	179	"	"	953	257	"	"	1031	329	"	*M*	193	409	"	"	1130
70	"	"	691	180	"	*J*	167	260	"	"	1144	333	"	"	1011	413	"	"	944
72	"	"	582	181	"	*M*	809	263	"	"	966	334	"	"	1045	415	"	"	1121
77	"	"	932	183	"	"	949	269	"	"	723	340	"	"	978	416	"	"	1047
82	"	*J*	196	186	"	"	911	279	"	"	899	343	"	"	767	419	"	"	970
84	"	*PC*	31	195	"	"	936	280	"	"	941	345	"	"	994	421	"	"	1126
85	"	*M*	800	208	"	"	319	282	"	"	1020	361	"	"	674	425	"	"	1110
88	"	"	652	211	"	"	948	286	"	"	1029	367	"	"	774	439	"	*J*	109
92	"	"	492	212	"	"	1007	290	"	"	1015	375	"	"	1060	441	"	*M*	1143
94	"	"	584	213	"	"	396	292	"	"	974	378	"	"	1084	443	"	"	1059
100	"	"	568	218	"	"	448	295	"	"	1008	384	"	"	1183				

24 Madras Law Weekly Notes=All India Reporter—(*Concld.*)

MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.			MLW)	A. I. R.		
444	1926	*M*	1082	525	1926	*M*	977	634	1926	*M*	1081	707	1927	*M*	36	803	1927	*M*	137
447	"	"	1083	529	"	"	1040	638	"	"	1176	711	1926	"	1198	808	1926	"	1214
448	"	*PC*	96	535	"	"	778	640	1927	"	81	713	1927	"	162	812	1927	"	120
451	"	*M*	1213	543	"	"	1165	641	1926	"	449	715	"	"	172	818	"	"	157
453	"	"	1128	546	"	"	1138	649	1927	"	78	716	1926	"	1093	826	"	"	204
455	"	"	1024	551	"	*PC*	105	653	1926	"	1166	725	1927	"	199	833	"	"	207
460	"	"	1167	559	"	*M*	1038	655	1927	"	66	730	"	"	166	836	"	"	190
475	"	"	1190	564	"	"	1071	657	"	"	59	738	1926	"	836	839	"	"	188
480	"	"	958	566	"	"	368	659	1926	"	1188	751	1927	"	129	842	"	"	185
482	"	"	1158	571	"	"	316	664	"	"	1051	752	"	"	123	848	"	"	177
484	"	*J*	135	576	"	"	1207	667	"	"	1177	757	1926	*J*	175	852	"	"	113
485	"	*M*	1167	579	1927	"	41	669	"	"	1009	759	1927	*M*	151	854	"	"	210
486	"	"	1159	600	1926	*J*	138	674	"	*J*	169	762	"	"	98	858	"	"	153
488	"	"	1178	601	"	*M*	1123	675	1927	*M*	72	764	"	"	75	863	1926	"	947
498	"	"	1197	603	"	*J*	99	677	"	"	76	766	"	"	111	867	1927	"	124
500	"	"	1196	606	"	*M*	1001	680	1926	"	1032	771	"	"	49	869	"	"	249
502	"	"	1193	611	1927	"	192	685	"	"	1048	773	"	"	93	878	1926	"	881
510	"	"	798	613	"	"	19	691	1927	"	73	778	"	"	130	908	"	*PC*	125
513	"	"	1099	621	"	"	53	697	1926	*J*	172	782	"	"	99	910	"	"	129
520	"	"	1069	630	1926	"	900	704	1927	*M*	34								

1926 Madras Weekly Notes=All India Reporter

MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.			MWN)	A. I. R.		
1	1926	*M*	366	128	1926	*M*	492	258	1926	*M*	323	384	1926	*M*	812	558	1926	*M*	902
2	"	"	404	129	"	"	429	262	"	"	453	385	"	"	782	559	"	*J*	186
4	1927	"	122	131	"	"	480	266	"	"	517	390	"	"	689	560	"	*M*	899
5	1926	"	1065	135	"	"	362	271	"	"	569	391	"	*J*	170	561	"	"	947
6	"	"	380	137	"	"	492	274	"	"	464	392	"	*M*	827	563	"	"	857
7	"	"	428	140	"	"	954	276	"	*J*	164	395	"	"	813	566	"	"	834
8	"	"	950	141	"	"	452	278	1925	*PC*	211	398	"	"	809	568	"	"	946
9	"	"	377	143	"	"	415	281	1926	*M*	510	399	"	"	774	569	"	"	903
11	1925	*PC*	249	145	"	*PC*	1	282	"	"	410	404	"	"	788	572	"	"	319
22	"	"	244	146	"	*M*	346	283	"	"	655	409	"	"	687	574	"	"	941
27	1926	*M*	179	147	"	"	420	285	"	"	644	412	"	"	568	575	"	"	836
29	"	"	184	149	"	"	417	286	"	"	679	413	"	"	723	582	"	"	1147
32	1925	*PC*	180	152	"	"	311	287	"	"	573	419	"	"	672	583	"	"	934
33	1926	*M*	177	156	"	"	347	288	"	"	577	423	"	"	601	585	"	*PC*	18
34	"	"	181	159	"	"	357	289	"	"	406	429	"	"	705	591	"	"	93
36	"	"	249	162	"	"	352	291*a*	"	"	634	434	"	"	859	592	"	"	88
38	"	"	282	163	"	"	353	291*b*	"	"	633	436	"	"	586	596	"	"	91
40	"	"	267	165	"	"	232	293	"	"	624	442	"	"	764	599	1925	*M*	1198
44	"	"	191	167	"	"	164	294	"	"	592	444	"	"	768	602	1926	*PC*	94
45	"	"	402	169*a*	"	"	360	296	"	*J*	133	445	"	"	752	606	"	*M*	906
48	"	*J*	102	169*b*	"	"	225	297*a*	"	*M*	620	450	"	"	615	611	"	*PC*	110
49	1925	*PC*	280	172	"	"	363	297*b*	"	"	434	458	"	"	621	612	"	*M*	958
62	"	"	305	174	"	"	487	315	"	"	808	459	"	"	597	613	"	"	900
63	1926	*M*	133	178	"	"	365	317	"	"	698	463	"	"	430	616	"	"	971
64	"	"	117	180	"	"	516	319	"	"	692	465	"	"	642	620	"	"	949
66	"	"	62	182	"	"	289	323	"	"	605	466	"	"	1044	622*a*	"	"	945
68	"	"	148	192	"	"	538	324	"	"	667	467	"	"	297	622*b*	"	"	767
69	1925	*PC*	213	194	"	"	535	325	"	"	161	478	"	"	368	624*a*	"	"	944
73	1926	*M*	261	195	"	"	898	326	"	"	68	480	"	"	352	624*b*	"	"	975
81	"	"	386	197	"	*PC*	16	328	"	"	584	482	"	*PC*	46	626	"	"	970
83	1925	*PC*	272	199	"	"	13	331	"	"	690	489	"	"	29	627	"	*J*	195
94	1926	*J*	170	203	"	"	9	332	"	*PC*	2	492	"	"	31	628	"	"	1001
96	1925	*PC*	293	209	"	*M*	495	341	"	*M*	676	493	"	"	32	631	"	"	959
101	"	"	257	212	"	*J*	104	344	"	"	511	495	"	"	34	633	"	"	978
106	1926	*M*	250	213	"	*M*	20	350	"	"	905	499	"	"	38	635	"	"	963
108	1925	*PC*	290	224	"	"	623	351	"	"	760	503	"	"	68	639	"	*J*	165
112	1926	*M*	256	226	"	"	559	355	"	"	505	509	"	"	64	641	"	"	167
114	"	"	186	235	"	"	945	359	"	"	478	514	"	"	73	642	"	*M*	911
116	"	"	407	236	"	"	566	362	"	"	565	520	"	"	85	648	"	"	1087
117	"	"	280	238	"	"	457	363	"	"	474	525	"	"	37	651	"	"	576
118	"	*J*	196	245	"	"	412	364	"	"	556	527	"	*J*	111	652	1927	"	144
120	"	*M*	411	249	"	"	650	366	"	"	554	528	"	*M*	656	657	1926	"	1122
121	"	"	363	251	"	"	484	368	"	"	582	529	"	*PC*	54	659	"	"	1060
123	"	"	365	253	"	"	641	370	"	"	449	533	*Too old*			661	"	"	1017
124	"	"	338	255	"	"	656	376	"	*PC*	22	535	1926	*PC*	56	662	"	"	1069
126	"	"	234	256	1927	"	175	382	"	"	27	540	"	*M*	881	665	"	"	953

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MWN)	A. I. R.		MWN)	A. I. R.		MWN)	A. I. R.		MWN)	A. I. R.		MWN	A. I. R.	
666	1926	*M* 951	714*a*	1926	*M* 1142	772	1926	*M* 878	842	1927	*M* 22	946	1927	*M* 153
667	"	" 1035	714*b*	"	" 1146	774	"	" 1173	857	1926	*PC* 112	949	"	" 66
671	"	" 1106	716	"	*PC* 100	778	"	" 1203	869	1927	*M* 41	950	1926	*J* 175
674	"	" 942	723	"	*M* 1140	784	"	" 1166	882	1926	*PC* 121	951	1927	*M* 113
676	"	" 1068	724	"	" 1128	785	"	" 1193	887	"	*M* 1214	952	"	" 72
678	"	*J* 110	726	"	" 1154	790	"	" 1097	890	"	" 980	953	"	" 192
680	"	*M* 1007	729	"	" 1213	793	1927	" 50	897	"	" 706	954	1926	*J* 173
681	"	" 1005	730	"	" 989	797	1926	" 1133	917	1927	" 89	956	1927	*M* 215
683	"	" 1104	732	"	" 1040	804	"	" 1188	919	"	" 82	957	"	" 59
687	"	" 1071	736	"	" 1123	808	"	" 1032	921	"	" 83	958	1926	" 609
688	"	" 1080	737	"	" 1082	812	"	*PC* 109	922	1926	" 1143	968	1927	" 114
689	"	*PC* 96	739	"	" 1145	814	"	*M* 1015	923	"	" 728	969	"	" 207
691	"	*M* 1021	740	"	" 1048	815	"	" 1018	928	"	" 1009	972	"	" 163
695	"	" 977	743	"	" 994	816	"	*PC* 105	931	"	" 986	977	1926	" 976
697	"	" 661	754	"	" 1038	822	"	*M* 1187	935	"	" 1019	978	1927	" 137
706	"	" 1078	757	"	" 1148	823	"	" 1165	936	"	" 755	981	"	" 184
707	"	*J* 109	761	"	" 974	825	"	" 1138	937	"	" 797	983	"	" 124
708	"	*M* 1126	763	"	" 991	828	"	*PC* 129	938	"	" 744	985	"	" 130
710	"	" 1109	767	"	" 1190	830	"	" 119	942	"	*PC* 125	986	"	" 93
713	"	" 1059	771	"	" 1177	832	"	" 136	943	1927	*M* 69	990	"	" 99

27 Cr. L J. & 91 to 98 Indian Cases=All India Reporter

CrLJ & I C	A. I. R.	CrLJ & I C	A. I. R.	CrLJ & I C	A. I. R.	CrLJ & I C	A. I. R.	CrLJ & I C	A. I. R.

Please refer to COMPARATIVE TABLE NO. II *in* **1926 Lahore**

TABLE No. III

Showing seriatim the pages of the ALL INDIA REPORTER, 1926 MADRAS Section with corresponding references of other REPORTS, JOURNALS AND PERIODICALS including the INDIAN LAW REPORTS.

N. B.--Column No. 1 denotes pages of the ALL INDIA REPORTER, 1926 MADRAS.

Column No. 2 denotes corresponding references of other REPORTS JOURNALS and PERIODICALS.

A. I. R. 1926 Madras=Other Journals

AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1	1925	*M W N*	613	33	90	*I C*	880	51	90	*I C*	829	65	22	*M L W* 538
6	49	*M L J*	479	35	49	*M L J*	414	54	49	*M L J*	450		92	*I C* 566
	22	*M L W*	287		22	*M L W*	848		89	*I C*	945	66	22	*M L W* 592
	1925	*M W N*	622		91	*I C*	612	55	48	*Mad*	821		92	*I C* 405
	90	*I C*	881	37	49	*M L J*	554		49	*M L J*	313	72	49	*M L J* 616
12	49	*M L J*	401		22	*M L W*	462		22	*M L W*	335		1925	*M W N* 832
	91	*I C*	443		91	*I C*	561		1925	*M W N*	768		92	*I C* 504
18	22	*M L W*	448	39	49	*M L J*	396		90	*I C*	725	78	48	*Mad* 767
	1925	*M W N*	763		1925	*M W N*	596	57	49	*M L J*	516		49	*M L J* 452
	50	*M L J*	102		90	*I C*	875		1925	*M W N*	603		22	*M L W* 439
	92	*I C*	20	42	49	*M L J*	656		91	*I C*	525		91	*I C* 16
20	48	*Mad*	846		22	*M L W*	274	59	49	*M L J*	335	81	49	*Mad* 29
	49	*M L J*	498		90	*I C*	1037		90	*I C*	669		49	*M L J* 634
	91	*I C*	597	46	49	*M L J*	317		26	*Cr L J*	1597		1925	*M W N* 866
	1926	*M W N*	213		22	*M L W*	188		49	*Mad*	891		22	*M L W* 885
29	22	*M L W*	518		1925	*M W N*	556	62	22	*M L W*	639		92	*I C* 342
	1925	*M W N*	789		88	*I C*	967		1926	*M W N*	66	84	49	*M L J* 568
	91	*I C*	270	50	49	*M L J*	68		91	*I C*	771		49	*Mad* 116
31	49	*M L J*	445		1925	*M W N*	806	64	49	*M L J*	632		92	*I C* 928
	22	*M L W*	423		87	*I C*	213		1925	*M W N*	785	96	49	*M L J* 608
	90	*I C*	1042	51	48	*Mad*	827		22	*M L W*	868		1925	*M W N* 826
33	49	*M L J*	358		49	*M L J*	341		91	*I C*	566		91	*I C* 729
	22	*M L W*	511		1925	*M W N*	582	65	49	*M L J*	363			

A. I. R. 1926 Madras=Other Journals—(*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
101	90	I C	410	141	1925	M W N	722	168	92	I C	968	217	92	I C	597
109	49	M L J	468		90	I C	551	173	22	M L W	786	218	22	M L W	679
	91	I C	671		23	M L W	178		93	I C	670		92	I C	112
	23	M L W	161	143	22	M L W	473	175	49	M L J	738	224	1925	M W N	927
112	22	M L W	618		91	I C	316		22	M L W	842		23	M L W	578
	1925	M W N	780	144	49	M L J	152		91	I C	780		92	I C	106
	50	M L J	48		22	M L W	366		49	Mad	200	225	22	M L W	691
	92	I C	483		90	I C	605	177	22	M L W	747		92	I C	624
113	49	M L J	520	146 (1)	22	M L W	319		1926	M W N	33		1926	M W N	169
	1925	M W N	774		91	I C	166		91	I C	1017	227	50	M L J	46
	91	I C	720	146 (2)	49	M L J	557	178	22	M L W	816		22	M L W	631
114	50	M L J	67		91	I C	724		92	I C	373		92	I C	472
	23	M L W	199	148	22	M L W	642	179	49	M L J	753	228	1925	M W N	797
	1925	M W N	707		1926	M W N	68		22	M L W	744		23	M L W	353
	92	I C	653		92	I C	570		1926	M W N	27		93	I C	914
117	22	M L W	634	149	49	M L J	540		91	I C	11	232	22	M L W	663
	91	I C	765		91	I C	576	181	49	M L J	788		91	I C	961
	1926	M W N	64	150 (1)	22	M L W	326		1926	M W N	34		1926	M W N	165
118	49	M L J	720		90	I C	1054		91	I C	454	233	49	M L J	719
	22	M L W	637	150 (2)	49	M L J	513		23	M L W	175		92	I C	523
	92	I C	333		91	I C	638	183 (1)	22	M L W	827	234	49	M L J	701
119	22	M L W	629	152 (1)	22	M L W	836		92	I C	687		23	M L W	13
	91	I C	727		91	I C	608	183 (2)	22	M L W	784		91	I C	660
120	1925	M W N	609	152 (2)	49	M L J	542		27	Cr L J	100		1926	M W N	126
	91	I C	181		22	M L W	619		91	I C	532	235	22	M L W	671
122	90	I C	843		91	I C	297	184	49	M L J	730		92	I C	18
123	49	M L J	595	154 (1)	22	M L W	831		22	M L W	853	236	23	M L W	81
	22	M L W	542	154 (2)	49	M L J	547		1926	M W N	29		1925	M W N	875
	91	I C	144		22	M L W	669		91	I C	1051		91	I C	973
125	22	M L W	546		92	I C	321	186	22	M L W	782	238	22	M L W	863
	91	I C	179	155	22	M L W	579		1926	M W N	114		92	I C	456
126	1925	M W N	493		1925	M W N	802		92	I C	1055		27	Cr L J	280
	90	I C	642		92	I C	599	187	49	M L J	742	241	49	M L J	679
128 (1)	49	M L T	664	156	49	M L J	628		1925	M W N	878		1925	M W N	844
	22	M L W	567		22	M L W	622		91	I C	1024		91	I C	868
	91	I C	98		1925	M W N	865		23	M L W	296		49	Mad	483
128 (2)	1925	M W N	781		91	I C	319	189	49	M L J	727	243	50	M L J	34
	92	I C	330	157	22	M L W	833		92	I C	390		22	M L W	858
	24	M L W	136		1925	M W N	776	190	22	M L W	794		92	I C	366
130	22	M L W	796		50	M L J	97		1925	M W N	884		49	Mad	208
	92	I C	556		92	I C	402		92	I C	412	244	49	M L J	704
132	90	I C	819	159	49	M L J	538		49	Mad	490		22	M L W	860
133 (1)	49	M L J	697		22	M L W	732		51	M L J	559		91	I C	820
	22	M L W	617		91	I C	302	191	49	M L J	756	245	22	M L W	870
	1926	M W N	63	160	49	M L J	394		1926	M W N	44		93	I C	923
	92	I C	603		22	M L W	67		92	I C	470	246	23	M L W	103
	49	Mad	217		90	I C	1038	193	49	M L J	640		1925	M W N	874
133 (2)	22	M L W	582		49	Mad	403		1925	M W N	871		50	M L J	148
	1925	M W N	804	161	49	M L J	560		91	I C	377		92	I C	790
	92	I C	800		91	I C	264		24	M L W	329		50	Mad	91
135 (1)	1925	M W N	779		23	M L W	411	194	49	M L J	643	247	22	M L W	874
	92	I C	415		1926	M W N	325		1925	M W N	907		93	I C	684
	23	M L W	406	162	48	Mad	688		92	I C	497	249	49	M L J	717
135 (2)	90	I C	721		49	M L J	324	201	49	M L J	523		22	M L W	749
136	49	M L J	602		22	M L W	130		91	I C	745		1926	M W N	36
	22	M L W	625		1925	M W N	569	204	22	M L W	719		92	I C	481
	1925	M W N	821		91	I C	109		93	I C	658	250	22	M L W	698
	91	I C	1027	164	49	M L J	630	206	49	M L J	709		1926	M W N	106
138	22	M L W	828		22	M L W	666		91	I C	874		92	I C	516
	92	I C	308		1926	M W N	167		49	Mad	189	251	23	M L W	31
	50	M L J	662		91	I C	714	210	22	M L W	673		1925	M W N	880
139	49	M L J	593	165	22	M L W	470		92	I C	855		92	I C	610
	22	M L W	723		1925	M W N	663		27	Cr L J	343		49	Mad	219
	1925	M W N	772		27	Cr L J	105	211	1925	M W N	887		51	M L J	62
	27	Cr L J	126		91	I C	537		92	I C	833	254	22	M L W	716
	91	I C	702	166	22	M L W	837		51	M L J	172		91	I C	859
140	22	M L W	522		91	I C	651	216	49	M L J	706	255	49	M L J	668
	1925	M W N	771	168	49	M L J	791		91	I C	985		22	M L W	704
	91	I C	280		22	M L W	772		23	M L W	308		91	I C	514
141	49	M L J	117		1925	M W N	857	217	22	M L W	872				

A. I. R. 1926 Madras=Other Journals—(*Contd.*)

AIR	Other Journals			AIR	Other Journals			AIR	Other Journals			AIR	Other Journals		
256	22	M L W	695	320	91	I C	659	365	92	I C	621	412	1926	M W N	245
	1926	M W N	112	321	50	M L J	153	366	23	M L W	382		92	I C	533
	92	I C	776		23	M L W	22		1926	M W N	1	415	50	M L J	39
258	23	M L W	85		92	I C	709		92	I C	847		1926	M W N	143
	1925	M W N	886	323	49	Mad	211	367	50	M L J	49		93	I C	99
	92	I C	615		50	M L J	208		23	M L W	16	417	M L J		54
259	22	M L W	820		23	M L W	193		92	I C	124		23	M L W	314
	92	I C	491		1926	M W N	258	368	50	M L J	176		1926	M W N	149
260	49	M L J	699		92	I C	977	F B	92	I C	943		92	I C	973
	1925	M W N	917	325	50	M L J	75		49	Mad	296	419	92	I C	98
	92	I C	109		23	M L W	409		1926	M W N	478	420	50	M L J	51
261	22	M L W	650		92	I C	802		24	M L W	566		23	M L W	56
	1926	M W N	73	326	23	M L W	105	370	23	M L W	90		1926	M W N	147
	95	I C	972		93	I C	169		27	Cr L J	176		27	Cr L J	184
267	49	M L J	746	336	91	I C	595		91	I C	960		91	I C	1000
	1926	M W N	40	338	23	M L W	10	371	50	M L J	79	421	50	M L J	161
	91	I C	924		1926	M W N	124		92	I C	1021		95	I C	12
270	22	M L W	675		92	I C	726	377	1926	M W N	9		49	Mad	746
	91	I C	615	339	91	I C	737		93	I C	955	427	50	M L J	298
272	22	M L W	815	341	50	M L J	59		23	M L W	707		23	M L W	361
	91	I C	880		92	I C	311	378	92	I C	352		92	I C	915
273	22	M L W	801	343	91	I C	754	379	91	I C	991	428	50	M L J	144
	49	Mad	98	345	23	M L W	219	380	23	M L W	571		1926	M W N	7
	50	M L J	413		93	I C	446		1926	M W N	6		92	I C	85
	93	I C	662	346	50	M L J	44		27	Cr L J	700	429	50	M L J	232
280	50	M L J	42		1926	M W N	146		94	I C	892		23	M L W	311
	22	M L W	701		27	Cr L J	350	381	50	M L J	301		1926	M W N	129
	1926	M W N	117		92	I C	862		23	M L W	233		93	I C	356
	92	I C	823	347	23	M L W	69		92	I C	1053	430	23	M L W	413
281	22	M L W	877		1926	M W N	156	384	23	M L W	29		27	Cr L J	361
	91	I C	7		93	I C	16		92	I C	844		92	I C	873
282	22	M L W	752	349	23	M L W	426	385	50	M L J	72		1926	M W N	463
	1926	M W N	38		27	Cr L J	88		23	M L W	472	431	50	M L J	116
	92	I C	594		91	I C	392		91	I C	485		92	I C	770
283	50	M L J	112	350	49	Mad	227	386	23	M L W	392	432	23	M L W	300
	22	M L W	792		50	M L J	90		1926	M W N	81		93	I C	877
284	49	M L J	734		92	I C	398		93	I C	338		50	M L J	665
	91	I C	914	352	23	M L W	149	388	91	I C	285	434	50	M L J	308
286	86	I C	304		1926	M W N	162	390	50	M L J	125	F B	1926	M W N	297
287	49	Mad	22		92	I C	976		92	I C	805		49	Mad	261
	50	M L J	63		1926	M W N	480	396	92	I C	100		94	I C	83
	22	M L W	822	353	23	M L W	157		24	M L W	213	447	91	I C	879
	91	I C	940		1926	M W N	163	398	23	M L W	186	448	50	M L J	77
288	91	I C	539		92	I C	61		93	I C	20		91	I C	933
	27	Cr L J	107	354	23	M L W	537	401	91	I C	355		24	M L W	218
289	49	M L J	684		27	Cr L J	90	402	1926	M W N	45	449	50	M L J	377
	91	I C	193		91	I C	394		92	I C	1028	F B	1926	M W N	370
	48	Mad	944	355	91	I C	414	404	23	M L W	262		94	I C	677
	1926	M W N	182	357	50	M L J	239		1926	M W N	2		49	Mad	441
293	23	M L W	101		23	M L W	145		93	I C	259		24	M L W	641
	92	I C	750		1926	M W N	159	405	91	I C	943	452	50	M L J	36
	27	Cr L J	334		93	I C	271	406	50	M L J	145		1926	M W N	141
297	49	Mad	49	359	91	I C	559		23	M L W	390		92	I C	626
	92	I C	918	360	23	M L W	80		1926	M W N	289		23	M L W	678
	1926	M W N	467		1926	M W N	169		92	C	720	453	50	M L J	215
305	92	I C	314		92	I C	249	407	50	M L J	432		1926	M W N	262
307	49	Mad	38	361	27	Cr L J	76		1926	M W N	116		92	I C	782
	97	I C	496		91	I C	252		93	I C	360	457	23	M L W	285
311	23	M L W	63	362	23	M L W	19		23	M L W	728		1926	M W N	238
	1926	M W N	152		1926	M W N	135	408	23	M L W	464		92	I C	827
	93	I C	276		91	I C	452		91	I C	368		50	M L J	689
	51	M L J	451	363	50	M L J	180	410	50	M L J	150		49	Mad	768
314	91	I C	1		23	M L W	94		23	M L W	396	462	50	M L J	157
316	50	M L J	190		1926	M W N	121		1926	M W N	282		23	M L W	267
F B	93	I C	293		1926	M W N	172		92	I C	962		92	I C	1051
	49	Mad	291		92	I C	573	411	23	M L W	92	464	50	M L J	234
	24	M L W	571		49	Mad	762		1926	M W N	120		23	M L W	373
319	92	I C	119	365	23	M L W	99		91	I C	1056		1926	M W N	274
	1926	M W N	572		1926	M W N	123	412	50	M L J	200		92	I C	986
	24	M L W	208		1926	M W N	178		23	M L W	227				

A. I. R. 1926 Madras=Other Journals—(*Contd.*)

AIR	Other Journals	
466	23 *M L W*	240
	92 *I C*	950
474	50 *M L J*	280
	1926*M W N*	363
	96 *I C*	112
475	91 *I C*	462
478	50 *M L J*	273
	23 *M L W*	420
	1926*M W N*	359
	98 *I C*	332
480	23 *M L W*	320
	1926*M W N*	131
	94 *I C*	164
	49 *Mad*	499
484	50 *M L J*	205
	1926*M W N*	251
	94 *I C*	526
	49 *Mad*	494
485	50 *M L J*	260
	23 *M L W*	215
	94 *I C*	334
487	50 *M L J*	442
	1926*M W N*	174
	93 *I C*	625
490	92 *I C*	385
492 (1)	50 *M L J*	412
	1926*M W N*	128
	93 *I C*	651
	49 *Mad*	519
	24 *M L W*	92
492 (2)	50 *M L J*	355
	1926*M W N*	137
	94 *I C*	487
494	92 *I C*	541
	24 *M L W*	219
495	1926*M W N*	209
	94 *I C*	302
496	50 *M L J*	282
	94 *I C*	489
500	23 *M L W*	339
	94 *I C*	955
505	50 *M L J*	267
	1926*M W N*	355
	96 *I C*	7
508	23 *M L W*	305
	96 *I C*	132
509	92 *I C*	526
510	50 *M L J*	237
	1926*M W N*	281
	93 *I C*	3
511	50 *M L J*	251
	1926*M W N*	344
	94 *I C*	458
516	1926*M W N*	180
	94 *I C*	453
	50 *M L J*	655
517	50 *M L J*	221
	1926*M W N*	266
	93 *I C*	49
521	49 *Mad*	315
	50 *M L J*	460
	23 *M L W*	327
	93 *I C*	8
526	92 *I C*	814
530	49 *Mad*	302
	23 *M L W*	277
	50 *M L J*	674
534	23 *M L W*	364
	93 *I C*	686
595	50 *M L J*	353

AIR	Other Journals	
535	1926*M W N*	194
	23 *M L W*	714
	94 *I C*	634
536	92 *I C*	377
537	92 *I C*	393
538	23 *M L W*	647
	1926*M W N*	192
	93 *I C*	644
539	23 *M L W*	265
	93 *I C*	14
540	92 *I C*	520
542	50 *M L J*	213
	94 *I C*	557
543	92 *I C*	672
544	49 *Mad*	156
	23 *M L W*	432
	95 *I C*	154
554	50 *M L J*	361
	23 *M L W*	592
	1926*M W N*	366
	94 *I C*	456
	49 *Mad*	539
556	50 *M L J*	358
F B	23 *M L W*	599
	1926*M W N*	364
	94 *I C*	642
	49 *Mad*	461
557	50 *M L J*	409
	94 *I C*	554
558	23 *M L W*	319
	94 *I C*	420
559	1926*M W N*	226
	49 *Mad*	580
	95 *I C*	720
565	50 *M L J*	279
	23 *M L W*	602
	1926*M W N*	362
	94 *I C*	254
	49 *Mad*	567
566	1926*M W N*	236
	94 *I C*	308
567	50 *M L J*	114
	23 *M L W*	427
	94 *I C*	337
568	50 *M L J*	399
S B	1926*M W N*	412
	49 *Mad*	523
	24 *M L W*	100
	96 *I C*	685
569	50 *M L J*	228
	1926*M W N*	271
	94 *I C*	561
570	23 *M L W*	384
	27 *Cr L J*	311
	92 *I C*	695
573	23 *M L W*	379
	1926*M W N*	287
	93 *I C*	831
	51 *M L J*	10
574	50 *M L J*	401
	95 *I C*	196
576	50 *M L J*	384
	27 *Cr L J*	635
	94 *I C*	411
	1926*M W N*	651
577	23 *M L W*	377
	1926*M W N*	288
	93 *I C*	305
578	50 *M L J*	369
	95 *I C*	222

AIR	Other Journals	
582	50 *M L J*	364
	1926*M W N*	368
	49 *Mad*	513
	24 *M L W*	72
	98 *I C*	428
584	50 *M L J*	348
	1926*M W N*	328
	94 *I C*	512
	24 *M L W*	94
	50 *Mad*	27
586	50 *M L J*	485
F B	49 *Mad*	450
	1926*M W N*	436
	24 *M L W*	25
	95 *I C*	489
591	92 *I C*	730
592	1926*M W N*	294
	94 *I C*	534
593	93 *I C*	335
594	94 *I C*	639
	23 *M L W*	367
597	92 *I C*	715
	1926*M W N*	459
601	50 *M L J*	468
F B	1926*M W N*	423
	95 *I C*	108
	24 *M L W*	167
	49 *Mad*	609
605	23 *M L W*	462
	1926*M W N*	323
	94 *I C*	73
606	23 *M L W*	513
	94 *I C*	126
607	23 *M L W*	521
	94 *I C*	853
609	23 *M L W*	496
	51 *M L J*	313
	96 *I C*	483
	1926*M W N*	958
615	50 *M L J*	520
F B	94 *I C*	515
	49 *Mad*	468
	1926*M W N*	450
	24 *M L W*	102
620	1926*M W N*	297
	95 *I C*	128
	23 *M L W*	757
621	50 *M L J*	429
	93 *I C*	141
	1926*M W N*	458
	24 *M L W*	249
622	23 *M L W*	518
	94 *I C*	77
623	23 *M L W*	515
	1926*M W N*	224
	93 *I C*	58
	49 *Mad*	508
	51 *M L J*	139
624	1926*M W N*	293
	23 *M L W*	760
	95 *I C*	262
625	92 *I C*	465
628	50 *M L J*	453
	93 *I C*	317
	49 *Mad*	553
	24 *M L W*	142
631	91 *I C*	519
633	1926*M W N*	291
	94 *I C*	1046
	51 *M L J*	159

AIR	Other Journals	
634	1926*M W N*	291
	95 *I C*	122
635	92 *I C*	1047
638	27 *Cr L J*	394
	93 *I C*	42
641	23 *M L W*	596
	1926*M W N*	253
	50 *M L J*	651
	94 *I C*	950
642	50 *M L J*	428
	94 *I C*	306
	1926*M W N*	465
643	23 *M L W*	575
	96 *I C*	86
644	1926*M W N*	285
	97 *I C*	613
645	93 *I C*	111
647	23 *M L W*	569
	96 *I C*	19
648	93 *I C*	5
	51 *M L J*	69
	24 *M L W*	231
650	1926*M W N*	249
	23 *M L W*	761
	95 *I C*	3
652	93 *I C*	307
	24 *M L W*	88
654	23 *M L W*	538
	94 *I C*	151
655	1926*M W N*	283
	95 *I C*	5
656 (1)	50 *M L J*	426
	23 *M L W*	511
	1926*M W N*	255
	94 *I C*	45
656 (2)	23 *M L W*	520
	92 *I C*	899
	1926*M W N*	528
657	49 *Mad*	419
	23 *M L W*	636
	93 *I C*	341
659	91 *I C*	794
661	50 *M L J*	535
F B	95 *I C*	92
	49 *Mad*	620
	1926*M W N*	697
667	1926*M W N*	324
	23 *M L W*	758
	95 *I C*	126
668	23 *M L W*	547
	94 *I C*	42
	51 *M L J*	734
670	49 *Mad*	426
	23 *M L W*	559
	50 *M L J*	659
	98 *I C*	472
	27 *Cr L J*	1352
672	50 *M L J*	448
	23 *M L W*	734
	1926*M W N*	419
	94 *I C*	535
674	49 *Mad*	325
	50 *M L J*	584
	94 *I C*	522
	24 *M L W*	361
676	1926*M W N*	341
	51 *M L J*	90
	95 *I C*	439
678	23 *M L W*	581

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A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals			A.I.R.	Other Journals		
678	51	M L J	67	741	27	Cr L J	894	782	95	I C	1014	853	23	M L W	36
	96	I C	129	743	23	M L W	675	785	50	M L J	595		92	I C	753
679	1926	M W N	286		94	I C	427		23	M L W	698	857	51	M L J	126
	94	I C	550	744	23	M L W	664		95	I C	610		23	M L W	744
	23	M L W	757		96	I C	26	788	1926	M W N	404		1926	M W N	563
	51	M L J	158		1926	M W N	938		96	I C	317		96	I C	657
680	1926	M W N	326	747	50	M L J	554	792	50	M L J	242	859	1926	M W N	434
	23	M L W	754		23	M L W	692		94	I C	384		96	I C	536
	94	I C	913		95	I C	196	797	23	M L W	650	861	23	M L W	740
681	23	M L W	528		49	Mad	807		96	I C	194		96	I C	105
	95	I C	33	748	50	M L J	552		1926	M W N	937	863	23	M L W	525
683	23	M L W	551		23	M L W	695	798	94	I C	546		94	I C	983
	50	M L J	681		94	I C	966		24	M L W	510	864	92	I C	661
	95	I C	209	749	50	M L J	547	799	94	I C	610	865	49	Mad	525
	49	Mad	596		95	I C	731	800	50	M L J	556	FB	96	I C	983
687	50	M L J	387		49	Mad	716		24	M L W	85		27	Cr L J	1031
	23	M L W	533		24	M L W	235		96	I C	690		52	M L J	210
	1926	M W N	409	752	50	M L J	514	801	50	M L J	602		1927	M W N	43
	94	I C	123		23	M L W	681		96	I C	944		25	M L W	248
689	50	M L J	477		1926	M W N	445		49	Mad	794	872	49	Mad	570
	1926	M W N	390		95	I C	740	806	23	M L W	620		97	I C	86
	95	I C	444	754	23	M L W	618		27	Cr L J	824	875	51	M L J	79
690	23	M L W	693		95	I C	267		95	I C	600		96	I C	962
	1926	M W N	331	755	49	Mad	333	808	50	M L J	511		50	Mad	63
	95	I C	304		23	M L W	652		23	M L W	749	877	49	Mad	563
691	93	I C	649		94	I C	8		1926	M W N	315		96	I C	912
	24	M L W	70		51	M L J	165		95	I C	264	878	24	M L W	66
692	1926	M W N	319		1926	M W N	936	809	24	M L W	181		95	I C	442
	51	M L J	73	756	23	M L W	625		1926	M W N	398		1926	M W N	772
	95	I C	691		95	I C	250		95	I C	856		51	M L J	498
695	23	M L W	540	757	50	M L J	669	810	23	M L W	584	879	95	I C	436
	95	I C	325		23	M L W	604		94	I C	508	881	49	Mad	652
698	1926	M W N	317		96	I C	290	812	1926	M W N	384		51	M L J	16
	95	I C	718	760	1926	M W N	351		95	I C	584		1926	M W N	540
699	49	Mad	337		95	I C	963	813	51	M L J	161		95	I C	651
	51	M L J	229	762	23	M L W	716		1926	M W N	395		24	M L W	878
705	50	M L J	479		95	I C	581		95	I C	587	894	92	I C	819
	1926	M W N	429	763	50	M L J	557	815	27	Cr L J	659	897	96	I C	750
	95	I C	339		96	I C	500		94	I C	707		24	M L W	68
706	49	Mad	349		27	Cr L J	948	816	50	M L J	612	898	51	M L J	304
	50	M L J	699		49	Mad	880		49	Mad	691		1926	M W N	195
	96	I C	1011	764	50	M L J	493		96	I C	607		96	I C	94
	1926	M W N	897		1926	M W N	442		25	M L W	258	899	24	M L W	279
720	23	M L W	564	765	50	M L J	580	825	94	I C	79		1926	M W N	560
	96	I C	164		23	M L W	720	826	23	M L W	643		51	M L J	349
	51	M L J	373		96	I C	77		95	I C	300		49	Mad	952
722	49	Mad	432	767	49	Mad	465	827	23	M L W	771		97	I C	411
	23	M L W	642		51	M L J	138		1926	M W N	392	900	51	M L J	119
	27	Cr L J	477		1926	M W N	622		96	I C	700		1926	M W N	613
	93	I C	701		24	M L W	343		51	M L J	414		24	M L W	630
	50	M L J	654		97	I C	395	829	23	M L W	653		97	I C	790
723	49	Mad	407	768	50	M L J	497		95	I C	968	902	1926	M W N	558
	50	M L J	434		23	M L W	752		51	M L J	630		97	I C	384
	1926	M W N	413		1926	M W N	444	830	94	I C	226	903	51	M L J	95
	95	I C	401		95	I C	424	832	92	I C	78		1926	M W N	569
	24	M L W	269	769	50	M L J	589	834	51	M L J	135		95	I C	447
727	23	M L W	718		23	M L W	657		23	M L W	765	905	1926	M W N	350
	95	I C	943		49	Mad	543		1926	M W N	566		95	I C	707
	27	Cr L J	863		96	I C	371		96	I C	492	906	51	M L J	112
728	23	M L W	609	772	51	M L J	12	836	1926	M W N	575	FB	1926	M W N	606
FB	96	I C	963		23	M L W	709		95	I C	214		96	I C	978
	49	Mad	820		96	I C	91		51	M L J	148		49	Mad	728
	1926	M W N	923	774	1926	M W N	399		50	Mad	34		27	Cr L J	1026
732	50	M L J	566		51	M L J	99		24	M L W	738		25	M L W	207
	95	I C	883		96	I C	993	841	23	M L W	476	909	23	M L W	468
739	23	M L W	724		24	M L W	367		94	I C	860		92	I C	396
	95	I C	865	778	93	I C	673	849	23	M L W	58	911	51	M L J	194
	51	M L J	658		49	Mad	781		92	I C	245	FB	24	M L W	186
741	50	M L J	559		24	M L W	535	851	23	M L W	349		1926	M W N	642
	96	I C	158	782	1926	M W N	385		94	I C	68		97	I C	212

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AIR.	Other Journals		
911FB	49	*Mad*	836
916	49	*Mad*	636
	24	*M L W*	150
	96	*I C*	950
	51	*M L J*	426
921	95	*I C*	789
926	23	*M L W*	210
	93	*I C*	641
932	51	*M L J*	215
	24	*M L W*	77
	96	*I C*	900
934	1926	*M W N*	583
	51	*M L J*	351
	49	*Mad*	869
	97	*I C*	443
936	51	*M L J*	182
	24	*M L W*	195
	97	*I C*	163
941	24	*M L W*	280
	1926	*M W N*	574
	97	*I C*	502
942	51	*M L J*	209
	1926	*M W N*	674
	49	*Mad*	935
	97	*I C*	706
944 (2)	1926	*M W N*	624
	24	*M L W*	413
	97	*I C*	895
945 (1)	24	*M L W*	404
	1926	*M W N*	622
	97	*I C*	608
945 (2)	23	*M L W*	336
	1926	*M W N*	235
	93	*I C*	639
946	51	*M L J*	130
	1926	*M W N*	568
	95	*I C*	446
947	1926	*M W N*	561
	51	*M L J*	701
	24	*M L W*	863
	97	*I C*	450
948	24	*M L W*	211
	97	*I C*	4
949	51	*M L J*	123
F B	24	*M L W*	183
	1926	*M W N*	620
	96	*I C*	957
	49	*Mad*	833
950	1926	*M W N*	8
	93	*I C*	84
951	51	*M L J*	193
	1926	*M W N*	666
	50	*Mad*	86
	97	*I C*	469
952	50	*M L J*	563
	96	*I C*	697
953	24	*M L W*	179
	1926	*M W N*	665
	97	*I C*	893
954	23	*M L W*	26
	1926	*M W N*	140
	92	*I C*	846
	50	*Mad*	5
	52	*M L J*	256
955	23	*M L W*	272
	96	*I C*	429
958 (1)	96	*I C*	175
958 (2)	1926	*M W N*	612
	24	*M L W*	480
	97	*I C*	413

AIR	Other Journals		
959	24	*M L W*	406
	1926	*M W N*	631
	97	*I C*	574
961	96	*I C*	279
962	24	*M L W*	252
	97	*I C*	684
963	51	*M L J*	167
	1926	*M W N*	635
	96	*I C*	1051
966	51	*M L J*	143
	24	*M L W*	263
	97	*I C*	718
968	51	*M L J*	255
	24	*M L W*	254
	97	*I C*	1031
970	24	*M L W*	419
	1926	*M W N*	626
	97	*I C*	462
971	51	*M L J*	290
	1926	*M W N*	616
	97	*I C*	517
974	51	*M L J*	211
	24	*M L W*	292
	97	*I C*	346
	1926	*M W N*	761
975	24	*M L W*	326
	1926	*M W N*	624
	97	*I C*	767
976	51	*M L J*	326
	24	*M L W*	390
	1926	*M W N*	977
	97	*I C*	393
977	51	*M L J*	249
	1926	*M W N*	695
	24	*M L W*	525
	97	*I C*	578
	50	*Mad*	80
978	24	*M L W*	340
	1926	*M W N*	633
	97	*I C*	548
980	51	*M L J*	219
	1926	*M W N*	890
	97	*I C*	1008
	50	*Mad*	67
985	23	*M L W*	688
	95	*I C*	1005
986	51	*M L J*	299
	1926	*M W N*	931
	97	*I C*	836
	49	*Mad*	954
988	24	*M L W*	324
	97	*I C*	727
989	51	*M L J*	328
	24	*M L W*	304
	1926	*M W N*	730
	49	*Mad*	978
	27	*Cr L J*	1123
	97	*I C*	643
991	51	*M L J*	282
	1926	*M W N*	763
	97	*I C*	551
994	51	*M L J*	269
F B	24	*M L W*	345
	1926	*M W N*	743
	49	*Mad*	849
	97	*I C*	825
1001	51	*M L J*	265
	1926	*M W N*	628
	24	*M L W*	606
	97	*I C*	581

AIR	Other Journals		
1003	24	*M L W*	227
	97	*I C*	785
1005	51	*M L J*	239
	24	*M L W*	300
	1926	*M W N*	681
	97	*I C*	787
1007	24	*M L W*	212
	1926	*M W N*	680
	96	*I C*	1054
1008	51	*M L J*	331
	24	*M L W*	295
	27	*Cr L J*	1149
	97	*I C*	669
	1927	*M W N*	63
1009	96	*I C*	652
	27	*Cr L J*	988
	49	*Mad*	833
	51	*M L J*	730
	24	*M L W*	669
	1926	*M W N*	928
1011	24	*M L W*	333
	97	*I C*	780
1012	51	*M L J*	258
	97	*I C*	437
1015	51	*M L J*	252
	24	*M L W*	290
	1926	*M W N*	814
	97	*I C*	389
1016	51	*M L J*	309
	97	*I C*	933
1017	51	*M L J*	387
	24	*M L W*	318
	1926	*M W N*	661
	97	*I C*	604
1018	51	*M L J*	254
	24	*M L W*	298
	1926	*M W N*	815
	49	*Mad*	939
	97	*I C*	622
1019	51	*M L J*	287
	1926	*M W N*	935
	97	*I C*	407
1020	24	*M L W*	282
	97	*I C*	488
1021	51	*M L J*	243
	1926	*M W N*	691
	97	*I C*	871
1024	51	*M L J*	295
	24	*M L W*	455
	1927	*M W N*	65
	97	*I C*	592
1026	51	*M L J*	334
	97	*I C*	722
1029	24	*M L W*	286
	97	*I C*	630
1031	24	*M L W*	257
	97	*I C*	586
1032	51	*M L J*	360
F B	24	*M L W*	680
	97	*I C*	850
	1926	*M W N*	808
1035	51	*M L J*	203
	1926	*M W N*	667
	97	*I C*	491
1038	51	*M L J*	354
F B	49	*Mad*	903
	24	*M L W*	559
	97	*I C*	993
	1926	*M W N*	754
1040	49	*Mad*	738

AIR	Other Journals		
1040	51	*M L J*	410
	1926	*M W N*	732
	96	*I C*	881
	24	*M L W*	529
1043	91	*I C*	450
1044	1926	*M W N*	466
	27	*Cr L J*	384
	92	*I C*	896
1045	24	*M L W*	334
	97	*I C*	842
1047	51	*M L J*	500
F B	97	*I C*	921
	24	*M L W*	416
1048	51	*M L J*	403
	1926	*M W N*	740
F B	49	*Mad*	910
	24	*M L W*	685
	98	*I C*	1
1051	49	*Mad*	725
S B	51	*M L J*	650
	24	*M L W*	664
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MADRAS HIGH COURT.

★★ A. I. R. 1926 Madras 1

DEVADOSS AND WALLACE, JJ.

Visvanatha Mudali and *another* — Appellant.

v.

Doraiswami Mudali and *another*—Respondents.

Appeal No. 39 of 1924, Decided on 12th February 1925, against the order of the Dist. Court of North Arcot in Appeal Suit No. 244 of 1922.

★★ *Hindu Law — Succession — Legitimate descendants of different sons of a dancing woman —One branch can inherit to the other—Hindu Law —Applicability.*

The rule of collateral succession obtains among the legitimate descendants of the two sons of a dancing woman whose paternity is unknown, i. e., each branch can inherit to the other.

It is a misnomer to call the son of a dancing woman whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wedlock, i. e., no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only an euphemism to call them illegitimate sons.

People who have been born in India and who are of the Hindu faith, and whose customs and manners are those of Hindus, are governed by the Hindu Law. In the case of a dancing woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus, and the Hindu Law therefore is applicable to them. It is consonant with reason and principle that when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom, valid and binding, is proved to the contrary, or else the application of that system is modified either by statute or by anything contained in the rules of that system. It is not necessary that in order to have heritable blood inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them. Hence there is heritable blood between the lines of their legitimate descendants. (*Case law discussed.*)

[P 1 C 2, P 2 C 1, P 3 C 1, P 4 C 2, P 5 C 2]

L. A. Govindaraghava Aiyar—for Appellants.

A. C. Sampath Aiyangar—for Respondent.

Devadoss, J.—The plaintiffs sue for a declaration that the sale of the plaint property in favour of Defendants 1 and 2 is not binding on them as they are the reversioners of one Murugesa Mudali. They claim to be the grandsons of Muthusami Mudali, the divided brother of Kachi Muniappa Mudali. The District Munsif held that being the sons of a prostitute there was no heritable blood between them and the plaintiffs had no reversionary right to the estate of Murugesa Mudali and dismissed the suit. The Subordinate Judge has reversed the decree of the District Munsif holding that the plaintiffs are reversionary heirs to Murugesa Mudali and has remanded the suit for disposal on the merits. Defendants 1 and 2 have preferred this appeal.

Muthusami Mudali and Kachi Muniappa Mudali were the sons of a dancing woman called Thanji Ammal. It is admitted that the plaintiffs are the legitimate grandsons of Muthusami Mudali and that Murugesa Mudali was the legitimate great-grandson of Kachi Muniappa. The question for decision is: Does the rule of collateral succession obtain among the legitimate descendants of the two sons of a dancing woman whose paternity is unknown? There is no authority on the point in the Hindu Law books. We have

not been referred to any decision in which the question was raised or decided. The principle applicable to the present case has to be deduced from the texts of the Hindu Law books and some of the decided cases.

A good deal of the argument in this case was with reference to the rights and disabilities of the illegitimate sons of Sudras. It is well settled that the illegitimate son of a man belonging to the twice-born class cannot inherit to his putative father ; he has only a right to maintenance, but in the case of Sudras, the illegitimate son inherits to his father his, share being half of that of the legitimate son, and he takes the whole in certain circumstances. West and Buhler 82, 194, 3rd Ed. Courts have gone the length of holding that a man's legitimate grandson by an illegitimate son succeeds to him in preference to a divided brother on the theory of representation : *Ramalinga Muppan* v. *Pavadai Goundan* (1). It is unnecessary to consider in detail all the decisions that have been quoted at the bar with regard to the rights of the illegitimate sons. It is a misnomer to call the son of a dancing woman whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wedlock, i. e., no marriage was solemnized between the father and the mother. In the case of sons of prostitutes or dancing women the paternity is unknown and it is only a euphemism to call them illegitimate sons. In Roman Law they are called *nullius filius.* Dancing women have their peculiar customs. Their status is recognized in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons.

The question in this case is : What is the law which is applicable to the descendants of the sons of a dancing woman assuming that the parentage of the sons is unknown and that they are not the sons of an individual ? In *Subbaratna Mudali* v. *Balakishnaswami Naidu* (2) a Bench of this Court held that the male members of the dancing girl caste are Hindus and are usually governed by the Hindu Law and usage. At page 208 the learned Judges observe : " All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes ; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned ; so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become professional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs." This decision is consonant with reason.

The plaintiffs and the defendants in this case are Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable ? Though the Sruthis and the Smrithis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevalent even to-day. The Aryans, when they settled in this part of India, attempted to introduce their customs and laws, but they were never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yagnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Sruthis and Smrithis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people. Manu, in order to extend the influence of the Aryans, compendiously uses term " Sudras" to the people of this country who are not Aryans in the same way as the Europeans use the word " Native" to all those who are not of

(1) [1903] 25 Mad. 519=11 M.L.J. 399.
(2) [1917] 22 M.L.T. 91=6 L.W. 184=33 M.L.J. 207=41 I.C. 408=(1917) M.W.N. 569.

European descent, and postulates that they are all Sudras who have fallen away from the high place once occupied by them in the Aryan polity as the following verses show : Chap. X, verse 43 : " the following races of Kshatriyas of their omission of holy rites and by seeing no Brahmins have gradually sunk among men to the lowest of the four classes," verse 44 " Paundrakhas, Oodras, Dravidas, Kambojas, Yavanas and Sakeas : Paradas, Pahlavas, Chinas, Kirates, Deradas and Chasas," verse 45 : " All those tribes of men who sprang from the mouth, the arm, the thigh and the foot of Brahma, but who became outcastes by having neglected their duties are called Dasyus or plunderers, whether they speak the language of the Mlechchhas or that of A'ryas." This attempt on the part of the law-giver Manu to extend the influence of the Aryans among the races who inhabited this land was always pushed in the direction of influencing their religion and the rules of succession. When the East India Company's Courts were established, the Judges took the law from the pandits who naturally relied upon the texts of the ancient law-givers and commentators as authority for their opinions. In course of time the Courts have come to regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this country who don't profess any distinctive faith like Muhammadanism or Christianity. The customary law was considered as an exception to that contained in the Sruthis and Smrithis. Under the loose terms " Hindu " all classes of people are brought within the pale of " Hindu Law" as expounded in the texts of the various Sruthis and Smrithis and their commentators. It therefore follows that people who have been born in India and who are of the Hindu faith, and whose customs and manners are those of Hindus, are governed by the Hindu Law.

In the case of a dancing woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindu, and the Hindu Law therefore is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate. In *Lingappa Goundan* v. *Esudasan* (3) it was held that the illegitimate son of a Hindu by a Christian woman was not entitled to maintenance from the estate of his Hindu father. Benson and Bhashyam Aiyangar, JJ., observe at p. 14 : " The Hindu Law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognized main castes) and gives separate names to the mixed castes to which such offspring will belong. In all these cases the Dharma or religious rites applicable to the offspring are those prescribed for the mother's caste : *Brindavana* v. *Radhamani* (4). The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is therefore beyond the pale of, and not governed by, the Hindu Law. There is no text of Hindu Law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth."

With all due respect it is difficult to see why the illegitimate son of a Hindu is not a Hindu when he follows the Hindu customs and manners. It is the Hindu father who is bound to support his illegitimate son and the mother's religion has nothing to do with his liability to maintain him. It is unnecessary to question the soundness of this decision in this case. The principle of the decision is the mother's religion determines the rights of her children. If the mother is a Hindu the children are Hindus, and the Hindu Law therefore is applicable to them. In *Myna Bayee* v. *Uttaram* (5) the facts briefly are : one Hughes kept two married women as his concubines ; one of them was a Gowda Brahmin. Two sons were born to the Brahman woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed to him. The Privy Council held that the illegitimate children of a Brahmin married woman born to a European father were to be considered as Hindus and their rights governed by that law. On remand the Madras High Court held (2 Madras High Court Reports, 196) that the sons of an Englishman by a Brahmin woman living apart from her husband were Hindus and their rights were to be determined by the rights of the class of Hindus to which they belonged ; and they also held that they were to be regarded as Sudras or a class

(3) [1905] 27 Mad. 13.

(4) [1889] 12 Mad. 72.

(5) [1850] 8 M. I. A. 400=2 W. R. (P. C.) 4.

still lower, and in the absence of preferable heirs the two sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203 : "Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illigitimate offspring. Takuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother and only not capable of inheriting to their father because he is not a Hindu at all. If not so she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever." They relied upon the Roman Law which recognized the relationship between an erring mother and her sons and of the sons towards one another. It was the influence of Christianity in the West that stood in the way of the claim of illegitimate son on his putative father. The principle deducible from these decisions is that if the mother is a Hindu and the children follow the Hindu religion and adopt Hindu manners and customs, the law applicable to them is the Hindu Law and it does not matter whether the father is a Christian or Muhammadan, European or an Indian. It necessarily follows that persons whose paternity is unknown & who are the descendans of Hindu mothers are governed by the Hindu Law. In a recent case [A.I.R. 1924 Pat. 420.] the Patna High Court held that the sons of the daughters of Hindus of the Naick caste who were converted to Muhammadanism but who lived with their Hindu grandparents and were brought up as Hindus are governed by the Hindu Law even though they have adopted the profession of dancing and have become prostitutes. Jwala Prasad, J. after an exhaustive consideration of the texts contained in the Srutis and Smrithis relating to the point and the decided cases bearing on the point, has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grandparents as Hindus are governed by the Hindu Law. It follows from this decision that the Hindu Law is the proper law which governs the relations and the inheritance of persons who are Hindus in faith and in customs and manners. Though it is stated that a Hindu is born and not made, yet when the question is what is the law applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law is applicable. In this case supposing Muniappa Mudali had died without issue and the widow alienated his property improperly would not Muthusami Mudali if he survived Muniappa, be entitled to bring a suit that the alienation was not binding on him as reversioner ? If Muthusami Mudali could bring such a suit, could not his son bring such a suit ? And if he could, his legitimate descendants can certainly bring such a suit. It is consonant with reason and principle that when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom valid and binding is proved to the contrary, or else the application of that system is modified either by statute or by anything contained in the rules of that system.

From the decisions in 8 *M. I. A.* 400 and 2 *Mad. High Court Reports*, 196, it is clear that Muthusami Mudali and Kachi Muniappa Mudali had heritable blood between them. This is not seriously disputed by the appellant. The question is whether their descendants can inherit to one another, in other words, whether the principle of collateral succession applies to the descendants of these two persons. The contention of Mr. Govindaraghava Aiyar for the appellant is that collateral relationship is traceable only through the father, in other words, it is only in case of agnatic relations that the principle of collateral succession is applicable, that an illegitimate son cannot inherit to his father's collateral relations and that in the case of Muniappa Mudali and Muthusami Mudali the father being unknown agnatic relationship does not exist and, therefore, there can be no collateral succession among their descendants. Reliance is placed on the following cases in support of the apppellant's contention. Amongst the Sudras governed by Mitakshara an illegitimate son cannot inherit collaterally in preference to legitimate heirs. *Ravji*

Valad Mahadu v. *Sakuji Valad Koloji* (6). Amongst Sudras governed by Mitakshara an illegitimate son does not inherit collaterally to the legitimate son by the same father, *Shome Shankar Rajendra Varore* v. *Rajesar Swami Jangam* (7). The illegitimate son is under Hindu Law excluded from all collateral succession, *Dharma Lakshman* v. *Sakharam Ramjiras* (8). The son of the legitimate son of a Sudra could not inherit to his illegitimate son *Zipru* v. *Bomtya* (9). It is well settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the legitimate son of his father but can succeed only to his father and the father can succeed to him. The relationship is therefore only between an illegitimate son and his father. In *Subramania Ayyar* v. *Rathnavelu Chetti* (10) it was held that the father was entitl- to succeed to his illegitimate son who left no issue, widow or mother. In all the cases where the illegitimate son was denied the right to succeed to his father's collateral relations the following text of Manu was relied upon: "The son of the young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice married woman, a son self-given, and a son by a Sudra are the six kinsmen but no heirs to collaterals": Manu Chap. IX, Verse 160.

But for this text, the illegitimate son would have the right to succeed to his father's collaterals. The question of succession to the putative father's collaterals does not arise here and the cases noticed above have therefore no application to the present case.

In the time of Manu a woman was allowed to marry more than once as is clear from Manu Chapter IX, verse 191. The sons of a mother though by different fathers were considered to have heritable blood between them for Nanda Panditha gives the order of precedence among brothers and sisters of whole blood and half blood thus: (1) Brothers of the whole blood, (2) Sisters of the whole blood, (3) sons of the same father by different mothers and (4) sons of the same mother by different fathers. The existence of heritable blood between sons of the same mother by different fathers cannot therefore be through the father and is attributable only to their being sons of the same mother. It is not therefore necessary that in order to have heritable blood inheritance should be traced through the father. It logically follows that the sons of a dancing woman or a prostitute have heritable blood between them.

If A can succeed to B in the absence of preferable heirs why should not A's legitimate son succeed to B if A predeceases B, in the absence of law or custom to the contrary? If two men are sons of the same mother they have heritable blood between them unless such a principle is opposed to any distinct text either in Manu or in the Mitakshara or in any one of the various commentaries. There is no text of Manu or any of his commentators against the descendants of the sons of a prostitute having heritable blood between them. Both Muthusami Mudali and Kachi Muniappa Mudali were brothers and their descendants are all legitimate; i. e., the plaintiffs are the legitimate sons of the legitimate son of Muthusami Mudali; similarly Murugesa Mudali was legitimate in descent from Kachi Muniappa Mudali. There was no *bar sinistar* so far as he, or his father or grandfather was concerned. Seeing that there was heritable blood between Muthusawmi Mudali and Muniappa Mudali, did the tie cease to exist between Muthusami's son and Muniappa's son? If there was heritable blood between the fathers, it is difficult to understand why that should not continue in the case of the sons. If Muthusami Mudali could succeed to Kachi Muniappa it is difficult to see why the legitimate son of Muthusami should not succeed to Kachi Muniappa. The principle of representation, as enunciated in 25 *Mad.* 519, is against the appellant's contention. In that case it was held that the legitimate son was entitled to succeed to a man in preference to his divided brother. Bhashyam Aiyangar, J., who delivered the judgment in the case observed with regard to *Krishnayyan* v. *Muthusami* (11), *Ranoji* v. *Kandoji* (12) and *Parvathi* v. *Thirumalai* (13). "The effect

(6) [1910] 34 Bom. 321=5 I.C. 964=12 Bom. L. R. 204.
(7) [1898] 21 All. 99=(1898) A.W.N. 117.
(8) [1920] 44 Bom. 185=55 I. C. 306=22 Bom. L. R. 52.
(9) A.I.R. 1922 Bom. 176=46 Bom. 424.
(10) [1917] 41 Mad. 44=22 M.L.T. 94=6 L. W. 149=(1917) M.W.N. 688=42 I. C. 555=33 M.L.J. 224 (F. B.).

(11) [1884] 7 Mad. 407.
(12) [1885] 8 Mad. 557.
(13) [1887] 10 Mad. 334.

of these decisions is that it is only when the father dies a separated householder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an "avibhakta" (undivided from his brothers or other collaterals) he is entitled only to maintenance. The principle of these decisions is explained as follows in *Thankam Pillai* v. *Suppa Pillai* (14). "But these decisions proceeded on the view that he had no claim by survivorship against his father's coparceners by *jus representationis*, and that he was neither a coheir with his father nor a sapinda in relation to his father's coparceners." The learned Judge goes on to observe at page 523: "Assuming, as explained in *Thangam Pillai* v. *Suppa Pillai* (14), that by reason of his illegitimacy an illegitimate son cannot claim his father's share as against his father's coparcener by *jus representationis* that principle will not be applicable to a legitimate son representing his father though the father was the illegitimate son of the grandfather. If a Sudra dies, leaving a legitimate son and a grandson or great-grandson by a predeceased illegitimate son can it be contended that the legitimate son is not bound to allow half a share to the son or grandson of his deceased illegitimate brother just as he would be if the illegitimate son did not predecease the father? If the grandson, as representing his father though not claiming under him, would be entitled as against his uncle to claim his father's share it can hardly be maintained, though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son since if he has legitimate half-brothers or other heirs of his father down to a daughter's son, he gets a half share, and in the absence of such heir the whole estate. The Sudra's illegitimate son is, therefore, in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died." The learned Judge relies for his opinion upon West and Buhler, III edition, pp. 72, 82, 83 and 390; and Mr. Jolly's work on Hindu Law, pp. 185, 186). I respectfully adopt the reasoning of that very learned Judge and I am of opinion that the legitimate descendants of Muthusami Mudali represent Muthusami Mudali and the legitimate descendants of Muniappa Mudali represent Muniappa.

If Muniappa Mudali's son had died without issue would not Muthusami Mudali, if he was alive, have succeeded to the property of that son? And if it is once granted that Muthusami's son represents him and Muniappa's son represents him then it is difficult to understand how their sons could not represent Muthusami and Muniappa respectively. If that is so then there is heritable blood between them and one line can succeed to the other line according to the principle of collateral succession. It is immaterial to consider whether Thanjai was a dancing woman or only a prostitute. Whether the mother be a dancing woman or an ordinary prostitute the legitimate descendants of her sons have heritable blood between them, and this decision does not turn upon any custom or law peculiar to dancing women. On a careful consideration of the cases quoted at the Bar and the various passages in the Hindu Law books touching on this point, I have come to the conclusion that the plaintiffs are the reversionary heirs to Murugesa Mudali.

The appeal is dismissed with costs.

Appeal dismissed.

(14) [1889] 12 Mad. 401.

★★ A. I. R. 1926 Madras 6

RAMESAM AND VENKATASUBBA RAO, JJ.

Valluru Appalasuri and *others*—Defendants—Appellants.

v.

Sasapu Kannamma Nayuralu—Plaintiff—Respondent.

Second Appeal No. 1061 of 1922, Decided on 5th February 1925, against the decree of the Addl. Sub-J., Vizagapatam, in A. S. No. 439 of 1921.

★★ (a) *Hindu Law—Widow—Cowidow—One cowidow alone alienating — Estate benefited — Alienor dying—Alienation is not binding on the surviving widow even to the extent of the deceased widow's share, where there was no partition between the widows which would be binding on the survivor.*

The estate of cowidows or other coheiresses in Hindu Law is a joint estate, but it is unlike other joint estates. It is indivisible. : [2 *Mad.* 194 *Foll.*] Strictly, it can never be divided, so as to create separate estates such that each sharer is the owner of her share and at her death, the reversioner's estate falls in. Such a division is impossible in law. Such partition as is permissible is merely for the convenience of their enjoyment by the sharers and may be of two kinds : (i) so as to last during the lifetime of both the widows ; (ii) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other, without alienating the property, it passes to the heirs of her private property and not to the other cowidow, or their reversioners, the dictum to the contrary in 3 *M. H. C.* 268 not being good law: [A.I.R. 1924 *Mad.* 75 and 43 *Mad.* 855, *Foll.*] By the very nature of the arrangement, there can be no survivorship if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other. One of the cowidows can alienate her share, which may be defined or undefined, according as there is a partition or not. If the alienor dies before the cowidow, the alienation ceases to be operative if there is no partition, or if the partition is of the first kind, the property goes to the cowidow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee, until the other cowidow dies. ; [22 *Mad.* 522 ; 23 *Mad.* 504 & A.I.R. 1924 *Mad.* 75 *Foll.*] (The obiter dictum to the contrary, in 33. *All.* 443, not followed.) Except for the limited purposes mentioned above, i e., during the lifetime of the alienor in a partition of the first kind, or during the lifetime of all the cowidows in a partition of the second kind, there can be no alienation by a widow of her interest. [1 *Mad.* 290 (*P. C.*) ; 16 *Mad.* 1 (*P. C.*) *Foll.*] and whether there is necessity or not, an alienation by one cowidow cannot bind the reversioner [3 *M. H. C. R.* 424; 24. *Cal.* 339; 43 *Mad.* 855 ; 23 *Mad.* 504 and 33. *All.* 443, *Foll.*] If an alienation for necessity is to bind the reversioners, all the cowidows must join in it. [P. 10 C. 1 & 2.]

★ (b) *Civil P. C., O. 6 R. 17—Amendment of plaint—Cause of action arising after filing of suit should be allowed to be added, where there is no change of jurisdiction, or undue delay in applying nor necessity for fresh enquiry on other facts.*

Events that happened, even after the filing of the suit including those that add to the title of the plaintiff, may be taken notice of, so that a cause of action that arose after the filing of the suit can be included by the amendment of a plaint. But the discretion ought not to be exercised when there is a change of jurisdiction, when there is a great delay in making the application, and may not be exercised if a fresh enquiry on other facts is necessary. But when these features do not exist, the amendment ought, as a general rule, to be allowed, to avoid multiplicity of proceedings. In all such cases, the only question of consequence is one of Court-fees a matter with which the parties are not concerned and the opposite party is not deprived of any defence which is open to him. [P. 12 C. 1.]

Y. Suryanarayana—for Appellants.

B. Jagannadha Doss—for Respondent.

Judgment.—This second appeal arises out of a suit by one of two Hindu widows for partition of her husband's property and possession of a share. The 1st defendant is the cowidow and she sold a part of the property, under Ex. IV, to the 2nd defendant, who married the daughter of the deceased cowife of plaintiff and 1st defendant, and another part to the 3rd defendant, under Ex. VI. The 4th defendant is the undivided brother of the 3rd defendant. The 1st and 2nd defendants lived in the same house. The District Munsif decreed the suit. On appeal, the Subordinate Judge remanded the suit for fresh trial. On remand, the District Munsif again passed a decree, in favour of the plaintiff. In the interval, the 1st defendant died. There was again an appeal to the Subordinate Judge. The plaintiff prayed for an amendment of the plaint and prayed for possession of the entire estate, as the result of the 1st defendant's death. The amendment was allowed. The Subordinate Judge granted a decree to the plaintiff, for possession of the entire property. The Defendants 2 to 4 appeal.

The portion of the case, relating to the alienations, in favour of Defendants 3 and 4, has not been seriously pressed and the other portion relating to the 2nd defendant has been fully argued.

The Subordinate Judge found that out of the Rs. 600, for which Ex. IV was executed, Rs. 516 was utilized to discharge a decree, obtained by D. W. 6 against the husband, (Ex. V). If the sale was effected by both the widows, it would have been for purposes beneficial to the estate and therefore binding on the daughter and other reversioners. The appellant's vakil contended, relying on *Kaliyanasundaram Pillai* v. *Subba Moopanar* (1) that the sale ought to be upheld against the plaintiff. In *Sri Gajapati Radhamani* v. *Maharani Sri Pusapati Alakajeswari* (2) and *Vadali Mamidigadu* v. *Kotipalli Ramayya* (3), it was held that one of two cowidows cannot alienate the share of the other, even for purposes

(1) [1904] 14 M. L. J. 139.
(2) [1893] 16 Mad. 1=19 I.A. 184=6 Sar. 1(P.C.).
(3) [1903] 26 Mad. 334.

beneficial to the estate, without the consent of the other. The decision in *Kaliyanasundaram Pillai* v. *Subba Moopanar* (1) decided by Benson and Bhashyam Aiyangar, JJ., [the same Judges who decided *Vadali Mamidigadu* v. *Kotipalli Ramayya* (3)] is apparently inconsistent with this, but, on a careful examination of the judgment, it seems to me that the Judges were of opinion, on its facts, that the senior widow was recognized, as manager or agent of the other. Such an inference can be made only in a case, where there is no known hostility between the widows and is not possible when the widows are hostile to each other, as in this case. We therefore agree with the Courts below, in holding that Ex. IV is not binding on the plaintiff's half share.

The next point that has been argued in the case is that Ex. IV is at least binding on the 1st defendant's half share. The appellants rely on the unreported judgment of this Court, in A. S. No. 166 of 1922. The position of two cowidows or two daughters has been the subject of consideration in several decisions of the various High Courts and the Privy Council. In *Rindamma* v. *Venkataramappa* (4), Bittleston, C. J., and Ellis, J., observed :

"Upon the death of the husband, the widows became jointly entitled ; they might agree to divide the estate and hold separately distinct shares of it, during their joint lives. We are not prepared to say that they might not enter into such an agreement as would bind each to an absolute surrender of all interest in the other's share so as to let in the next heirs of the husband immediately upon the death of that other . . . . .One obtained a decree against the other for a division . . . . . It dealt only with the joint estate, and the joint estate ceased on the death of Krishnamma. Then the whole estate of the husband vested in the surviving widow ; and neither Krishnamma's claim for division, nor the decree for division could touch that."

In another case, *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (5) of the same volume, Scotland, C. J., and Ellis, J., observed, at p. 452:

"Now, the right, as contended for on behalf of the appellants, namely, to the absolute partition of the joint estate, giving to each widow a share in severalty, we are of opinion, is not maintainable. In support of it, reliance was placed on the language of the foregoing texts.....The division there spoken of must be understood to refer only to the distributive enjoyment of the benefits of the joint property, and no doubt, two or more widows might, by an agreement inter se not prejudicial to the rights of the next heir in succession, provide for such enjoyment, by an apportionment of the property. A partition, converting the joint estate into an estate in severalty whenever either of the widows choose to insist upon it, is quite incompatible with the right of survivorship to the whole property, arising out of the joint estate for life and the surviving widow or widows being the nearest heir or heirs. On the other hand it has been recently decided by this Court in the case of *Rindamma* v. *Venkataramappa* (4) that a division, obtained under a decree, was ineffectual against the claims of the survivor of two widows to the divided moiety."

They then consider the question, whether the relief of separate possession of a portion of the inheritance may not be granted, when it appears to be the only proper and effectual mode of securing the enjoyment of her distinct right to an equal share of the benefits of the estate. This case has been approved by the Privy Council, in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6). Their Lordships say:

"It was held here that there was no objection to a transaction, which was merely an arrangement for separate possession and enjoyment, leaving the title to each share unaffected, although the widows nevertheless remained coparceners, with a right of survivorship with them and there could be no alienation by one without the consent of the other. Their Lordships, guarding themselves against being supposed to affirm by this order, that either widow has power to dispose of the one-fourth of the estate allotted to her, or that they have any right to a partition in the proper sense of the term, are not disposed to vary."

In *Kathaperumal* v. *Venkabai* (7), it was observed :

4) 3 M. H. C. 268.
5) 3 M. H. C. 424.

(6) [1876-78] 1 Mad. 290=4 I. A. 212=1 C.L. R. 97=3 Suther 447=3 Sar. 753 (P. C.).
(7) [1878-80] 2 Mad. 194.

"But by Hindu Law, two widows of one and the same husband take a joint interest in one undivided estate, and it has been held that, although the widows may arrange for the enjoyment of the estate in separate portions, there can be no compulsory partition, converting the joint estate into an estate in severalty."

In *Ariyaputri* v. *Alamelu* (8), we have:

"It is true that when there are more widows than one, they take together as a class. It is also true that partition is permitted between them, not as in the case of male coparceners, for the purpose of converting a joint estate into two or more separate estates to be held in severalty, but for the limited purpose of securing to each widow a distributive enjoyment of the benefit of joint property. In this view, partition between them certainly creates no separate property, in the portions placed in their separate possession and no disposing power, so as to defeat the right of survivorship vesting in the cowidow, but as between them, each widow is entitled to take the income of the portion, placed in her possession, during her life....."

In *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapati Alakajeswari* (2), which arose out of the facts of *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6) their Lordships of the Privy Council observed at p. 10:

"It may be assumed, for the present judgment, without deciding the point, that there was a sufficient necessity, for borrowing money to pay the Government revenue, or even for the payment of Nilamani's debt, but that necessity did not render a mortgage by one widow binding upon the joint state, which had descended from their deceased husband, so as to affect the interest of the surviving widow."

One may add "or that of the reversioners," though this was not necessary for the case: (see *Jijoyiamba Bayi Sahiba* v. *Kamakshi Bayi Sahiba* (5), already quoted. It is well to remember that, in that case, part of the money borrowed by the alienating widow was applied for paying Government Revenue, and still no decree, even for this amount, was given. The case, in *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (9) is a case of daughters, but as was observed in *Ramakkal* v. *Ramasami Naickan* (10) to be next referred to, the case is analogous to that of widows. Nor does the fact that the Calcutta case was under the Dayabhaga Law make any difference, as observed in *Ammani Ammal* v. *Pariasami Udayan* (11) by Oldfield. J., at p. 4. It was there observed:

"that being so, the estate that devolved on the daughters of Radhakrishna, would not determine, until after the death of Ganeswari and until that event happens, the arrangement come to, between the daughters, which was assented to, by all the daughters, should, in our opinion, remain in operation. This would not in any way interfere with the rights of the reversionary heirs, for the simple reason that those rights do not come into existence, until after the death of Gaganeswari..... As we have already indicated, its effect was to make the properties, allotted to each daughter, remain her property, capable of being alienated by her, and if not alienated, capable of passing on her death, to the heirs of her separate property, as distinguished from the property inherited by her from her father."

In *Ramakkal* v. *Ramasami Naickan* (10), it was held that one of two widows can alienate any estate which came to her as such for her life and can therefore enter into such a deed as will preclude her from recovering during her life property which she has alienated to the full extent of such alienation, provided it does not extend beyond her life-interest. In *Kanni Ammal* v *Ammakannu Ammal* (12), it was held that, while one of two daughters cannot by alienation, alter the character of the daughter's estate, so far as concerns the right of survivorship or the rights of reversioners, she may alienate her interest in the property. The parties in that case were ably represented as two of the vakils for the appellant and two vakils for the respondent have since become Judges of this Court and a full report of the argument is available and is instructive. It shows that there may be two kinds of partition between two widows, or other coheiresses: (1) so as to last during their joint lives only and if one dies, the other gets it by survivorship and (2) so as to last until the death of all.

(8) [1888] 11 Mad. 304.
(9) [1897] 24 Cal. 339.
(10) [1899] 22 Mad. 522=9 M. L. J. 101.
(11) A. I. R. 1924 Mad. 75=45 M. L. J. 1=32 M. L. T 323=(1923) M. W. N. 652.
(12) [1900] 23 Mad. 504=10 M. L. J. 253.

If one dies first the other does not get her share by survivorship and the share will continue to be enjoyed by the alienee, if alienated, or will go to the heirs of her stridhanam property, if unalienated. In either case, the partition is an arrangement for their own convenience and cannot affect reversioners.

In *Chengappa* v. *Buradagunta* (13) and *Ammani Ammal* v. *Periasami Udayan* (11), (in which one of us, Venkatasubba Rao, J., took part) the remark in *Rindamma* v. *Venkataramappa* (4), quoted by me, that the arrangement may be such that, after partition by the cowidows, the death of one may let in the reversioner's right, was disapproved, i. e., the reversioner's interest does not begin, until all the widows die, (unless there is a surrender by all).

The decisions establish that :

(1) The estate of cowidows or other coheiresses in Hindu Law is a joint estate, but it is unlike other joint estates. It is indivisible: see *Kathaperumal* v. *Venkabai* (7). Strictly, it can never be divided so as to create separate estates such that each sharer is the owner of her share and at her death the reversioner's estate falls in. Such a division is impossible in law.

(2) Such partition as is permissible is merely for the convenience of their enjoyment by the sharers and may be of two kinds:

(i) so as to last during the lifetime of both the widows ;

(ii) so as to bind them until the death of all of them. In the latter case if one of the widows dies before the other without alienating the property, it passes to the heirs of her private property and not to the other cowidow, or their reversioners, the dictum to the contrary in *Rindamma* v. *Venkataramappa* (4) not being good law. *Ammani* v. *Periasami Udayar* (11) and *Chengappa* v. *Buradagunta* (13).

(3) By the very nature of the arrangement, there can be no survivorship, if the partition is of the second kind. But if it is of the first kind, it cannot affect the right of survivorship of the other.

(4) One of the cowidows can alienate her share, which may be defined or undefined according as there is a partition or not. If the alienor dies before the cowidow, the alienation ceases to be operative, if there is no partition ; or if the partition is of the first kind, the property goes to the cowidow by survivorship. But if the partition is of the second kind, the property continues to be enjoyed by the alienee: [*Ramakkal* v. *Ramasami Naicken* (10); *Kanni Ammal* v. *Ammakannu Ammal* (12) ; *Ammani Ammal* v. *Periasami Udayan* (11);] until the other cowidow dies. The obiter dictum to the contrary in *Durga Dut* v. *Gita* (14) has not been followed here.

(5) Except for the limited purposes mentioned above, i. e., during the lifetime of the alienor in a partition of the first kind, or during the life-time of all the cowidows in a partition of the second kind, there can be no alienation by a widow of her interest : *Gajapathi Nilamani* v. *Gajapathy Radhamani* (6), *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapatti Alakajeswari* (2); and whether there is necessity or not, an alienation by one cowidow cannot bind the reversioner : *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (15): *Kailash Chandra Chukerbutty* v. *Kashi Chandra Chukerbutty* (9); *Ramakkal* v. *Ramasami Naicken* (13); *Kanni Ammal* v. *Ammakannu Ammal* (12), and *Durga Dat* v. *Gita* (14).

(6) If an alienation for necessity is to bind the reversioners, all the cowidows must join in it.

It follows that I cannot agree with the decision in A. S. No. 166 of 1922. In that case, the last male owner left a widow, Gangalakshmi, and two daughters Rattamma and Narasamma. Rattamma effected an alienation of the property, along with her sons. The suit was brought by four plaintiffs, Plaintiffs 1 to 3 being parties to the alienation ; but the fourth plaintiff was not a party to it. Their Lordships found that there was necessity and held that the alienation was binding on the reversioners. So far as Plaintiffs 1 to 3 were concerned, the decision might well have rested on the ground that they were parties to the alienation and could not question it : (*Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (16), and *Basappa* v. *Fakirappa*(17). But

(13) [1920] 43 Mad. 855=39 M. L. J. 567=12 L. W. 656=60 I. C. 135=28 M. L. T. 272.

(14) (1911) 33 All. 443=8 A. L. J. 220=9 I. C. 498.

(15) 3 M. H. C. 424.

(16) A. I. R. 1923 All. 387=45 All. 339=21 A. L. J. 235=4 L. R. A. Civ. 392 (F.B.).

(17) A. I. R. 1922 Bom. 102=46 Bom. 292.

as to the 4th plaintiff, we are constrained to differ from the judgment and to dissent from its reasoning. The decisions in *Sri Gajapathi Radhamani* v. *Maharani Sri Pusapathi Alakejeswari* (2); *Ramakkal* v. *Ramasami Naicken* (10); *Durga Dat* v. *Gita* (14) were referred to and then it was observed:

"the facts in this case are different from those in the cases quoted. Gangalakshmi gave away or surrendered her life-interest in some property, in favour of Rattamma, and it is stated that by another deed she surrendered her right to some other property in favour of Narasamma. After that, both Narasamma and Rattamma began to deal with their properties as their own."

We are not able to see how the surrender of the mother, in favour of her daughters and the conduct of the daughters can have any effect on the rights of the reversioners. It was conceded in the judgment that the alienation cannot affect the rights of Narasamma by survivorship; but it was observed, that this has nothing to do with the reversioners, who do not claim through Narasamma. Here again I am compelled to dissent with all deference. When the surviving cowidow gets the property by survivorship, after the death of the alienating widow, she represents the estate, and the reversioner, though he cannot be said to claim through her so as to be bound by her acts, still claims through her in respect of matters where she represents the estate. But apart from this the cases cited by me also show that a single widow has no power of alienation, except for her own convenience, i. e., so as not to affect the other widows (except in the partition of the second kind) or the reversioners. It seems to me that the learned Judges who decided A. S. 166 of 1922 did not give due weight, while referring to *Ramakkal* v. *Ramasami Naicken* (10), to the qualification referred to at p. 524, i. e., the words "provided it does not extend beyond her life interest," nor to the words "which will prejudice the right of survivorship of her cowidow, or the rights of the reversioners after the death of the survivor of the widows," in *Durga Dat* v. *Gita* (14), which was actually quoted by them. The cases in *Gajapathi Nilamani* v. *Gajapathi Radhamani* (6), *Jejoyi Bayi Sahiba* v. *Kamakshi Bayi Sahiba* (15), *Kailash Chandra Chuckerbutty* v. *Kashi Chandra Chuckerbutty* (9), and *Kanni Ammal* v. *Ammakannu Ammal* (12), were not cited at all. All the authorities show that, strictly, there is no separate estate of any kind in any one of the widows, a right of partition for the convenient enjoyment being all that is permitted. This contention of the appellants must therefore be disallowed.

The third point argued by the appellant is that he is entitled to the amount of Rs. 516, which was utilized for discharging the husband's decree debt. Apart from the difficulty that the documents (Exs. IV-a and V) show that the debt was discharged by the 1st defendant and not by the 2nd defendant, and assuming it is open to us to construe them, as if the payment to the creditor was made by the 2nd defendant, we do not think he is entitled to any relief. The decree was not a mortgage decree. If the debt discharged was a charged debt, the plaintiff may be entitled to the relief he claims by subrogation. But when there is no charge, and seeing that any right by contribution against the plaintiff's half-share can be operative during the lifetime of the 1st defendant and not after the death of the 1st defendant, so as to affect plaintiff's right by survivorship, there can be no subrogation: vide Sheldon on Subrogation, p. 4, S. 3). S. 69 of the Contract Act cannot help the 2nd defendant for he was not interested in the payment, but his vendor; nor can S. 70, as he did not make the payment, for or on behalf of the plaintiff. This contention must also be negatived. The plaintiff is entitled to mesne profits, in respect of 1st defendant's half-share only from the death of the 1st defendant. The decree requires no modification, as no mesne profits have been awarded for the additional half-share.

The fourth point, argued by the appellant, is that the amendment of the plaint, so as to enable the plaintiff to claim the whole of the property, including the 1st defendant's share, ought not to be allowed. He relies on *Lakshmi Ammal* v. *Alamelu Ammal* (18). If the decision is regarded merely as one on the question of discretion on the particular facts of the case and the stage at which the amendment was asked, we have nothing to say against it. But if it meant to lay down that a cause of action, that arose after the filing of the suit, ought never to be taken

(18) A. I. R. 1924 Mad. 309=45 M. L. J. 811=18 M. L. W. 874=(1923) M. W. N. 839.

notice of, we are constrained to dissent from it. That events that happened, even after the filing of the suit—including those that add to the title of the plaintiff, —may be taken notice of has been established by several casees (vide *Ram Ratan Sahu Bishun Chand* (19), *Mohant Sahu Rai Charan* v. *Biswa Nath* (20); *Sri Rajah Setrucharlu Ramchandra Raju* v. *Maharjah of Jeypore* (21) reversed by Privy Council on another point, *Subbaraya Chetty* v. *Nachiar Ammal* (22), *Durasswami Pillai* v. *Chinna Goundan* (23), *Thimmayya* v. *Siddappa* (24). Specially in partition suits, it will be very inconvenient, if the general principle of confining the suit to the cause of action, in the plaint, is rigidly adhered to, as can be seen from a simple case, where A filed a suit against his two brothers for partition and seeks to recover a third share, and during the pendency, one of the brothers dies, to say that the plaintiff cannot be awarded half, instead of a third, and that the decree should be limited to a one-third, he being compelled to file another suit for one-sixth is to be technical with a vengeance; (vide Jenkins, C. J.'s judgment in *Rustomji* v. *Sheth Purshotamdas* (25). No doubt, the discretion ought not to be exercised, when there is a change of jurisdiction, when there is a great delay in making the application, and may not be exercised if a fresh enquiry, on other facts is necessary. But when these features do not exist, in our opinion the amendment ought, as a general rule, to be allowed, to avoid multiplicity of proceedings. In all such cases, the only question of consequence is one of Court fees-a matter with which the parties are not concerned and the opposite party is not deprived of any defence, which is obviously open to him: (see also *Pendekkallu Thimmayya* v. *Pendekkallu Siddappa* (24). This contention must be disallowed. The appeal fails on the merits. The Defendants 2 to 4 say that they are not in possession of properties, other than those alienated to them and in respect of which a full decree is not passed against them.

In the lower Court, the decree in respect of all the properties was passed against all the defendants, including Defendants 2 to 4. The plaintiff is entitled to be put in possession of all the properties, but the decree, in respect of the properties, other than those alienated to Defendants 2 to 4, should not have been passed against the Defendants 2, 3 and 4. For this reason the parties will bear their own costs in Second Appeal.

Appeal dismissed.

(19) [1907] 11 C. W. N. 732=6 C. L. J. 74.
(20) [1914] 20 C. L. J. 107=26 I. C. 410.
(21) [1916] 1 M. W. N. 354=34 I C. 411=19 M. L. T. 360.
(22) [1918] 7 L. W. 403=44 I. C. 863=(1918) M. W. N. 199.
(23) [1918] 7 L. W. 335=22 M. L. T. 538=34 M. L. J. 258=43 I. C. 560=(1918) M. W. N. 89.
(24) A. I. R. 1925 Mad. 63.
(25) [1901] 25 Bom. 606=3 Bom. L. R. 227.

★★ A. I. R. 1926 Madras 12

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Vuppulury Somasundaram — Plaintiff—Appellant.

v.

Bhimisetti Kondayya — Defendant—Respondent.

Letters Patent Appeal No. 63 of 1924, Decided on 12th March 1925, against the judgment of Krishnan, J., D/- 18th February 1924, in Second Appeal No. 693 of 1921.

★★ *Civil P. C., O. 21, R. 92—Judgment-debtor being aware of execution proceedings but not objecting to Court sale—Sale confirmed—Neither judgment-debtor nor his transferee with notice can subsequently contend that the property was inalienable—Civil P. C., S. 11—Evidence Act, S 115—Execution.*

Under O. 21, R. 92, Civil P. C., where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under S. 47 to the sale and his objection is overruled he is bound by the decision of the executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale, in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction purchaser and he cannot go behind it. 9 *C. W. N.* 972; 26 *Cal.* 727; 34 *Cal.* 199 and 40 *All.* 680 *Foll.* [P 14 C 2]

Plaintiff a transferee from the auction purchaser sued to redeem a mortgage held by the defendant subject to which the property was sold at the auction. The defendant pleaded that the property being an inam land was inalienable and therefore the sale conveyed no title to the auction-purchaser and further, that subsequent to the auction sale the land was enfranchised by the

Government in the name of the judgment-debtor from whom he subsequently purchased the same. The defendant as well as the judgment-debtor had notice of the execution proceedings.

Held : that the defendant must be considered to be bound by the order confirming the sale in favour of the auction purchaser and that it was not open to him to question the validity of the Court.

Held : further that the question whether the sale of an unenfranchised inam is absolutely void did not strictly arise. [P 15 C 2 P 16 C 1]

C. Rama Rao—for Appellant.

K. Venkatarama Raju—for Respondent.

Venkatasubba Rao, J.—This is a Letters Patent appeal from the judgment of Krishnan, J. I shall briefly state the facts before discussing the question of law that arises. Perumal was the owner of the property and he mortgaged it to the defendant. It was then an unenfranchised inam. In execution of a money decree obtained against Perumal the property was subsequently sold in Court auction. Even then it was an unenfranchised inam. The plaintiff's vendor became the purchaser at the Court sale.

This suit has been instituted to redeem the mortgage in favour of the defendant. The defence is that the sale conveys to the plaintiff no title, the property having been inalienable. The defendant has had to concede that on this hypothesis the mortgage in his favour is also invalid. He, however, relies upon a sale made to him of the property by Perumal subsequent to the enfranchisement of the property.

These facts cannot be disputed : first, the property was inalienable on the date of the Court sale and consequently no valid title passed to the plaintiff ; secondly, by reason of the subsequent enfranchisement, Perumal acquired a right which could be transferred and the defendant, having then purchased the property from the owner, acquired a good title. Krishnan, J., relying on these facts has dismissed the plaintiff's suit. In my opinion, the question is not what are the true facts, but what is the effect of the Court sale ; in other words, can Perumal or the defendant who claims through him plead that the property was in fact inalienable on the date of the Court sale ? If Perumal is precluded from pleading that the land was inalienable, the defendant who claims through him is equally barred.

It was not disputed before Krishnan, J., that Perumal, the judgment-debtor, was aware of the execution proceedings that culminated in the sale and the argument apparently proceeded on the footing that though he had knowledge, he did not object to the attachment and sale. The plaintiff's learned vakil before us suggested that as a matter of fact Perumal put in a petition objecting to the sale and that his objection was overruled by the executing Court which thereafter ordered the sale of the property. The petition of Perumal and the order made thereon were not relied on in any of the lower Courts or before Krishnan, J. We did not think it necessary to decide whether this additional evidence should be received or not, for, in our opinion, it is immaterial whether an objection was put forward which was overruled or whether the judgment-debtor having knowledge of the proceedings refrained from objecting. I therefore proceed to deal with the case on the footing that Perumal had notice of the proceedings and had an opportunity to object to the attachment but did not put forward any objection.

The Court sale was held on the assumption that the property could be sold. Is Perumal or his representative, the defendant, now to be permitted to show that this assumption was wrong and that in fact the property was inalienable ? In my opinion there is a preponderance of authority in favour of the position that he ought not to be so permitted.

The first case I shall refer to is *Sheikh Murullah v. Sheikh Burullah* (1). In execution of a decree against the defendant, his property was sold and a stranger became the purchaser. The latter transferred his right to the plaintiff and he brought the suit for possession. The defendant raised the objection that the holding was non-transferable by custom and the sale was therefore bad. Mitra, J. held that the defendant could have objected to the attachment under S. 244 and he not having done so was precluded from resisting the purchaser after confirmation of the sale. The learned Judge observes : "As between the purchaser and himself (the defendant) the title to the property vested in the purchaser on the confirmation of sale." Mitra, J., lays emphasis on this aspect, namely, whether the judgment-debtor had knowledge of the execution proceedings that culminated in the sale. If he had, he would be concluded by the

(1) [1904-05] 9 C. W. N. 972.

order confirming the sale. If he did not have knowledge, it would be open to him to object to the sale in subsequent proceedings. Mitra, J., refers to *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2), where what was apparently a contrary view was taken, namely, that the defendant could resist a purchaser although he had not objected to the attachment under S. 244. The case was distinguished on the ground that no question was raised in it as to the effect of the knowledge on the part of the defendant of the execution proceedings leading to the sale. In *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), referred to with approval by Mitra, J.' the learned Judges were of opinion that knowledge on the part of the debtor was decisive of the question. To quote their words: "If this question (whether the judgment-debtors were aware of the proceedings or not) be answered in the affirmative, then we are clearly of opinion that it is not open to them now to question the propriety of the sale that has already taken place." The view of Mitra, J., was affirmed in Letters Patent Appeal by Maclean, C. J., and Pargiter, J., who expressly followed *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3).

This point was again considered in *Dwarkanath Pal* v. *Tarini Sankar Ray* (4). The facts were similar to those in *Sheikh Murullah* v. *Sheik Burullah* (1) and the learned Judges accepting the law as laid down by Mitra, J., express the view that *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) had been sufficiently dealt with by that learned Judge in his judgment.

Lala Ram v. *Thakur Prasad* (5) is also a direct authority on the point. The facts are again similar to those in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the same view of the law was again taken. The principle is stated thus: "As between him (the judgment-debtor) and the auction purchaser the sale has become conclusive and the auction purchaser has acquired a vested interest in the property sold." Here again the learned Judges advert to the fact that the judgment-debtor was aware of the execution proceedings and did not object.

(2) [1897] 24 Cal. 355=1 C. W. N. 396.
(3) [1899] 26 Cal. 727=3 C. W. N. 586.
(4) [1907] 34 Cal. 199=5 C.L.J. 294=11 C.W.N. 513.
(5) [1918] 40 All. 680=47 I. C. 947=16 A. L. J. 691.

The principle underlying these four cases, namely, *Durga Charan Mandal* v. *Kali Prasanna Sarkar* (3), *Sheik Murullah* v. *Sheikh Burullah* (1), *Dwarkanath Pal* v. *Tarini Sankar Ray* (4) and *Lala Ram* v. *Thakur Prasad* (5), I may state thus: Under O. 21, R. 92, Civil Procedure Code, where no application is made to set aside a sale or where such application is made and disallowed, the Court is bound to make an order confirming the sale and it thereupon becomes absolute. Under S. 65 where property is sold in execution of a decree and the sale has become absolute, the property vests in the purchaser. If the judgment-debtor objects under S. 47 to the sale and his objection is overruled he is bound by the decision of the executing Court. If being aware of the execution proceedings and having an opportunity to object, he fails to do so, he is likewise bound by the order confirming the sale, in other words, he is, in effect, in either case a party to the order by which the sale is confirmed equally with the auction purchaser and he cannot get behind it.

In my opinion, this is the right principle and I am prepared to follow the four cases mentioned above.

I have dealt with cases from which a definite principle is deducible. There are some other rulings which also negative the right of the judgment-debtor but which state the principle differently. Before discussing these cases, I may refer to *Pandurang Balaji* v. *Krishnaji Govind* (6), which is identical with the four cases cited above excepting that it makes no reference to the knowledge or want of knowledge on the part of the judgment-debtor although it decided that he was barred from contending in the suit that the sale was bad.

In *Gokulsing Bhikaram* v. *Kisen Singh* (7) the plaintiff was the purchaser at the Court-sale and the defendants were the judgment-debtors in the previous suit. They had not objected in the execution proceedings to the attachment and sale. Could they now object? It was held, they could not. The reason is given thus:--

"Though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed and though he is not a representative of either the decree-holder or the

(6) [1903] 28 Bom. 125=5 Bom. L. R. 799.
(7) [1910] 34 Bom. 546=7 I. C. 457=12 Bom. L. R. 539.

judgment-debtor for the purpose of S. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

The learned Judges seem to think that the result of setting aside the sale would affect a party to the previous suit and the question was thus one virtually between the parties to that suit and ought to be decided under S. 244. (See p. 552 last sentence).

In *Nadamuni Narayana Aiyangar* v. *Veerabhadra Pillai* (8) the plaintiff was the judgment-debtor in the previous suit. He sued to get the sale held in execution of the decree against him, annulled. Wallis, J., as he then was, observes that the plaintiff is barred from bringing the suit not by reason of S. 244 but by reason of general grounds of policy which underlie that section. Krishnaswami Aiyar, J. states the principle in a different way, for, according to him, the only mode in which the sale can be impeached is by an application to the executing Court to set aside the sale. In his opinion, unless a sale is set aside in the proceedings between the parties, the suit against the purchaser is not maintainable. With great respect, I am unable to understand the ground of the decision of Krishnaswami Aiyar, J.

It is, however, unnecessary to pursue this point further, as, in my opinion, as I have stated, the right principle is that which underlies the decision in *Sheikh Murullah* v. *Sheikh Burullah* (1) and the other three cases which I have mentioned above.

In *Venkataramanachariar* v. *Meenakshisundaram Aiyar* (9) a Bench of this Court approve of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2). But I am not prepared to say that the learned Judges have taken a different view from that taken in the later Calcutta cases to which I have referred. In my opinion, it must be taken that *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) was understood by this Bench in the way it was by Mitra, J., in *Sheikh Murullah* v. *Sheikh Burullah* (1).

(8) [1910] 34 Mad. 417=(1910) M. W. N. 662=9 M.L.T. 152=8 I. C. 429=21 M.L.J. 928.
(9) [1909] 19 M.L.J. 1=1 I.C. 193=4 M.L.T. 285.

It was strenuously contended by the learned vakil for the respondent that whereas the judgment-debtor as a plaintiff cannot impeach the sale, he may as a defendant resist the suit. This distinction is artificial and I can find no justification for it. The case that was most relied on for this proposition viz. *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) cannot any longer be regarded an authority in support of it. It is true that Miller, J., in *Thathu Naick* v. *Kondu Reddi* (10) accepts this proposition, but on the facts of the case his observations seem to be obiter; for, Sankaran Nair, J., the third Judge to whom the case was referred, on a difference of opinion between Miller and Abdur Rahim, JJ., points out at p. 252 that the judgment-debtors were not aware before the confirmation of the sale of the facts which were sought to be relied on to invalidate the sale. There is nothing in this case to suggest that the principle on which *Sheikh Murullah* v. *Sheikh Burullah* (1) rests is not sound.

It was next contended that the sale of an unenfranchised inam is absolutely void and the plaintiff's suit should on that ground be dismissed. I cannot follow this contention. As I have said, we are not here concerned with the true facts of the case but only with the result of certain proceedings. Is the defendant to be permitted to plead that the land was inalienable at the time of the Court-sale? The effect of the order confirming the sale is that the land can be alienated. The order is conclusive, and it must be deemed that there is an adjudication that the property can be sold. In this view, it is unnecessary to consider *Raja of Vizianagram* v. *Danjivada Chelliah* (11), *Sannamma* v. *Radhabhayi* (12), *Narahari Sahu* v. *Siva Korithan Naidu* (13) and other cases cited on this point.

The appeal must, therefore be, allowed.

According to our judgment the plaintiff has become the owner of the property and this assumes that the defendant is not. The District Munsif though purporting to decide Issue I has really decided

(10) [1908] 32 Mad. 242=1 I. C. 221=5 M. L. T. 248.
(11) [1904] 28 Mad. 84=14 M. L. J. 468.
(12) [1917] 41 Mad. 418=22 M.L.T. 532=34 M. L.J. 17=(1918) M.W.N. 23=43 I. C. 935=7 L.W. 234 (F. B.).
(13) [1913] 24 M.L.J. 462=19 I. C. 881=(1913) M.W.N. 415.

Issue II. We have now reversed his decision on that Issue. Issues I, III and IV remain to be decided. The decision on the first issue is reversed and the suit is remanded to the District Munsif's Court for disposal in regard to the other issues. The defendant will pay the costs incurred by the plaintiff in the first Court, the lower appellate Court and in this Court.

There will be refund of Court-fee on the memorandum of appeal in this Court and in the lower appellate Court.

Madhavan Nair, J. —I have had the advantage of reading the judgment of my learned brother with which I agree. The facts of the case have been clearly stated in that judgment and they need not be re-stated here. The plaintiff is a transferee from the auction purchaser and his suit is to redeem a mortgage held by the defendant and subject to which the property was sold at the auction. The defendant pleads that the property being an inam land is inalienable and therefore the sale conveyed no title to the auction-purchaser and further, that subsequent to the auction sale, the land was enfranchised by the Government in the name of the judgment-debtor Perumal, and that he is now holding it as the purchaser from the said Perumal. The question for decision arising in these circumstances is whether it is now open to the defendant to put forward these pleas by way of resistance to the plaintiff's suit for redemption. It may be stated at the very outset that arguments have proceeded on the assumption that for the purposes of this case the defendant may be taken to represent Perumal, the judgment-debtor, and that he claims through him. It has also been assumed throughout the arguments that Perumal was aware of the execution proceedings and did not object to the same. It has also not been disputed that the defendant himself during the course of the execution proceedings put forward his mortgage interest and that the property was ordered to be sold subject to such interest.

The auction sale was held on the assumption that the property sold was alienable. Is it now open to Perumal or the defendant to plead that the property is inalienable? In my opinion the decision in *Lala Ram* v. *Thakur Prasad* (5), *Dwarkanath Pal* v. *Tarini Sankar Ray* (4) and *Pandurang Balaji* v. *Krishnaji Govind* (6) conclusively show that it is not open to him to raise these contentions now. In *Lala Ram* v. *Thakur Prasad* (5) a house was sold by auction in execution of a decree obtained against the defendant in the case and was purchased by the plaintiff. When he failed to get actual possession, he instituted a suit for its recovery, but his claim was contended on the ground that the house was not liable to sale in view of the provisions of S. 60 (c) of the Code of Civil Procedure. The learned Judges held in the case that "after that sale and confirmation of sale, it was not not open to the defendant at this stage to question the validity of the sale and the title which the plaintiff had acquired under it." In the course of their judgment, the learned Judges observe as follows :—

"Under O. 21, R. 92, after a sale has taken place, and has been confirmed, the auction-purchaser acquires a title to the property. In the present instance no objection to the sale was raised before it took place, or at any time. It is not suggested in the pleadings that the defendant-judgment-debtor was not aware of the execution proceedings. As between him and the auction-purchaser the sale has become conclusive and the auction purchaser has acquired a vested interest in the property sold.....In the present case no objection having been taken, and the sale having become conclusive as between the parties, it is not open, in our opinion, to the defendant, after the lapse of so many years from the date of the sale, to contend that the sale ought never to have taken place and conveyed no title to the purchaser."

This view is supported by the decision in *Dwarkanath Pal* v. *Tarini Sankar Ray* (4). In overruling the contention similar to the one raised in the present case the learned Judges in that case refer with approval to the opinion of Mr. Justice Mitra in *Sheik Marullah* v. *Sheik Burullah* (1) to the effect that "after a judgment-debtor, with a full knowledge of the execution proceedings and full opportunity of raising an objection to the effect that the holding was an occupancy holding and non-transferable, had failed to raise that objection at the time of the sale, it was not competent to him to resist the purchaser after the confirmation of the sale and that as between the purchaser and the judgment-debtor the title

to the property vested in the purchaser on the confirmation of the sale." The apparently contrary opinion expressed in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) in favour of the view that the defendant could resist the auction purchaser's suit though he did not object to the attachment and sale had been sufficiently explained in the case in *Sheik Murullah* v. *Sheik Burullah* (1) which has been referred to in *Dwarkanath Pal* v. *Tarini Shankar Ray* (4). The decision in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha* (2) has no doubt been mentioned with approval in two Madras cases, viz., *Venkataramanachariar* v. *Meenakshisundaram Aiyar* (9) and *Thathu Naik* v. *Kondu Reddi* (10), but as has been clearly pointed out in my learned brother's judgment there is nothing in these cases to suggest that the "principle on which *Sheik Murullah* v. *Sheik Burullah* (1) rests is not sound." The decision in *Pandurang Balaji* v. *Krishnaji Govind* (6) also supports the view put forward on behalf of the appellant. Applying the principle laid down in these cases, it follows that the defendant must be considered to be bound by the order confirming the sale in favour of the auction-purchaser and that it is not open to him to question the validity of the Court-sale in the present case.

The above conclusion is supported also by the decision in *Gokulsingh Bhikaram* v. *Kisen Singh* (7) and *Nadamuni Narayana Aiyangar* v. *Virabhadra Pillai* (8) which state that principle in a slightly different way. In *Gokulsingh Bhikaram* v. *Kisen Singh* (7) it was held that the judgment-debtors who had not objected in the course of execution to attachment and sale of the suit properties could not afterwards question the validity of the sale in a suit instituted by the auction-purchaser. The learned Judges observe thus:

"Though an auction-purchaser at a Court-sale in execution of a decree is not a party to the suit in which the decree was passed, and though he is not a representative of either the decree-holder or the judgment-debtor for the purposes of S. 244, yet if the question raised by the judgment-debtor, as to the legality of the Court-sale is virtually one between the parties to the suit, and if in the decision and result of that question the auction-purchaser is interested, the judgment-debtor ought not to be allowed to attack the sale in a suit."

In *Nadamuni Narayana Aiyangar* v. *Veerabhadra Pillai* (8) the plaintiff (who represented the judgment-debtor in the prior suit) sued to set aside the sale of a temple office which was made in execution proceedings in favour of the defendant auction-purchaser. It was held by Wallis, J., that he was precluded from bringing the suit by reason of "the general intention of legislature" as manifested in S. 244. The same conclusion was arrived at by Krishnaswami Aiyar, J., who states the principle thus: "The auction-purchaser derives his rights from the sale which the party to the execution proceeding should not be permitted to impeach, except by application to the executing Court." It seems to me that in all the above decisions which we have examined the learned Judges give effect to the broad principle that the proper place to raise objections to attachment and sale is the executing Court and that the judgment-debtor who has had notice of the execution proceedings must be deemed to be bound by the order passed in such proceedings confirming the sale in favour of the auction-purchaser. As already pointed out it follows, therefore, that the defendant is now precluded from raising his present contentions.

In the view it is not open to the defendant to plead that the suit land is inalienable inasmuch as he is bound by the order confirming the sale which amounts to an adjudication that the land can be sold, the question whether the sale of an unenfranchised inam is absolutely void does not strictly arise in this case and the decision cited in support of that contention, viz., *Raja of Vizianagram* v. *Dantivada Chelliah* (11), *Sannamma* v. *Radhabayi* (12), and *Nazabari Sahu* v. *Siva Korithan Naidu* (13) need not, therefore, be considered.

In the result, I agree that the decision of Krishnan, J., should be set aside and the case should be remanded to the lower Court for disposal as pointed out by my learned brother. The defendants will pay the costs of the plaintiff up to date.

Case remanded.

★ A. I. R. 1926 Madras 18

JACKSON, J.

Veeraswami Mudali—Plaintiff — Petitioner.

v.

P. R. Venkatachala Mudali and *others* —Respondents.

Civil Revision Petition No. 923 of 1923, Decided on 18th August 1925, for revision of the decree of the Dist. Munsif, Poonamallee, in Original Suit No. 475 of 1922.

★ (a) *Civil P. C. S. 115—Remedy by way of suit open—Revision does not lie.*

Where a remedy by way of suit is available the High Court will not ordinarily interfere by way of revision. [(1914) *M. W. N.* 95 *Ref.*] But if the remedy is clear and is sure to result in applicant's success the parties will not necessarily be driven to another suit. 32 *Mad.* 334, (*F.B.*) *Foll.*[P 18 C 1]

★ (b) *Sp. Rel. Act, S. 9—Land let out to tenant—Landlord cannot sue a trespasser for immediate possession.*

When a landlord creates a tenancy under him which entitles the tenant to the exclusive use of the property the landlord cannot have any right to actual possession so long as the tenant is entitled to possession, and therefore the landlord cannot maintain a suit under S. 9 against a trespasser for immediate possession. 18 *All.* 440 (*F. B.*); 21 *Mad.* 288 and 44 *Mad.* 937, *Foll.* [P 18 C 2]

K. Rajah Aiyar and *N. Panchapakesa Aiyar*—for Petitioner.

B. Somayya—for Respondents.

Judgment. — Plaintiffs in two connected suits, Nos. 475 and 476 of 1922, District Munsif's Court, Poonamallee, brought under S. 9 of the Specific Relief Act, were unsuited on the ground that on the date of the suits the plaint lands, although trespassed upon by defendants, were leased to others and therefore only their lessees and not plaintiffs themselves were entitled to sue. This petition is brought in order to revise the decision.

Plaintiffs have their remedy by way of suit and in such circumstances this Court will not ordinarily interfere by way of revision; *Devata Sri Ramamurti* v. *Venkata Sitaramachandra Row* (1).

But if the remedy is clear, the parties will not necessarily be driven to another suit: *Sree Krishna Doss* v. *Chandook Chand* (2). Therefore the question for determination in this case resolves itself into whether there is clear authority supporting or controverting the decision of the District Munsif.

There has been sharp divergence of judicial opinion upon this point as was clearly revealed when it came before a Full Bench of the Allahabad High Court. Blennerhassett, J., could see no reason why a landlord who has put a tenant in possession should not himself sue to eject a trespasser. Edge, C. J., affirmed, as prevailing all the world over, that when a man creates a tenancy under him which entitles the tenant to the exclusive use of the property, the man creating the tenancy cannot have any right to actual possession so long as the tenant is entitled to possession. It was accordingly held with the concurrence of four other Judges that in these circumstances plaintiffs might be entitled to a declaratory decree that the trespasser could not interfere with his right to receive rent and a decree to be put into possession of the rents; but so long as he did not himself possess the right to enjoy physical possession he could not eject the trespasser: *Sita Ram* v. *Ram Lal* (3).

Two years later the question came before a Bench of this Court which assumed it to be an elementary rule that a plaintiff who seeks possession must show that at the date of the suit he was entitled to such relief: *Ramanadan Chetti* v. *Pulikutti Servai* (4).

So far the law on the matter was clear. The next Madras ruling, *Jaganathacharry* v. *Rama Rayer* (5), hardly affected the previous decision; for it was held that the landlord must be entitled to possession at the time of suit, and he was so entitled in that case because the lease had terminated immediately after the dispossession of the tenant by a third person and the tenant was no longer interested in the matter. But unfortunately the head-note to this ruling is drafted as if affirming that a landlord can always bring a suit for possession when his tenant has been dispossessed by a third party. For this unqualified statement there might seem at first to be better authority in *Rangasawmi Aiyangar* v. *Krishna Goundan* (6), when Sankaran Nair, J., sitting alone does appear to allow a landlord to sue for physical possession of property of

(1) [1914] M.W.N. 95=22 I.C. 279.
(2) [1909] 32 Mad. 334=5 M.L.T. 125=19 M. L.J. 307 (F.B.).
(3) [1896] 18 All.440=(1896) A.W.N. 162 (F.B.).
(4) [1898] 21 Mad. 288=8 M.L.J. 121.
(5) [1905] 28 Mad. 238.
(6) [1910] M.W.N. 838=8 I.C. 844=9 M.L.T. 205.

which his tenant had been dispossessed. But though that is the effect of the judgment the reasoning proceeds on the assumption that it is only a question of receiving rent, a matter about which, as Sir John Edge showed in *Sita Ram* v. *Ram Lal* (3), there is no difficulty. An earlier Madras case is cited: *Innasi Pillai* v. *Sivagnana Desikar* (7), which also is entirely confined to the question of rent; and before concluding Sankaran Nair, J. makes it clear that he is not differing from *Ramanadhan Chetti* v. *Pulikutti Servai* (4). It is not an easy judgment to understand,but it is no authority for holding that the landlord can sue in these cases.

In *Krishnan Nambudri* v. *Secretary of State* (8), Wallis, J., and Abdur Rahim, J., reaffirmed *Ramanadhan Chetti* v. *Pulikutti Servai* (4), and its statement of the elementary rule. Thus it may be said that at this date there was no real difference of opinion, and the ruling of the Allahabad Full Bench prevailed.

In *Ambalavana Chetty* v. *Singaravelu Odayar* (9), a plaintiff who had long been out of possession seems to have suggested that if his tenant had been in possession (which was not the fact) there would be no bar of limitation. His plea was rejected on the facts, but his hypothesis was fully discussed by Sundara Aiyar, J., who has assembled the various rulings on the point. His Lordship says that it is held that the landlord, where his tenant is ousted by a trespasser, may sue under S. 9 of the Specific Relief Act in *Ramaswami Aiyangar* v. *Krishna Goundan* (6), *Jagannatha Charry* v. *Rama Rayer* (5), and *Innasi Pillai* v. *Sivagnana Desikar* (7). But as shown above none of these cases is real authority for that broad proposition. He acknowledges that *Ramanadhan Chetti* v. *Pulikutti Servai* (4), and *Krishnan Nambudri* v. *Secretary of State* (8), are against him, but on the whole is inclined to hold that the landlord has a cause of action: see page 155. This opinion, it may be noted, is obiter and is not very strongly expressed.

In 1914 it was held, *Somiammal* v. *Vellaya Sethurayan* (10),that if a landlord had given a lease to a tenant the landlord might eject a trespasser in order to put his tenant into possession. The tenant in that case "had not been put in possession at all, but was anxious to obtain possession." Such a case seems to proceed on the assumption that the landlord has a right to immediate possession in order to fulfil his contract ; and the elementary rule in *Ramanadan Chetti* v. *Pulikutti Servai* (4), would not then be infringed. It is not as though only the tenant had the right of immediate possession.

In *Tiruvengada Konan* v. *Venkatachala Konan* (11), it was ruled that though a landlord is not entitled to immediate or khas possession, he may obtain a decree for the possession of the reversion and for formal possession. This ruling practically follows *Sita Ram* v. *Ram Lal* (3). It also questions whether the obiter dictum in *Ambalavana Chetty* v. *Singaravelu Odayar* (9), is not too broadly stated.

In 1916 the question came before Oldfield, J. and Phillips, J. : *Kathiri Kutti Musaliar* v. *Chekkutti Musaliar* (12). They held that a landlord could sue to enable himself to fulfil his contract to give or restore possession to his tenant. Of course if the ruling stopped at the words "to give" it would merely re-affirm *Somiammal* v. *Vellaya Sethurayan* (10), but the addition of the words "to restore" opens up the whole question, and in effect this is a ruling contrary to *Ramanadan Chetti* v. *Pulikutti Servai* (4). Oldfield, J., begins by remarking that the exposition of the law in *Ambalavana Chetty* v. *Singaravelu Odayar* (9), is consistent with the decisions in *Narayanaswami Naidu Garu* v. *Yerramilli Ramakrishnayya* (13), and *Somiammal* v. *Vellaya Sethurayan* (10). The former merely states what is more elaborately developed in the latter ruling that a landlord can sue in order to fulfil his contract to put his lessee in possession. Of course the broader proposition in *Ambalavana Chetty* v. *Singaravelu Odayar* (9), that he can sue whenever his tenant is dispossessed is not inconsistent with these rulings. Then Oldfield, J., finds that these rulings admit exceptions to the general rule, though it seems that they establish only one exception, if it can

(7) [1895] 5 M. L. J. 95.
(8) [1909] 19 M. L. J. 347=4 I. C. 30=5 M. L. T. 213.
(9) [1912] M. W. N. 669=15 I. C. 146.
(10) [1915] 29 M. L. J. 233=(1915) M.W.N. 12=16 M. L. T. 582=26 I. C. 347=1 L.W. 1047.
(11) [1916] 39 Mad. 1042=32 I. C. 198=30 M. L. J. 258.
(12) [1917] 5 L. W. 330=39 I. C. 425=(1917) M. W. N. 339.
(13) [1910] 33 Mad. 499=(1910) M.W.N. 221=5 I. C. 479=7 M. L. T. 119.

indeed be called an exception. This rule is that on the date of the suit the landlord must show that he has a right to be in possession. If he has never put his tenant in possession and has to get possession in order to do so, he has a right to be in possession and his suit is not in contravention of the rule. But when it is also claimed that after a landlord has put his tenant into possession and that tenant has been dispossessed, the landlord may sue to restore his possession, it is not to set up an exception to the rule, it is to negative the rule altogether. Oldfield, J., proceeds that he cannot follow *Krishna Nambudri* v. *The Secretary of State* (8), in so far as it rules that a landlord cannot give or restore. *Krishna Nambudri* v. *The Secretary of State* (8), is not concerned with the question whether he can give ; but it certainly rules that he cannot restore and in declining to follow this ruling, Oldfield, J., is maintaining the opposite and overriding *Ramanadhan Chetti* v. *Pulikutti Servai* (4). No doubt his Lordship seeks to distinguish this ruling by finding on the facts that the trespasser colluded with the tenant and is therefore (see concurring judgment of Phillips, J.,) only the licensee of the tenant against whom the landlord can have no cause of action during the continuance of the lease. But in *Ramanadhan Chetti* v. *Pulikutti Servai* (4), although it was alleged in the plaint that the tenant and trespasser had colluded, there is no finding to that effect nor any mention of collusion in the body of the judgment. When their Lordships lay down the elementary rule they are not considering collusion. *Kathirikutti Musaliar* v. *Chekutti Musaliar* (12) must be taken as contrary to *Ramanadhan Chetti* v. *Pulikutti Servai* (4). In fact Phillips, J., practically states as much in his concluding sentence.

The whole question was then reviewed by Wallis, C. J., in *Mohideen Ravuther* v. *Jayarama Aiyar* (14). The principle underlying the rule is fully explained and the three ruling cases *Ramanadhan Chetti* v. *Pulikutti Servai* (4), *Krishna Nambudri* v. *The Secretary of State* (8), and *Sita Ram* v. *Ram Lal* (3) approved. The acceptance of the obiter dictum in *Ambalavana Chetti* v. *Singaravelu Odayar* (9), as authority is deprecated with an expression of regret that *Sita Ram* v. *Ram Ral* (3) was not brought to the notice of the learned Judge. The learned C. J., even goes so far as to find that the landlord cannot sue in order to fulfil his contract at page 940, differing from the view already expressed by Sadasiva Aiyar, J., in *Somiammal* v. *Vellaya Sethurayan* (10), which view Sadasiva Aiyar, J., re-affirms in a dissenting judgment in this case.

In *Udaykumar Das* v. *Katyani Debi* (15), it is held that the view of Sundara Aiyar, J., in *Ambalavana Chetty* v. *Singaravelu Odayar* (9), cannot be justified on principle and is opposed to what is regarded by Lord Alverstone, C. J., as well established doctrine.

I think it clear from the above examination of the authorities that the view of the learned District Munsif is well supported, and there is no justification for revision. I consider that the question is concluded by *Sita Ram* v. *Ram Lal* (3), and *Ramanadhan Chetti* v. *Pulikutti Servai* (4). and *Mohideen Ravuther* v. *Jayarama Aiyar* (14). The petition is dismissed with costs.

Petition dismissed.

14) [1921] 44 Mad. 937=13 L. W. 281=(1921) M. W. N. 43=29 M. L. T. 78=62 I. C. 284=40 M. L. J. 38.

(15) A. I. R. 1922 Cal. 87=49 Cal. 948=35 C. L. J. 292.

★★ A. I. R. 1926 Madras 20

PHILLIPS, J.
on difference between
DEVADOSS AND WALLACE, JJ.

(Nawab) Shuja-ul-mulk Bahadur—Appellant.

v.

Umir-ul-umra Bahadur and *others*—Respondents.

Appeal No. 413 of 1923, Decided on 29th April 1925, against the order of the Dist. J., Kurnool, D/- 20th August 1923, in E. P. No. 12 of 1922.

★ *(a) Law Reports Act (18 of 1875)—Act does not apply to P. C. Rulings which are, therefor, binding on Indian Courts though not appearing in Govt. Reports* (Devadoss, J.)

The Indian Law Reports Act has no application to a decision of the Privy Council, and therefore the Courts are at liberty to refer to an unauthorized report of the decision of the Privy Council and, if they are satisfied that it is a correct report, they are bound to follow it. [P 23 C 1, 2]

★★ *(b) Civil P. C., S. 48—Decree directing recovery of money from A on failure to recover from B—*

Execution against A is barred after 12 years from date of decree. (Phillips and Devadoss JJ.; Wallace, J. contra)—40 *Mad.* 989 (*F. B.*) *considered as overruled in* 22 *C. W. N.* 145 (*P. C.*).

Phillips, J. agreeing with *Devadoss, J.*—Where a decree directs that money is recoverable from a party only on failure to recover from another party, the execution of the decree becomes barred against the former after 12 years from the date of the decree. (*Wallace, J. contra.*) 48 *I. A.* 17 (*P. C.*) *Dist.*; 22 *C. W. N.* 145 (*P. C.*) *Foll.*; 40 *Mad.* 989 (*F. B.*) considered as overruled by 22 *C. W. N.* 145 (*P. C.*) [P. 22, C. 1]

Wallace, J.—In a case like this the decree-holder's remedy against the former party accrues not on the date of the decree but on the date of the failure of the other party to satisfy the decree, which date must be fixed by an order of Court, and limitation begins to run in respect of that remedy from the date of that order. Such order would have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such; that is, 12 years' limitation for the relief against the second party will run from the date of such an order. [P. 26. C. 1]

L. S. Viraraghava Aiyar—for Appellant.

N. Swaminatha Aiyar for *K. V. Krishnaswami Aiyar*—for Respondents.

Devadoss, J.—The main question argued in this appeal is whether the execution of the decree in plaintiffs' favour is barred by reason of S. 48 of the Code of Civil Procedure. The District Judge has held that the execution application is not barred by limitation and the 1st respondent in the lower Court has preferred this appeal. The decree in O. S. No. 17 of 1901 was passed by the District Court of Kurnool on 30th March 1904. It was confirmed by the High Court on 17th January 1907. The defendants in that suit were the trustees of a religious and charitable institution. The defendants were removed from the office of trustees, and the 1st defendant was directed to pay the plaintiff's costs and in case the plaintiff was unable to obtain the costs from the 1st defendant, he was to recover them from the income of the trust property. Attempts were made by the plaintiff to recover the costs from the 1st defendant, and he recovered only a portion, and a considerable amount now remains to be recovered. The plaintiff's legal representatives have now applied for execution against the income of the religious and charitable institution, namely, the Darga. The contention of Mr. Viraraghava Aiyar for the appellant is that the decree being more than twelve years old is incapable of execution by reason of S. 48 of the Code of Civil Procedure. S. 48, Cl. (1) is in these terms:—

Where an application to excute a decree, not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from (a) the date of the decree sought to be executed; or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the appellant seeks to execute the decree."

The decree in this case being a decree for money, and there being no time fixed after which the plaintiff was to proceed against the Darga property, it is urged, the application after twelve years from the date of the decree is barred under S. 48. The District Judge, following *Aiyasamier* v. *Venkatachala Mudali* (1) and *Narayana Aiyar* v. *Singaravelu Vannian* (2), held, that the remedy against the income of the Darga was available to the plaintiff only after he exhausted his remedies against the 1st defendant, and therefore the plaintiff had 12 years' time from 1915 when he failed to get the amount from the 1st defendant.

Under the Civil Procedure Code of 1882, S. 230, "a decree for payment of money became barred after 12 years from (a) the date of the decree sought to be enforced or of the decree on appeal affirming the same; or (b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree." Under the old Civil Procedure Code attempts were made to get over the 12 years' period by showing that the decree was not a decree merely for money. In *Vaidhinadasamy Aiyar* v. *Somasundaram Pillai* (3) it was held that "a decree directing the sale of mortgaged properties in default of payment of

(1) [1916] 40 Mad. 989=31 M. L. J. 513=20 M. L. T. 391=(1916) 2 M. W. N. 296=37 I. C. 741=4 L. W. 507 (F. B.).

(2) [1917] 33 M. L J. 543=(1917) M. W.N. 845=42 I. C. 282=6 L. W. 675.

(3) [1905] 28 Mad. 473=15 M. L. J. 126 (F. B.).

money is a decree for money, whether there is a direction to pay personally or not and whether the remedy against the property is exhausted or not, such decrees will be money decrees under Ss. 230, 258 and 295 of the Civil Procedure Code although they will not be so under Ss. 220 and 222 of the Code." Under the present Code there is no distinction made between a decree for money and any other decree. S. 48 is clear in its terms, and no distinction, therefore, could be made between a decree for money and any other decree. The section provides for decrees whereby money is made payable on or after a certain date or money is payable by instalments and for cases of recurring liability as in the case of decrees for maintenance, etc. The question, therefore, is whether a decree which does not come within one of the exceptions to the 12 years' rule in S. 48 can be executed after the expiry of 12 years from the date on which it was passed or affirmed by the appellate Court. The argument advanced for the respondent, and which has found favour with the lower Court, is that the decree against the income of the Darga was unexecutable till the remedy against the 1st defendant was exhausted. The terms of the decree are against such a construction. All that the decree says is "in case of failure to recover the costs from the 1st defendant, the same shall be recovered from the income of the trust property." Can it be said in this case that the plaintiff has 12 years from the date of the decree for pursuing his remedy against the 1st defendant, and, on failure to realize the amount from him, he could proceed against the income of the Darga for another 12 years? Where the decree does not specifically mention the period after which the decree becomes executable against a particular individual or institution, the decree is deemed executable from the date on which it is passed: supposing a decree directs the principal debtor to pay the decree amount and that on the failure of the plaintiff to recover it from the principal debtor, he should be entitled to proceed against the surety, it cannot be said that the creditor has 12 years' limitation against the principal debtor and another 12 years against the surety. The decision in *Aiyasamier* v. *Venkatachala Mudali* (1), which was followed in *Narayana Aiyar* v. *Singaravelu Vannian* (2), no doubt supports the contention of the plaintiff to some extent. In *Aiyasamier* v. *Venkatachala Mudali* (1) a Full Bench held that "where a mortgage decree provides for recovery of any balance from the other properties of the mortgagor in case the sale-proceeds of the mortgaged properties are found insufficient to satisfy the entire decree amount, the decree-holder has, under S. 48 of the Civil P. C., twelve years for the recovery of such balance reckoned from the time when it is ascertained to be due. Abdur Rahim, Officiating Chief Justice, observed at page 997:

"When the reliefs given in respect of those rights are distinct and enforceable at different periods of time, then, for purposes of execution, there is, in fact, more than one decree, though embodied in one document. In such cases it is only reasonable to hold that the date of the decree, sought to be executed within the meaning of S. 48, Cl. (a) of the Code of Civil Procedure, may not be what it bears on its face. It is the date when the particular adjudication sought to be enforced becomes ripe for execution according to the terms of the decree."

This observation is as regards a mortgage decree whereby the other properties of the mortgagor could be proceeded against only after exhausting the remedy against the mortgaged properties. In the present case who is to determine whether all the remedies against the 1st defendant have been exhausted? The decree simply says that in case of failure to recover the costs from the 1st defendant, the same be recovered from the income of the trust property. It is not a condition precedent in this decree that all the remedies against the 1st defendant should be exhausted before the income of the property could be proceeded against. This case on the facts is distinguishable from the decision in *Aiyasamier* v. *Venkatachala Mudali* (1). But the authority of the Full Bench decision in *Aiyasamier* v. *Venkatachala Mudali* (1) has been considerably shaken by the decision of the Privy Council in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4). There the same point as was under consideration in *Aiyasamier* v. *Venkatachala Mudali* (1) was the subject of decision. The Calcutta High Court disallowed the contention that the decree should be read as directing the payment of money at a

(4) [1917] 22 C. W. N. 145=45 I. C. 436 (P. C.).

certain date, that is, after the mortgaged properties had been sold. The learned Judges observed :

"The terms of S. 48 seem to us to be perfectly clear, and according to that section time runs from the date of the decree. The date of the decree is fixed by O. 20, R. 6, and we cannot understand how there can be any other date of the decree from which limitation should run. It has been suggested that this case may be regarded as one in which the decree directed the payment of money to be made at a certain date, namely, after the mortgaged property had been sold. It appears to us that a direction of such a kind would, certainly, not be a direction to pay money at a certain date. The date would not be certain."

On appeal to the Privy Council, the judgment of the Calcutta High Court was affirmed. In the course of the argument the learned counsel for the appellant urged the very same argument that was put forward in *Aiyasamier* v. *Venkatachala Mudali* (1). He submitted it was not an effective decree as it could not be enforced until all the mortgaged properties had been sold, and time therefore did not begin to run against the appellant from the date of the decree. The law required that two decrees ought to be made: "The appellants are entitled to 12 years from each decree, that is, from the decree for sale as well as the decree under S. 90." Lord Dunedin, in delivering the judgment of their Lordships, simply stated: "Their Lordships did not see any reason to differ from the judgment of the High Court in this case." It is suggested for the respondents that this decision has not been reported in the Indian Law Reports and therefore it is not binding on us. The Indian Law Reports Act (Act XVIII of 1875), S. 3, is in these terms:

"No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case decided by any of the said High Courts on or after the said day, other than a report published under the authority of the Governor-General in Council."

This Act has no application to a decision of the Privy Council, and, therefore, we are at liberty to refer to an unauthorised report of the decision of the Privy Council and, if we are satisfied that it is a correct report, we are bound to follow it. The point was specifically raised before the Privy Council, and their Lordships overruled the contention of the appellant. This decision of the Privy Council was followed in *Baranashi Koer* v. *Bhabadeb Chatterjee* (5). In *Rameshwar Singh* v. *Homeshwar Singh* (6) there was no executable decree against Ekradeshvar on the date it was passed. As observed by their Lordships:

"The decree against Ekradeshvar could not have been executed without a further application. This application could not have been made till Ekradeshvar had come into possession of the property of Janeshvar, and by Art. 181, in the schedule to the Limitation Act, the period of limitation for making an application is three years from the time when the right to apply accrues."

In the present case no fresh decree need be passed against the Darga as the decree of 1904 enables the plaintiff to proceed against its income on his failure to recover the decree amount from the 1st defendant.

It is contended by Mr. K. V. Krishnaswami Aiyar for the respondents that there was no executable decree against the income of the Darga till the remedy against the 1st defendant was exhausted. He contends that the Privy Council case, even if it be an authority, cannot apply to the present case, as the mortgagor was only one person against whom the decree was passed, though the mortgaged property was to be proceeded against in the first instance and afterwards his other properties were to be proceeded against. I do not think the Privy Council decision can be explained away on this basis. Whether the decree is against one person or more than one person, unless a time is fixed for proceeding against any particular person, limitation under S. 48 would begin to run from the date of the decree and not from any other date.

It is also contended that time should be calculated only from the date of the decree which is sought to be executed, namely, the decree against the Darga; in other words that the decree consists of two decrees, one against the 1st defendant and the other against the Darga. Whether the remedy is against one or more persons is immaterial so long

(5) [1921] 34 C. L. J. 167=66 I. C. 758.
(6) [1920] 48 I. A. 17=40 M. L. J. 1=19 A. L. J. 26=59 I. C. 636=1 P. L. T. 731 (P. C.)

as no time is fixed for the execution of the decree against the particular individual. The mere fact that, in the first instance, the 1st defendant should be proceeded against and on failure to recover the amount from him the income of the Darga property should be proceeded against is not tantamount to fixing a particular date, after which alone the decree against the Darga could be executed. If such a contention is tenable the question would arise: When was the failure to recover the costs from the 1st defendant? and what amounts to a failure to recover costs from the 1st defendant? I do not think such a contention is tenable in the absence of a specific date in the decree after which alone it is to be executed against the particular individual or institution.

In *Gopaldas* v. *Tribhowan* (7) it was held that the application for execution of a mortgage decree more than twelve years after the passing of the decree absolute was barred by S. 48 of the Civil Procedure Code. In that case the main argument was that the decree was under the Code of 1882 and that S. 48 did not apply to a decree passed under the old Code. A Bench consisting of the learned Chief Justice and Fawcett, J., held that that contention was untenable. Macleod, C. J., observed at page 376:—

"It would have been better if the attention of holders of mortgage decrees had been drawn to the alteration made by S. 48 of the Code of 1908, so that they might have been able to realize that no fresh application for execution could be entertained after the expiry of twelve years from the date of their decrees."

In that case the defendants' counsel did not raise the contention that the mortgagee decree-holder had 12 years' limitation from the time the mortgaged property was sold for proceeding against the other properties of the mortgagor.

The case in *Aiyasamier* v. *Venkatachala Mudali* (1) was decided in August, 1916 and the decision of the Privy Counsel in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) was on 21st June 1917. The decision of the Madras High Court does not seem to have been brought to the notice of their Lordships; but that is no ground for holding that the decision in *Aiyasamier* v. *Venkatachala Mudali* (1) is a proper enunciation of the law on the subject. I therefore hold that the plaintiffs' application for execution is barred under S. 48 of the Civil Procedure Code.

The next contention on behalf of the respondents is that the order was made on 3rd March 1916, for payment of the amount due in three instalments, and the application therefore is in time. Under O. 20, R. 11, the application is to be made to the Court which passed the decree within six months and the order could be made only with the consent of the decree-holder. But the application to pay in instalments was made long after the passing of the decree; and from the order of the District Judge it does not appear that the plaintiffs consented to receive the amount in three instalments. It is not necessary to consider this in detail.

Wallace, J.—I regret that in this case I have not been able to agree with my learned brother.

It is clear that a narrow interpretation of the strict terms of S. 48, Civil P. C., places great difficulties in the application of the section to particular cases. If the decree is not executable except on the happening of certain contingency and that contingency does not happen until after twelve years, is the decree a waste paper? Or to take an illustration given by Sadasiva Aiyar, J., in *Aiyasamier* v. *Venkatachala Mudali* (1) when a compromise decree is passed making a certain sum payable to a minor girl on her marriage and she does not marry until after 12 years from the date of decree, is the decree a waste paper? In the case of such decrees, it is clear that the decree itself implies that there shall be a subsequent order or direction by the Court that the time for executing the decree has arrived and that from that date the decree is executable and time will begin to run. Such an order need not perhaps be explicit although it will be better if it were so; but it certainly is implicit. The Court, in deciding whether such a decree was time-barred, would enquire first, whether 12 years had run from the date when the decree became executable; that is, it would decide as on what date the decree became executable and then begin to compute the 12 years from that date. This is on the well-known principle that a decree which cannot be executed cannot be time-barred. The Courts would stultify themselves if they administered justice on the theory

(7) [1920] 45 Bom. 365=59 I. C. 790=22 Bom. L. R. 1420.

that a party will be barred from a relief because he did not seek it during a period when it was not open to him to seek it.

In order to reconcile this principle with the strict wording of S. 48, Civil P. C., some learned Judges have at times held that the phrase "sought to be executed" in Cl. 1 (a) indicates that the date has to be ascertained with reference to the time when the decree becomes capable of execution. Other learned Judges have held that the word "certain" in Cl. 1 (d) means "that which may be rendered certain." I would suggest that the difficulty may be resolved by giving a liberal interpretation to the words "or any subsequent order" in Cl. 1 (b). Clearly such subsequent order must be one contemplated by the decree. But if the decree requires such subsequent order to be made before the date on which the money is to be paid or the property is to be delivered becomes certain, and if that date is not certain without such order, then limitation will begin to run from the date of such order. The order becomes in a sense a decree within a decree. It would be passed naturally by the Court which passed the decree acting as such and not by the Court executing the decree :see *Jurawan Pasi* v. *Mahabir Dhar Dube* (8). Such an order, as instanced in that case, would be an order under O. 20, R. 11, Civil P. C. But I can see no reason why the phrase should be confined to such orders. In the case of a decree, on the face of it not immediately executable, there ought to be a subsequent order declaring it to be now executable.

If the decree directs payment on a certain contingency happening, there ought to be a subsequent order declaring that that contingency has happened. If the decree is not executable against a certain person until and unless a certain contingency happens, there ought to be a subsequent order declaring that that contingency has happened and fixing the date of its occurrence. Such subsequent order will direct the payment of money or delivery of property to be made at a certain date and Cl. 1 (b) will then apply in terms.

The decree now before us declared that the trust was only liable if and when the 1st defendant failed to satisfy the decree personally and to the extent to which he so failed. This implies that, before the trust can be made liable, there must be a further order of the Court, implicit if not explicit, that the 1st defendant has failed by some particular date to satisfy the decree, and laying down to what extent he has failed. Only then has the right to execute the decree against the trust accrued, and only then, on the general principle laid down above, does the decree become executable against the trust and limitation begins to run against the decree-holder in respect of that relief. This principle is clearly not affected by the fact that the decree was immediately executable in some other form or against some other person. When the decree-holder has been prevented by the decree itself from seeking his remedy in the form in which, or against the person against whom, he now wishes to seek it, then the decree itself implies that there must be a subsequent order removing this bar to execution in the desired form, before the decree-holder can have the right to execute it in that form or against that person. The decree-holder, when he comes to execute against the trust, is in substance, although perhaps not in form, asking for an order that his remedy against the trust has opened, and it is the duty of the Court to consider whether it has so opened, that is, whether there is a failure of the first party to satisfy the decree, before it allows the decree-holder to pursue his remedy against the trust.

It is clear also, I hold, that in the case of a decree like the one now before us, it must be the Court and no one else who is to be the judge when the second remedy provided for in the decree has opened, that is, in this case, when the failure of the first party to satisfy the decree occurred. It cannot be the decree-holder because it would be always open to the second party against whom execution was sought to contend that the decree-holder had not exhausted his remedies against the principal party or that the principal party was colluding with the decree-holder against him and therefore it was impossible to say that there had been as yet any failure to satisfy the decree, and an executing Court would certainly not permit the decree-holder to execute against the second party until he has satisfied the Court that the principal party has failed to satisfy the decree, and that there is no further reasonable hope of his being

(8) [1918] 40 All. 198=44 I. C. 24=16 A. L. J. 71.

able to satisfy it. Therefore it must be left to the Court to decide between these conflicting views. That is only to say that the subsequent order of the Court which the decree implies must be a judicial order. The Court will further enquire whether the decree-holder has been diligent in coming forward to enforce his remedy against the second party; diligent both in enforcing his remedy against the first party and diligent in coming forward to obtain an order, implicit or explicit, that his remedy against the second party has now opened. Unless the decree-holder at once diligently executes his decree against the principal party, his remedy against the second will not accrue, and the ordinary 12 years' rule will apply. But if, owing to circumstances not under his control, some obstruction to execution which he has to surmount, he is unable, say for some years, to pursue to the end his remedy against the principal party, so that his diligence and bona fide pursuit of his remedy against the principal party occupies, say, 12 years from the date of the decree, then, unless the view I indicate prevails, he is deprived of the very remedy against the second party which he obtained by his decree.

I would hold, therefore, that in a case like the present the decree-holder's remedy against the second party accrued not on the date of the decree, but on the date of the failure of the first party to satisfy the decree, which date must be fixed by an order of Court, and that limitation begins to run in respect of that remedy from the date of that order. Such order would, in my view, have the effect of a fresh decree directing the payment of money by the second party to be made from the date of its order, and S. 48 would apply to it as such; that is, 12 years' limitation for the relief against the second party will run from the date of such an order.

An analogous case would be that of a mortgage decree which provides for recovery of any balance from the other property of the mortgagor in case the sale proceeds of the mortgaged property are insufficient to satisfy the entire decree amount. In such a case a Full Bench of this Court has held that when the reliefs given in respect of rights under a decree are distinct and enforceable at different periods of time, then for purposes of execution there is in fact more than one decree although embodied in one document, and that the decree-holder has, under S. 48, 12 years from the time when such balance is ascertained to be due, thus implying a subsequent order of the Court declaring on what date that sum was ascertained to be due. It must be admitted that the authority of this decision has been shaken by a later Privy Council case reported in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4), a case reported with disconcerting brevity; but it would appear that the Subordinate Judge in that case dated the 12 years from an order under S. 90 of the Transfer of Property Act. This was an appeal from the Calcutta High Court which had followed the view that if the decree originally provided for realization of the balance from the other property of the judgment-debtor, an order under S. 90 of the Transfer of Property Act was not necessary [See *Tarini Sahoi* v. *Hurruck Narain* (9)] and in any case was an order in execution and not an order in the suit. It may be that the High Court in that case held that the terminus a quo of S. 48 could not be an order *in execution*, and therefore, held the application for execution barred, and that their Lordships of the Privy Council who give no reasons for their judgment followed that line of reasoning. I do not think that report is full enough for us to conclude that that ruling has reversed the principle of our Full Bench ruling. It may be noted that another Privy Council ruling in *Rameshwar Singh* v. *Homeshwar Singh* (6) holds with reference to an interpretation of Art. 182 of the Limitation Act that in the case of a decree not executable except on the happening of a particular contingency, time will not begin to run until that contingency occurs. If the ruling in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4) really means that in all cases of decrees, whether immediately executable or not, the decree is to run from its date, that will conflict with the principle of this ruling, since in that case the decree may become time-barred before it ever becomes capable of being executed. The case in *Narayan* v. *Timmayya* (10) a case of a decree against a principal and a surety does not assist. The decision there

(9) [1893] 21 Cal. 26.
(10) [1906] 31 Bom. 50=8 Bom. L. R. 807.

turned on the question whether where the decree-holder might proceed either against the principal or against the surety, execution proceedings against the former will avail to save the bar of time against the latter. *Narhar Raghunath* v. *Krishnaji Govind* (11) is somewhat analogous to the present case as the personal remedy against judgment-debtor only came into force on the happening of a certain contingency and the Court held that limitation began to run from the happening of that contingency. The decision in *Maharaja of Benares* v. *Lalji Singh* (12) does not seem to me to assist and I do not think it necessary to dwell on other cases cited before us.

My general conclusion then is that what is essentially required before limitation begins to run in a case of this kind is an order of the Court stating that the decree-holder's right to execute against the second party has either accrued from a fixed date from which time will begin to run against him in the matter of that supplemental execution or that it has not accrued at all. In the present case there is no such order and I think it is essential that there should be such an order. The lower Court has not adopted the proper principle in deciding that the right accrued in 1915. It fixes that date merely because the decree-holder chose then to abandon his remedy against the 1st defendant, and to seek his remedy against the trust, that is, it has allowed the decree-holder himself to decide when his right to proceed against the trust began. I am clear that that is not the proper way in which the case should be decided. I would hold therefore that the lower Court's order is not correct and that the case will have to go back to the lower Court being the Court which passed the decree for a fresh decision on the principles laid down above (1) as to whether the plaiantiff's right to execute the decree against the trust has accrued, (2) if so, on what date it accrued, and (3) whether calculating limitation from that date the decree is, or is not, time-barred.

By Court.—In view of the difference of opinion for a disposal of the appeal, we think that the preliminary point should be referred to another Judge under S. 98, Civil Procedure Code.

(11) [1912] 36 Bom. 368=15 I. C. 822=14 Bom. L. R. 381.

(12) [1912] 34 All. 636=16 I. C. 190=10 A. L. J. 256.

"Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree ?"

Phillips, J.—The question, "Where a decree directs that money be recoverable from a party only on failure to recover from another party, does the execution of the decree become barred against the former after 12 years from the date of the decree ?" has been referred to me under S. 98 of the Code of Civil Procedure owing to a difference of opinion between two learned Judges of this Court. The material portion of the decree in this case is,

"that 1st defendant do pay to plaintiff his costs of the suit, Rs. 1,129 ; that in case of failure to recover these costs from 1st defendant the same be recovered from the income of the trust property."

The question put in the above form has not been definitely answered in any reported decisions, but a very similar question is the subject of conflict in decisions. That similar question is whether when there is a decree directing sale of mortgaged property and, in default of the decree amount being realized, directing payment by the mortgagor, the decree is capable of execution more than 12 years after its date. It was held by a Full Bench of this Court by a majority of the Judges that the 12 years for enforcing the personal remedy against the mortgagor will run from the date of the sale of the mortgaged property, *Aiyasamier* v. *Venkatachala Mudali* (1). The same point was considered by the Calcutta High Court and it was held that the 12 years run from the date of the decree, *Jnanendra Nath Bose* v. *Khulna Loan Company* (13). The Calcutta case went up to the Privy Council on appeal and the decision of the High Court was affirmed, *Khulna Loan Company, Limited* v. *Jnanendra Nath Bose* (4). In the present case the two referring Judges do not appear to agree as to whether the decision of the Privy Council has the effect of overruling the Full Bench ruling of this Court, Devadoss, J. holding that it does do so and Wallace, J., concluding that it does not do so. The reason given by Wallace, J. is that the report is not full enough to enable him to decide that the principle

(13) [1913] 18 C. W. N. 492=24 I. C. 35 ....

of the Madras Full Bench ruling has been reversed, but I must observe that, although the judgment of the Privy Council is very brief, it states that their Lordships do not see any reason to differ from the judgment of the High Court. As they use the word "judgment" and not "decree" I think it is clear that they adopt the reasoning contained in the judgment of the Calcutta High Court, and consequently we must accept the principle there laid down. The decision is based on the terms of S. 48 of the Code of Civil Procedure, and on the fact that the date of the decree being fixed by O. 20, R. 7, there can be no other date for the decree. This was one of the main points relied upon by me in my dissenting judgment in *Aiyasamier* v. *Venkatachala Mudali* (1), where I held that a decree can only bear one date and that therefore under S. 48, 12 years must be calculated from that date. It is argued that the decision of the Privy Council on this point is considerably affected by a later judgment [*Rameshwar Singh* v. *Homeshwar Singh* (6)] where it was held that in the case of a decree not executable, except on the happening of a particular contingency, time will not begin to run until that contingency occurs. This decision has reference to Art. 182 of the Limitation Act and not to S. 48 of the Code of Civil Procedure, but I think it can be distinguished on another ground, namely, that it deals with a decree which was wholly unexecutable on the date it was passed. In the present case, and in the case of mortgage decrees, the decree is undoubtedly executable, at least in part, on the date of the decree, and consequently so far as that part is concerned, the 12 years under S. 48 must undoubtedly run from the date of the decree itself. If the Legislature had intended that in such a case a further period of limitation should commence from the date when the second portion of the decree became executable, I think it would have said so, for there is a provision in S. 48, Cl. 1 (b) that where a decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making payments or delivery in respect of which the applicant seeks to execute the decree is to be the date from which the 12 years is to run. Therefore in a mortgage decree and other decrees like the present it may well be open to the Court to pass a subsequent order declaring that the second portion of the decree had become executable, and directing execution to proceed, and such an order would come within the meaning of the subsequent order referred to in S. 48, Cl. (1) (b). In the present case, the decree directs payment of the costs by the 1st defendant and that in case of failure to recover these costs from the 1st defendant, the same be recovered from the income of the trust property. It would, therefore, have been open to the plaintiff to ask the Court for a declaration that the costs could not be recovered from the 1st defendant and for an order directing payment out of the trust property, in which case undoubtedly a further period of limitation would begin under S. 48, Cl. (1) (b). It is pointed out with some force by Devadoss, J., in his order of reference that it cannot be said that under the decree the plaintiff has 12 years to pursue his remedy against the 1st defendant and a further 12 years against the trust property. S. 48 provides an unqualified prohibition of the execution of the decree after 12 years from its date, unless certain specified circumstances exist, and consequently I do not think that it is open to Courts to extend that period, which after all is a very long period, unless the provisions of S. 48 are strictly complied with.

The other cases cited for and against the proposition do not materially further the determination of the question before me. In *Ramana* v. *Babu* (14) it was held that, in executing a decree which had left the question of mesne profits to be determined in execution, an application to determine the profits made after 12 years from the date of the decree was barred under S. 48. In *Venkata Perumal* v. *Prayag Dassjee* (15) a Bench of this Court followed the Calcutta ruling in *Jnanendra Nath Bose* v. *Khulna Loan Company Limited* (13) in preference to the ruling in *Narhar Raghunath* v. *Krishnaji Govind* (11). The case in Bombay was not one of mortgage decree, but was determined on the principle that the 12 years period under S. 48 runs only from the date when the decree became in all its parts ripe for execution. This was the view taken by the majority of the Full Bench in *Aiya-*

(14) [1912] 37 Mad. 186=24 M. L. J. 96=13 M. L. T. 79=18 I. C. 586=(1913) M. W. N.114.
(15) [1915] 29 I. C. 556.

samier v. *Venkatachala Mudali* (1). As I have pointed out above, this is not in accordance with the judgment of the Privy Council and appears to contemplate the proposition that a decree can bear two separate dates, the first date being the date of the decree on which it can be partially executed, and the second date being the date on which the right to apply for execution of the latter portion falls due. This latter principle is not at all supported by the ruling in *Khulna Loan Company* v. *Jnanendra Nath Bose* (4).

In view of all these circumstances I must answer the question referred to me in the affirmative.

Reference answered in the affirmative.

★ A. I. R. 1926 Madras 29

DEVADOSS, J.

Ramaswami Reddi and *others*—Defendants—Appellants.

v.

E. Rajagopalachariar—Plaintiff—Respondent.

Second Appeal No. 1611 of 1922, Decided on 1st May 1925, against the decree of the Dist. J., Chingleput, in A. S. No. 296 of 1920.

★ *Hindu Law—Alienation by widow—Reversioners consenting—Purposes of alienation not mentioned in deed but decided by alienees in their written statement—Onus lies on reversioners to disprove.*

Where reversioners consent to a transaction by a limited owner, in the absence of any evidence to the contrary, their consent is prima facie evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity under the Hindu Law and which would be sufficient to bind the reversion. It is not necessary that the purpose itself should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time the transaction was entered into which would justify a limited owner to pass full interest in favour of the alienee, in other words, which would entitle a limited owner to bind the reversion by the alienation.

Where the alienees did allege the circumstances which would amount to necessity in their written statement:

Held: that it was not necessary that such circumstances should have been mentioned in the documents by which the alienations were effected and that the onus lay on plaintiffs to disprove the allegations: 42 *Mad.* 523 (*P. C.*) *Foll.*

[P. 30 C. 1, 2, P. 31 C. 1]

A. S. Venku Aiyar, *T. R. Ramachandra Aiyar* and *C. V. Harihara Aiyar*—for Appellants.

K. Bashyam Aiyangar—for Respondents.

Judgment.—This appeal is connected with the one just disposed of (Second Appeal No. 1548 of 1922) as it arises out of the same suit. The appellants are Defendants 26, 27, 29 to 44 and 46 to 48. They are alienees and the lower appellate Court has decided that their alienations are not valid and binding on the plaintiff. The alienations were made so far back as 1888 and 1889 under Exs. 3, L2, L9 to L11 and C1. The alienations were made by the plaintiff and his two brothers and by their mother Alamelammal and by a minor brother for whom Alamelammal acted as guardian. The purposes for which amounts were borrowed under these documents were not mentioned in the deeds. Only cash consideration is recited and the mother and the sons are the executants of the documents. The District Judge held that the mere execution of the documents by the sons would not amount to consent on their part to the alienations, and therefore they were not bound by the alienations. The defendants in their written statement pleaded that the amounts got under these documents were spent for a purpose which could bind the reversion. Defendants 26 and 27 in paragraph 7 of the written statement say:

"That the allegations in paragraph 6 of the plaint are entirely false. At the time of the alienations mentioned above Alamelammal was not even able to maintain herself out of the income of her properties. Of the suit items most are waste lands not brought under cultivation. The alienations were made solely for maintaining herself and her children and for paying kist on the suit land."

In paragraph 6 they say:

"The sale mentioned in paragraph 5 was effected for necessary purposes binding on the reversion. The other defendants have adopted the statement of defendants 26 and 27 in paragraph 7—8, etc. The defendants therefore plead that the alienations were for purposes which could bind the reversion."

The issue raised on this point, Issue 2, is whether the various alienations pleaded

by the defendants are true and binding on the reversion. It was held in *Rangasami Gounden* v. *Nachiappa Gounden* (1) that the consent of the reversioners was prima facie evidence of necessity. At page 536 their Lordships observe :

"When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved aliunde and the alienee does not prove inquiry on his part and honest belief in the necessity, the consent of such reversioners, as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which if not rebutted by contrary proof will validate the transaction as a right and proper one.

In this case there is allegation on the part of the defendants that the alienations were for a purpose binding on the reversion. They have not adduced any evidence and the documents are silent as to the purpose. The question is whether in such circumstances the consent of the reversioners is sufficient prima facie proof of the existence of circumstances which would amount to necessity under the Hindu Law. It is open to the reversioner to rebut the presumption by adducing evidence that at that time there was no necessity for the transaction. In the case of the alienation under appeal the reversioners were not merely consenting parties, but they joined in the execution of the documents along with their mother. They not only consented to the transaction, but they actually participated in the transaction as executants. The principle deducible from *Rangasami Gounden* v. *Nachiappa Gounden* (1) and the other cases decided by the Privy Council is this : it is for the alienee to prove circumstances which would amount to necessity under the Hindu Law. If he is unable to prove such circumstances he must at least prove that he made bona fide inquiries and satisfied himself that such circumstances existed which would amount to a necessity under the Hindu Law. If he is unable to prove such circumstances or to prove that he made such bona fide inquiries, the proof that the nearest reversioners consented to the transaction is prima facie evidence or presumptive proof that these circumstances existed which would make the transaction one binding on the reversion, and it is open to the reversioner to rebut the presumption by adducing evidence. Like all presumptions it is liable to be displaced by proof of facts, but, so long as the reversioners do not adduce any evidence as regards the actual purpose to the knowledge of the alienee, the presumption would be quite sufficient to enable the Court to give a decree in favour of the alienee. Mr. Bashyam's contention for the plaintiff-respondent is that the purpose for which the alienation was made should be mentioned in the document, and if it is not mentioned in the document, then it cannot be said that the circumstances which amounted to necessity existed at the time. It is not necessary that the purpose itself should be mentioned in the document. All that the law requires is that the alienee should prove the existence of circumstances at the time the transaction was entered into which would justify a limited owner to pass full interest in favour of the alienee, in other words, which would entitle a limited owner to bind the reversion by the alienation. In this case the alienees did allege the circumstances which would amount to necessity in their written statement. It is not therefore necessary that such circumstances should have been mentioned in the documents by which the alienations were effected.

Then the next contention of Mr. Bashyam is that the consent is only a consent to the fact that the money was borrowed or a sale was effected and does not amount to anything else. This argument overlooks the principle of the decision in *Rangasami Gounden* v. *Nachiyappa Gounden* (1). When the reversioner consents to a transaction he does not merely say :

"I am only looking on and I see that you sell the property to the alienee or mortgage the property for consideration," but the very object of getting the consent of the reversioner is not only to appraise him of the fact that a transaction is taking place, but to make him consent to the transaction, on the ground that such circumstances do exist as would make the transaction binding on him. Otherwise the consent of the reversioner would be meaningless and no alienee would take the trouble to get the consent of the reversioner simply as a witness of the trans-

(1) [1919] 42 Mad. 523=46 I. C. 72=26 M. L. T. 5=36 M. L. J. 493=17 A. L. J. 536=29 C. L. J. 539=21 Bom. L. R. 640=23 C. W. N. 777=(1919) M. W. N. 262=50 I. C. 498=10 L. W. 105 (P. C.).

action and nothing more. I do not rest my judgment in this case on the question of estoppel. It may be said in this case that the reversioners having joined in effecting a sale of the property along with the limited owner, they cannot afterwards question the validity of their own act. What representations were made at the time, and what representations were believed in by the alienees at the time, have not been proved in the case. The transactions were more than 30 years before the date of the suit, and it would not be easy to get evidence as to what transpired at the time. I prefer to rest my judgment on the principle enunciated in *Rangasami Gounden* v. *Nachiyappa Gounden* (1) that, where reversioners consent to a transaction by a limited owner, in the absence of any evidence to the contrary, their consent is prima facie evidence or presumptive evidence of the existence of circumstances which would be sufficient to constitute necessity under the Hindu Law and which would be sufficient to bind the reversion. In the result, I allow this appeal with costs. I set aside the decree of the lower appellate Court and restore that of the District Munsif with costs in this Court and in the lower appellate Court.

Appeal allowed.

★ A. I. R. 1926 Madras 31

RAMESAM, J.

(Syed) Muhammad Sahib—1st Defendant—Petitioner.

v.

A. P. R. L. Alagappa Chettiar—Plaintiff—Respondent.

Civil Revision Petition No. 143 of 1924, Decided on 8th April 1925, for revision of the judgment and decree of the Dist. Court, Coimbatore, in C. M. A. No. 70 of 1923.

★ *Civil P. C., O. 9, R. 13—Application under—Merits of the case are not to be considered—Knowledge of particular decree on defendant's part is essential—Vague suspicion that defendant may have known of some decree is not enough to impute him with knowledge of the decree.*

In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits, but whether there is proper service, and if there is proper service whether there was sufficient cause for his non-appearance. Courts even in moffusil ought not to proceed to the trial of a case until at least three services have been taken upon the defendants which is the practice in the High Court. Unless the Court finds positively that the petitioner was aware of the decree at a time which was more than a month before the petition it is not barred by limitation; and apart from the limitation the knowledge of the suit after a decree is irrelevant for any other purpose. A vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation. [P. 32, C. 1]

Watrap S. Subramania Aiyar—for Petitioner.

S. Muthiah Mudaliar—for Respondent.

Judgment.—The facts of this revision petition may be stated as follows: The respondent before me was the plaintiff in O. S. No. 1006 of 1922 on the file of the District Munsif of Tiruppur. He filed a suit to recover Rs. 797-9-6 due on a pro-note executed on 27th December 1919 by the two defendants. The 2nd defendant never appeared in the suit and we are not now concerned with him. The 1st defendant is the petitioner before me. The first summons to him was issued in April 1922. It was not personally served and a fresh service was ordered. Summons was taken out a second time in July 1922. The amin went to the village of the defendants on 7th July. He learnt that the defendants had gone to Satyamangalam and other places and the time of their return was not known and that there was no adult male member in their families. The summonses were then affixed to the outer doors of their houses. These facts were sworn to by the amin before the Deputy Nazir and apparently also confirmed by the report of the village officer. This return of the Amin was on the 10th July. The District Munsif ordered the suit to proceed ex parte and the case was taken up on the 19th July and decreed in favour of the plaintiff. The 1st defendant filed the present petition on the 7th of August, 1923 with an affidavit in which he states that he was not aware of the suit, that the notice in E. P. No. 2104 of 1923 (a petition filed for the execution of the decree) was served on him on 31st July 1923. He mentioned other facts going to show that there was collusion between the plaintiff and the 2nd defendant and referred to a mortgage obtained by the plaintiff's brother from the 2nd defendant

He afterwards applied for and obtained a copy of this mortgage and filed it before the District Munsif on the 19th of October, 1923. The District Munsif said : " No doubt there was no personal service but 1st defendant has apparently been aware of the decree and second defendant's alleged partial adjustment of it * * * * 1st defendant's defence on the merits seems to be very weak * * * * * I am not inclined to set aside the decree. " In an application under O. 9, R. 13, what the Court has to find is not whether the defendant has any good defence on the merits,but whether there is proper service, and if there is proper service whether there was sufficient cause for his non-appearance. I presume that in this case there was service which was good service according to law, though I should think Courts ought not to proceed to the trial of a case until at least three services have been taken upon the defendants which is the practice in the High Court, and I would like this to be followed in the Courts below before the case is allowed to proceed ex parte, but, as I said, I will assume that there was some good service according to law. But even then a defendant may give a good reason for non-appearance. He may tell the Court that as a matter of fact he was unaware of the suit which means that he never saw any paper pasted on the outer door of his house. If the Court believes him it follows that he could not be aware of the suit and in such a case, though there was good service. there is sufficient cause for the non-appearance of the party, and in such a case the Court ought to set aside the ex-parte decree.

In *Arunachala Aiyar* v. *Subbaramiah* (1), Schwabe, C. J., and Wallace, J., held that this ought to be the attitude of the Court in dealing with an application of this kind though no doubt there the facts were somewhat different. The same view was taken by the same Bench in *Lakshminarayana* v. *Standard Oil Co. of New York* (2) though again the facts are somewhat different. Whether the 1st defendant was aware of the decree after the passing of the decree and partial adjustment by the 2nd defendant is irrelevant except for the purpose of deciding whether the petition is barred by limitation. There is no finding by the District Munsif that the petitioner became aware of the decree on or before a particular date. It is therefore clear to me that the District Munsif did not refer to the mortgage document and the 1st defendant being aware of the decree for the purpose of limitation. The application for the copy of the mortgage itself was made after the filing of the petition. If it is not useful for the purpose of limitation it is irrelevant for any other purpose. I therefore think the District Munsif has not addressed himself to the question that has to be decided in an application of this sort. On appeal the District Judge says : " Appellant was twice affixed, his co-executant's (second defendant's) property was attached before judgment * * * * * I cannot believe his statement that he had no knowledge of the suit until more than a year after the decree. " The statement that the appellant was twice affixed only amounts to saying that there was service which was good according to law, a matter with which I agree. The next statement " his co-defendant's property was attached before judgment " seems to be irrelevant. Assuming that a man heard of the attachment of a co-defendant's property, it does not follow that he has evaded service or that he abstained from appearing without proper cause. It may be he was waiting for being served and never got the summons. The next statement of the District Judge that he cannot believe the petitioner's statement that he had no knowledge of the suit until more than a year after a decree again leads to no conclusion. Unless the District Judge finds positively that the petitioner was aware of the decree at a time which was more than a month before the petition, it is not barred by limitation. And apart from the limitation the knowledge of the suit after a decree is irrelevant for any other purpose. I therefore think the District Judge also has not addressed himself to the proper question. The case *Sankaralinga Mudali* v. *Ratnasabapathi Mudali* (3) only shows that an Amin is justified in affixing the summons to the door if there is no prospect of his being able to serve the defendant within a reasonable time. I assume this point in favour of the respondent in

(1) A. I. R. 1923 Mad. 63=46 Mad. 60=43 M. L. J. 632=(1922) M. W. N. 600=31 M. L. T. 257=16 M. L. W. 583.

(2) A. I. R. 1923 Mad. 581=44 M. L. J. 488=17 M. L. W. 627=32 M. L. T. 296.

(3) [1897] 21 Mad. 324=8 M. L. J. 58.

this case. In *Abraham Pillai* v. *Donald Smith* (4) it was laid down that summons if possible must be served in person and that substituted service should be ordered only when reasonable grounds exist for believing that defendant is keeping out of the way to avoid service or for other reasons, he cannot be served in the ordinary way. Because these conditions are not fulfilled the High Court interfered in revision. It is true the present case is not a case of substituted service and I have held that the service on the door by affixture was good service, but still, as the Courts below have not considered the question whether sufficient cause was shown by the defendant for non-appearance, I hold it is an irregularity justifying my interference in revision. In *Abraham Pillai* v. *Donald Smith* (4) the High Court itself set aside the ex parte decree. A similar view was taken in *Nagari Rasappa Setti* v. *Namburi Venkataratnam* (5) though I keep before my mind the fact that the revision petition in that case was a petition under S. 25 of the Small Cause Courts Act. Waller, J., seems to have taken a similar view in Civil Revision Petition No. 745 of 1924. In *Bapurao Sakharam* v. *Sadbu Bhiva* (6) it was pointed out that even for the purposes of limitation a vague knowledge that a decree had been passed by some Court is not enough. It must be found that the defendant had knowledge that a particular decree had been passed against him in a particular Court in favour of a particular person and for a particular sum. I agree with this view of Macleod, C. J., and Crump, J. A vague suspicion that the defendant must have heard of some decree is not enough to dismiss his petition on the ground that it is barred by limitation. It is true that the view in *Abraham Pillai v. Donald Smith* (4) was not fully concurred in *Sitaram* v. *Kalandi Patra* (7), *Pitchayya* v. *Mahomed Abdul Kareem* (8) and *Kasivisvanathan Chetty* v. *A. S. P. L. S. Somasundaram Chetty* (9). In *Sitaram* v. *Kalandi Patra* (7) the defendant left Bengal for the Madras Presidency. It was held there was good service but the question whether there was sufficient cause for non-appearance otherwise was not discussed. The only point discussed is whether the Amin's affixture of the summons was proper. This case was followed in *Pitchayya* v. *Mahomed Abdul Kareem* (8). In *Kasi Viswanathan Chetty* v. *Arunachallam Chetty* (10) the defendant had gone to a foreign territory. Substituted service was held to be proper and no other question was discussed. The same remarks apply to *Basavayya* v. *Kistna Brahmam* (11). In *Bhaichand Ful Chand* v. *Dawood Ayub* (12) the defendant had notice. The only question is whether he could not attend on account of illness and the High Court refused to interfere in revision. Following *Abraham Pillai* v. *Donald Smith* (4) and the principle laid down in *Arunachella Aiyar* v. *Subbaramiah* (1) and *Lakshminarayana* v. *Standard Oil Co. of New York* (2) I hold I am entitled to interfere in revision. I find that the defendant was not as a matter of fact aware of the suit and showed sufficient cause for non-appearance. I set aside the order of the Courts below and direct the District Munsif to proceed with the suit according to law only so far as 1st defendant is concerned. But as I have no desire to be unduly lenient to the petitioner, the costs in all the Courts will abide the result. The security already furnished by the petitioner will continue till the disposal of the suit.

Order set aside.

(4) [1906] 29 Mad. 324.
(5) [1913] M. W. N. 1028=21 I. C. 922=14 M. L. T. 535.
(6) A. I. R. 1923 Bom. 193=47 Bom. 485=25 Bom. L. R. 74.
(7) [1912] 17 C. W. N. 999=13 I. C. 127.
(8) [1914] 26 M. L. J. 368=15 M. L. T. 217=23 I. C. 14=(1914) M. W. N. 253.
(9) A. I. R. 1922 Mad. 93=45 Mad. 875=42 M. L. J. 422=(1922) M. W. N. 173.
(10) [1911] 21 M. L. J. 978=10 M. L. T. 566=12 I. C. 420=(1911) 2 M. W. N. 357.
(11) [1914] 1 L. W. 351=23 I. C. 219.
(12) A. I. R. 1924 Patna 815.

★ A. I. R. 1926 Madras 33

PHILLIPS, J.

Muthukaruppa Muthirian and *others*—Plaintiffs—Appellants.

v.

Sivabhagyathammal and *others*—Defendants—Respondents.

Second Appeals Nos. 1489 and 1490 of 1922, Decided on 15th April 1925, against the decrees of the Dist. Court, Trichinopoly, in A.S. Nos. 229 and 211 of 1921.

★ (a) *Hindu Law—Will—Construction—Bequest to wife and daughter could create joint tenancy—Intention to create joint tenancy depends on facts and circumstances.*

A Hindu by his Will left some property to his senior wife and her daughter jointly, to his junior wife separately, and provision was made for the joint payment of debts by the mother and daughter.

Held: that the dictum of the Judicial Committee in 23 Cal. 670 (*P. C.*) that "the principle of joint tenancy appears to be unknown to the Hindu Law, except in the case of a coparcenary between members of an undivided family," treated as a broad statement of law is not strictly accurate and therefore the question of the testator's intention to create joint tenancy has to be considered with reference to the facts of each case. 23 *Cal.* 670 (*P. C.*), *Dist.*; 25 *Mad.* 678, (*P. C.*) and 11 *Cal.* 1 (*P. C.*) *Foll.* [P 34 C 2, P 35 C 1,]

★ (b) *Civil P. C., S.* 100—*Whether joint tenancy was intended to be created is question of fact.*

Question of intention to create joint tenancy is one of fact, and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in second appeal. [P 35 C 1]

N Rajagopalachari—for Appellants.

K.G. Srinivasa Aiyar—for Respondents.

Judgment.—The question at issue in this appeal is the construction of the will of one Vythi Muthirian whereby he left his property to his senior wife and her daughter and to his junior wife, the first two being bequeathed a larger portion of the property than the latter. The question now is whether the senior wife and her daughter took the property as joint tenants or as tenants-in-common, the plea that they only took a life-estate not being seriously pressed before me.

The District Judge has considered the language of the will and the circumstances in which it was executed and has come to the conclusion that the bequest was to the wife and daughter as joint tenants. It is now contended for the appellants that this finding cannot be sustained as it is opposed to the decision of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1). In that case, in which there was a will of a somewhat similar nature, it was held that the legatees, mother and son, to whom a joint bequest was made, took the property as tenants-in-common and not as joint tenants. I may here point out that in the will under consideration in that case there were words of inheritance used after the bequest and there were no special circumstances to guide the Court in arriving at the intention of the testator. A case of this Court reported in *Vydinada* v. *Nagammal* (2) was overruled. In that case the bequest to a nephew and to his wife was held to constitute a joint tenancy. The Judicial Committee overruled that decision on the ground that the High Court was not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing and also on the ground that under the English Law a conveyance by one joint tenant operates as a severance. In addition there is a dictum of their Lordships upon which the appellants now rely and that is, "the principle of joint tenancy appears to be unknown to the Hindu Law except in the case of a coparcenary between members of an undivided family." If that were a strictly accurate statement of Hindu Law and treated as an invariable proposition of law, there would be a very strong presumption that a bequest to two persons who are not members of an undivided family would not constitute joint tenancy, and such a presumption could only be rebutted by special words creating such joint tenancy. It, however, appears that this statement treated as a broad statement of law is not strictly accurate. As is pointed out in a subsequent case *Venkayamma Garu* v. *Venkataramanayamma Bahadur Garu* (3) by their Lordships there are instances of Hindus taking property jointly who are not coparceners of a joint Hindu family. It was there recognised that widows succeed jointly, as also daughters, and it has also been held that this is the case with daughter's sons. Joint tenancy is not, therefore, unknown to Hindu Law and consequently there is not the same difficulty in inferring that such an estate has been created as if such an estate were entirely unknown to Hindu Law. There is a case reported in *Narpat Singh* v. *Mahomed Ali Hussain Khan* (4) which is opposed to the decision in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (1) and is not expressly overruled by the latter and consequently I think it must be taken that the latter is to be read solely with reference to the facts of that particular case and not as laying down a principle that no joint tenancy can ever

(1) [1896] 23 Cal. 670=23 I. A. 37=6 M. L. J. 75=7 Sar. 13 (P. C.).

(2) [1888] 11 Mad. 258.

(3) [1902] 25 Mad. 678=29 I. A. 156=7 C.W.N. 1=12 M. L. J. 299=4 Bom. L. R. 657=8 Sar. 286 (P. C.).

(4) [1884] 11 Cal. 1=R. and J's. No. 82=4 Sar. 558 (P. C.).

be created by a Hindu testator without specific words to that effect. If that is conceded, as I think it must be, then the question of the testator's intention has to be considered with reference to the facts of each case. Here the learned District Judge has considered the language of the document and the fact that provision was made for one wife and her daughter apart from the second wife, for whom provision was also made, and that provision was made for the joint payment of debts by the mother and daughter, and also other considerations specified in his judgment and has come to the conclusion that the testator did intend to create a joint estate in the mother and daughter to which the survivor would succeed. This question of intention is one of fact and so long as the Judge makes no inferences which are not justified in law, the finding of intention is one which cannot be interfered with in second appeal. Assuming that the testator could create a joint tenancy, the question of whether he did so by his will and intended to do so is one of fact. I am not prepared to say that the District Judge's finding is wrong and accordingly the appeal must be dismissed with costs.

Appeals dismissed.

★ A. I. R. 1926 Madras 35

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

P. M. A. M. Ramaswami Chettiar and *others*—Defendants—Appellants.

v.

Lodd Govindoss Krishnadoss Varu—Plaintiff—Respondent.

O. S. Appeal No. 31 of 1925, Decided on 29th April 1925, from the judgment and decree of Srinivasa Aiyangar, J., D/- 3rd March 1925, in Civil Suit No. 722 of 1920.

★ *Evidence Act, S. 92—Deed—Recital of consideration—Oral evidence to show it to be incorrect being admissible, opposite party can let in oral evidence to prove the contrary.*

Where there is a recital in a document of the payment of a certain sum of money as consideration, oral evidence is admissible to prove that the recital is incorrect as a matter of fact. Such a recital being only an averment of fact, if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by similar evidence that it is not incorrect and that the recital was deliberately put in, and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. S. 92 does not bar such proof, for such proof is adduced not for the purpose of varying or altering any term of the written contract, but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated: 36 All. 537 *Foll.*; 38 *Mad.* 514 *Dist.*; 22 *All.* 370 (*P. C.*) and 33 *All.* 340 (*P.C.*), *Foll.*

[P. 36, C. 2]

A. Krishnaswami Aiyar, A. Ramachandra Aiyar and *N. Chandrasekhara Aiyar*—for Appellants.

V. Radhakrishnayya—for Respondent.

Krishnan, J.—This suit has been disposed of by the learned trial Judge on the pleadings without taking any evidence except filing a document. He held that S. 92 of the Evidence Act barred the defendant from adducing oral evidence of his plea, as he proposed to do.

The plaintiff had assigned to one P. M. A. R. Muthiah Chettiar, whose legal representatives the respondents are, an 1/8th share of a mortgage decree which his father had obtained against the Rajah of Karvetnagar and others, plaintiff having succeeded to his father's rights on his death. A copy of the deed of assignment has been filed in evidence as Document No. 3159. The consideration for the assignment is recited in this deed as follows:

"For a consideration of Rs. 2,89,000 to be paid by Muthiah Chettiar to Lodd Govindoss (the plaintiff) whereof Rs.89,000 is paid in advance this day and the three promissory notes, dated 24th March 1915, and 26th April 1917, executed by Messrs. Tawker & Sons in favour of Muthiah Chettiar for Rs. 1,50,000, together with the four jewels pledged as security by the said Tawker & Sons, are assigned in favour of the plaintiff free from any claim by Muthiah Chettiar against Tawker & Sons, and the balance of Rs. 50,000 being payable at any time before the end of February 1918."

The deed is dated 1st October 1917. In this case we are not concerned with the second and third items of consideration but only with the first. The plaintiff alleges in this suit that the recital in the deed that Rs 89,000 were paid is incorrect and that only Rs. 60 000 were paid, and he seeks to recover the balance, Rs. 29,000. The defendant conceded that only Rs. 60,000 were in fact paid, but he pleaded that he was not liable to pay the balance. His contention amounts to an averment

that the recital of payment in full of Rs. 89,000 was made in the deed deliberately and that there was no mistak about it and he wants to adduce oral evidence to show the circumstances in which that recital was made in the document. His case is that the real consideration agreed to be paid for the assignment was only Rs.2,60,000, but that he agreed to consideration being stated to be nominally Rs. 2,89,000 on condition that a recital should be made in the deed that the whole of Rs. 89,000 was paid off though only Rs. 60,000 was in reality paid. In fact the recital of consideration in the deed as Rs. 2,89,000 was, according to him, closely connected with, and dependent on, the further recital of payment of Rs. 89,000 in full though only Rs. 60,000 was paid. The document, it will be noted, further says that the amount still due under it was only Rs. 50,000 confirming the previous recital. He pleads that all these recitals were made in the circumstances above stated and that he is not bound to pay the suit amount.

The learned trial Judge, relying on the decision of the Privy Council in *Sah Lal Chand* v. *Indarjit* (1) has allowed the plaintiff to go behind the recital of payment and to show that it is wrong as only Rs. 60,000 were actually paid, on the ground that such a recital was only an averment of fact and that it could be proved to be wrong by oral evidence, S. 92 of the Evidence Act not barring such proof. So far he is correct ; but he has at the same time shut out the defendant from showing the circumstances in which the recital was made as he considered that it involved proof of a consideration different from the one recited in the deed and that such proof by parol evidence was barred by S. 92 as consideration is one of the terms of the contract.

I regret I am unable to follow his view on the second point. I am clearly of opinion that if one party is allowed to show by oral evidence that a recital in a document is incorrect in fact, the other party must certainly be allowed to show by similar evidence that it is not incorrect and that the recital was deliberately put in and for the purpose of showing it he must be allowed to prove what the real consideration for the document was. S. 92 does not in my opinion bar such proof, for such proof is adduced, not for the purpose or varying of altering any term of the written contract, but only to show that the recital in it is correct. To shut out oral evidence for the purpose will be to allow a gross fraud to be perpetrated.

This question was discussed in *Chunni Bibi* v. *Basanti Bibi* (2) where the learned Judges of the Allahabad High Court laid down that if one party to a deed alleged and proved that whole of the consideration, the receipt of which was acknowledged in the deed, did not pass, the case fell within the proviso 1 of S. 92 and the other party was at liberty to show what the real consideration was and parol evidence could be given of the real nature of the transactions. What the first party tries to prove in such a case is failure of consideration and that brings it under proviso (1) ; the second party can then clearly prove in rebuttal of the first party's case that there was in truth no failure of consideration and for that purpose show what the real consideration was. As pointed out by the learned Judges in Allahabad, a party cannot both affirm and disaffirm the same transaction by showing its true nature for his own relief and by insisting on its apparent character to prejudice his adversary. This view is supported by the observation of the Privy Council in *Shah Mukhun Lall* v. *Baboo Sree Kishen Singh* (3) and also by the decision in several previous cases, namely, *Lala Himmat Sahai Singh* v. *Llewhellen* (4), *Kailash Chandra Neogi* v. *Harischandra Biswas* (5), *Nathu Khan* v. *Sewak Koeri* (6) and *Hanif-un-nissa* v. *Faiz-un-nissa* (7). The last of these cases is a ruling of the Privy Council in which their Lordships had no difficulty in holding that what appeared on the face of the document to be a sale for a consideration might be shown to be in reality a gift and that parol evidence was admissible for the purpose. My learned brother, Srinivasa Aiyangar, J., refused to

(1) [1900] 22 All. 370=27 I. A. 93=4 C. W. N. 485=2 Bom. L. R. 553=7 Sar. 702 (P. C.).

(2) [1914] 36 All. 537=24 I. C. 661=12 A. L. J 969.
(3) [1868] 12 M. I. A. 157=11 W. R. 19=2 B. L.R. 44=2 Suther 190=2 Sar. 403.
(4) [1885] 11 Cal. 486.
(5) [1900] 5 C. W. N. 158.
(6) [1911] 15 C. W. N. 408=9 I. C. 161.
(7) [1911] 33 All. 340=15 C. W. N. 521=8 A. L. J. 373=13 C. L. J. 510=13 Bom. L. R. 391 =10 M. L. T. 23=(1911) 2 M.W.N. 370=11 I. C. 398=2 M. L. J. 1126 (P. C.).

follow the ruling in *Chunni Bibi* v. *Basanti Babi* (2) on the ground that it was in conflict with the ruling of this Court in *Adityam Aiyar* v. *Ramakrishna Aiyar* (8). With respect, I think he is wrong. The Madras case was cited to the Allahabad Judges and they distinguished it, and I think rightly. There was no question in the Madras case of a recital in a deed being allowed to be shown to be incorrect by one of the parties. That ruling does not touch the principle of the Allahabad case. It may be open to doubt whether the Madras ruling can be supported in the face of the ruling of the Privy Council in *Hanif-un-nissa* v. *Faiz-un-nissa* (7) but that question we need not consider. In my view that case has no bearing on the case before us. I think the Allahabad decision embodies a sound principle and I am with respect, prepared to follow it. No authority has been cited to us in which the correctness of that ruling has been doubted or challenged. Following it I would hold that this case should be tried on oral evidence and as the trial Judge had excluded such evidence the case must go back to him for a fresh trial. I would allow the appeal and remand the case for a fresh trial. The respondent must pay the costs of this appeal. The other costs will be disposed of by the trial Judge.

Kumaraswami Sastri, J.—I agree.

Case remanded.

(8) [1913] 38 Mad. 514=25 M. L. J. 602 ; (1913) M. W. N. 847=21 I. C. 458=14 M. L. T. 382.

★ A. I R. 1926 Madras 37

RAMESAM, J.

S. Samu Asari—1st Defendant—Appellant.

v.

Anachi Ammal, (Kullappan Asari's wife)—Plaintiff—Respondent.

Second Appeal No. 1730 of 1922, Decided on 13th July 1925, against the decree of the Sub J., South Malabar, at Palghat in A. S. No. 95 of 1921.

(a) Prov. Sm. C. Courts Act, 2nd Sch. Art. 28—Suit to recover price of jewels of deceased daughter as heir—Jewels forming whole property of deceased—Suit lies on original side.

Suit t recover the price of jewels belonging to plaintiff's deceased daughter which the plaintiff clai ns as her heir on the ground that the marriage of the deceased was in the Asura form lies on the original side where the subject-matter of the suit forms the whole of the property or the deceased ; 27 *All.* 622 and 11 *W. R.* 93 *Dissented from.* [P. 37, C. 2; P. 38, C. 1.]

(b) Jurisdiction—Venue is determined by construction of plaint only and not by the probable defence.

The question whether a suit lies in the small cause side or on the original jurisdiction depe ds upon a construction of the plaint o ly. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plai tiff prior to suit is really an irrelevant consideration in the determination of this question. [P. 38, C. 1.]

★ *(c) Hindu Law — Marriage — Form of—Substantial contribution towards marriage expenses by bridegroom—Marriage is in Asura form—A general custom to that effect does not make the marriage in Bramha form.*

Although presents made to the bride's parents which are either small or relatively smal' having regard to the scale on which the rest of the expenses of the marriage are incurred do not necessarily make a marriage an Asura marriage; a substantial contribution towards the expenses of the marriage must be regarded as equivalent to taki g a bride price, and lends support to the suggestion that the marriage is in Asura form. The prevalence of a general custom of taking contribution from the bride groom's party among Asaris renders every Asari marriage an Asura form of marriage, and on the ground of the general prevalence of such a custom any particular marriage cannot be regarded as one in the Brahma form. [P. 38, C. 2, P. 39, C. 1.]

C. S. Swaminathan—for Appellant.

C. Unikanda Menon—for Respondent.

Judgment.—When the second appeal was taken up I at first felt a doubt whether a second appeal lay, because the suit is to recover Rs. 270 being the price of jewels belonging to plaintiff's deceased daughter which the plaintiff claims as her heir on the ground that the marriage of the deceased was in the Asura form.

The learned vakil for the respondent took up my suggestion and argued the preliminary objection He relied on *Chhedi* v. *Gulabo* (1) in support of his objection. This decision no doubt seems to support him. It relies on two earlier decisions in *Kapalee Bewah* v. *Keshram Kooch* (2) and in *Moheshur Mondul* v. *Kailash Nath Mondul* (3). I may at once observe that the decision in *Moheshur Mondul* v. *Kailash Nath Mandul* (3) is really irrelevant. For, in that case, the title was established by a prior judgment and the suit was merely for possession of

(1) [1905] 27 All. 622.
(2) [1869] 11 W.R. 93=2 B.L.R. App. 23
(3) [1880] 7 C.L.R. 71

specific moveable property. It is now well established that the question whether a suit lies in the small cause side or on the original jurisdiction depends upon a construction of the plaint only. What the defence of the defendant in his written statement will be or what attitude the defendant assumed with reference to a demand made by the plaintiff prior to suit is really an irrelevant consideration in the determination of this question. Art. 28 of the Second Schedule of the Provincial Small Cause Courts Act runs as follows :—

"(28) A suit for a legacy or for the whole or a share of a residue bequeathed by a testator, or for the whole or a share of the property of an intestate."

In the present case it is conceded by the vakils on both sides that the deceased Ankammal had no other property except these jewels. If there had been any other property in the possession of the defendant, the plaintiff would have sued for it. It is obvious that the plaintiff is suing for the whole of the property of her deceased daughter who died intestate. I fail to see why a suit of that kind does not fall under Art 28 simply because the defendant does not set up the plea of a rival claimant. I find some difficulty in accepting the test laid down in *Chhedi* v. *Gulabo* (1) and in the case in *Kapalee Bewah* v. *Keshram Kooch* (2) relied on in it. But, in the present case, even according to the test laid down in *Chhedi* v. *Gulabo* (1), it seems to me that the suit lies in the original side because the defendant, in his written statement. contends that Krishnamasari, the husband of the deceased, succeeded to her property and that the 2nd defendant succeeded Krishnamasari as his mother. This contention amounts to setting up the plea of a rival claimant. It is true there are other defences also in the written statement, but I do not see how the addition of other defences makes it the less the plea of a rival claimant. For these reasons I think the second appeal lies though I must again add that the second reason (according to which I have to refer to the written statement) is unsatisfactory and I would rather rest my conclusion on a construction of the language of the article differing from *Chhedi* v. *Gulabo* (1) and from *Kapalee Bewah* v. *Keshram Kooch* (2). The preliminary objection is, therefore, overruled.

Coming to the merits of the case, the evidence in the case and the findings of the Courts below show that, in the community to which the parties belong, namely the community of goldsmiths or Asaris, it is customary for the bridegroom's party to make a payment to the parents of the bride to enable them to meet a substantial part of the expenses of the marriage. It seems to me immaterial whether it is the whole of the expenses of the marriage or a substantial portion of it. To the extent the bride's father gets a contribution of that kind from the bridegroom's father he benefits by it ; though he does not pocket it, he spends for the marriage. It is true that presents made to the bride's parents which are either small or relatively small having regard to the scale on which the rest of the expenses of the marriage are incurred do not necessarily make a marriage an Asura marriage. One must really look into the substance of the transaction. In the case in *Rev. Gabrielnathaswami* v. *Valliammai Ammal* (4) there was some obscurity as to the meaning of the word *parisu panam* The learned Judges who originally heard the second appeal had a suspicion that it might be merely a courtesy present given to the bride's parents and so they called for a finding whether it was regarded as a bride price. Having regard to the ruling in *Muthu Aiyar* v. *Chidambara Aiyar* (5) and to the statement in Manu, Ch. III, vv. 25 and 52, Ch. IX, vv. 98 and 100, quoted in Mayne's Hindu Law, 9th edn., Art. 81 : "Let no father, who knows the law, receive a gratuity however small, for giving his daughter in marriage, since the man who, through avarice, takes a gratuity for that purpose is a seller of his offspring." I think that a substantial contribution towards the expenses of the marriage must be regarded as equivalent to taking a bride price. The learned vakil for the respondent relied on a remark in my judgment in *Ratnathanni* v. *Somasundara Mudaliar* (6). I there said : "No special custom among Mudaliars to the effect that the bridegroom should incur the expenses of the marriage has been pleaded." That

(4) [1920] M.W.N. 158=26 M.L.T 348=53 I.C. 423=10 L.W. 491.
(5) [1813] 3 M.L.J. 261.
(6) [1921] 41 M.L.J. 76=(1921) M.W.N. 635= 62 I.C. 931=13 L.W. 582.

remark was made to avoid discussion of that question. It is true in this case a custom has been pleaded and proved, and I have to decide whether the existence of such a custom makes any difference in the result. I am of opinion it does not. If there is a general custom of taking contribution from the bridegroom's party among Asaris, it only comes to this : that every Asari marriage is an Asura form of marriage and it is not that on the ground of the general prevalence of such a custom, the marriage should be regarded as one in the Brahma form. The decision in *Jaikisondas Gopaldas* v. *Harikishondas Hullochandas* (7) has nothing to do with the point before me. There a present called *palu* was made to the bride and not to the bride's relations. I am of opinion that the form of marriage in the case is not Brahma form, but Asura form, and, agreeing with the Courts below, I dismiss the second appeal with costs.

Appeal dismissed.

(7) [1877-78] 2 Bom. 9.

★ A. I. R. 1926 Madras 39

VENKATASUBBA RAO, J.

M. K. Muhammad Batcha Sahib—Appellant.

v.

Arunachalam Chettiar—Respondent.

Second Appeal No. 834 of 1922, Decided on 2nd February 1925, against the decree of the District Court of Coimbatore, in A. S. No. 65 of 1921.

★ (a) *Evidence Act, S.* 115—*Finding as to representation by one inducing another to do an act is one of fact—Civil P.C., S.* 100.

Whether a person by any representation or by conduct amounting to representation induced another to do a certain act is a question of fact and the finding must be accepted in second appeal. [P. 39, C. 2, P 40, C. 1]

★ (b) *Evidence Act, Ss.* 92 *and* 115—*Sections do not conflict with each other—In S.* 92 *subsequent representation is relied upon as true ; in S.* 115 *it is relied upon as binding upon the party making it.*

Where a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case very probably is that the representation is false but that the person who made it should not be allowed to show that it is false. Ss. 92 and 115 deal with two entirely different topics and there is no conflict between the two. [P. 41, C. 1]

★ (c) *Registration Act, S.* 47—*P's deed executed after but registered before D's deed in respect of the same property—D fraudulently delaying registration and misleading P—D's deed should not be given priority.*

A conveyance of certain property in favour of D was executed on the 1st of August 1919, but was not immediately registered. Misled by the conduct of D, P took a sale deed on the 10th September of the same property and got it registered on the 11th. D ignoring what had happened, and with the fraudulent object of enforcing the sale in his own favour, then presented his conveyance for registration on the 13th of September and got it registered on the 20th of October.

Held: that though the effect of registration is to confer validity on the document from the date of its execution, D. should not be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the said deed in P's favour executed later but registered earlier. [P. 41, C. 2]

C. S. Venkatachari and *K. G. Babu Rao*—for Appellant.

T. M. Krishnaswamy Aiyar—for Respondent.

Judgment.—The facts are complicated and as the Munsif has set them out clearly in his judgment, I do not propose to state them again. The 1st defendant was the owner of the property in dispute. On the 1st of August 1919, she executed a sale deed in favour of the 2nd defendant (Ex. II) On the 10th September 1919, she executed a sale deed in favour of the plaintiff (Ex. C.). The contest is now between the plaintiff and the 2nd defendant. The question is shortly : Whose sale deed is to prevail ?

The conveyance in favour of the 2nd defendant being earlier in date would in the ordinary course take precedence. On behalf of the plaintiff it is urged that the conduct of the 2nd defendant created an estoppel and that he is precluded from relying upon his sale deed. The 2nd defendant treated the sale in his favour as cancelled, but under S. 92 of the Indian Evidence Act the subsequent agreement rescinding the sale cannot be proved. The question then is : Did the 2nd defendant by any representation or by conduct amounting to representation induce the plaintiff to purchase the property parting with valuable consideration ? The effect of the finding of the Courts below is that the conduct of the 2nd defendant was of an unequivocal character and that the plaintiff was thereby misled. This is a question of fact and the finding must be accep-

ted in second appeal. Even apart from this, I am satisfied that the finding is correct. It is unnecessary to narrate the circumstances which give rise to the plea of estoppel. The outstanding facts that are relied upon by the plaintiff in this connexion are, that the 1st defendant with the concurrence of the 2nd defendant agreed on the 5th of September to sell the property to the 7th defendant; that an agreement of sale was accordingly executed and that the 2nd defendant giving up his rights under his own conveyance, attested the agreement to sell. The 2nd defendant thus held out that the sale in his own favour was inoperative, that the 1st defendant still continued to be the owner of the property; that she had authority to dispose of it and that the 2nd defendant was willing that the property should be dealt with as if it was at the absolute disposal of the 1st defendant. In short, the 2nd defendant's conduct amounted to a representation that although he took a conveyance, the 1st defendant remained the owner of the property. The Courts below have also held, disbelieving the plaintiff himself on this point, that he was induced to purchase the property by this conduct on the part of the 2nd defendant. I agree with its conclusion. Can the 2nd defendant now turn round and say that he was on the date of the sale to the plaintiff, the owner of the property? I think not. In *Sarat Chaunder Dev* v *Gopal Chounder Laha* (1) their Lordships of the Judicial Committee made the following observations:

"What the Law and the Indian statute mainly regard is the position of the person who was induced to act and the principle on which the law and the statute rest is that it would be most inequitable and unjust to him that if another by a representation made, or by conduct, amounting to a representation, has induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it."

Their Lordships quote the following passage from the judgment of Lord Chanceller Campbell in the case of *Cairncross* v. *Lorrimer* (2).

"The doctrine will apply, which is to be found, I believe, in the laws of all civilized nations, that if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained he cannot question the legality of the act he had so sanctioned to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

Their Lordships also held that the terms of S. 115 of the Indian Evidence Act did not enact as law in India anything different from the law of England on the subject of estoppel.

I am clearly of the opinion that the 2nd defendant cannot be allowed to deny that the 1st defendant was the owner of the property and was competent to dispose of it. I may observe that we are not concerned with the 7th defendant who does not put forward any claim.

For the appellant, it was strenuously argued that to give effect to the doctrine of estoppel would be tantamount to abrogating S. 92 of the Indian Evidence Act. I cannot follow this argument. I am not asked to admit evidence of any subsequent agreement to rescind the original sale. Under S. 92 the existence of such agreement cannot be proved. The question would arise in this way under that section. If the 2nd defendant proves by the production of the sale deed that he is the owner of the property, no evidence can be given of a subsequent oral agreement on his part to rescind the sale. But, in the present case the plaintiff does not rely upon any subsequent agreement. What he says in effect is, the 2nd defendant's conduct amounted to a certain representation and he acted upon it. Did he or did he not make that representation? That is the point to be decided. If he did make the representation and the plaintiff was misled by it and acted upon it, estoppel can be successfully pleaded. The Court is not called on to look at the conveyance in favour of the 2nd defendant at all. It is not in the least degree concerned with it. Neither is it necessary to look at the sale deed nor to admit evidence of an agreement to rescind the sale. In fact the issue which the Court will

(1) [1893] 20 Cal. 296=19 I. A. 203=6 Sar. 224 (P.C.).
(2) [1866] 3 Macq. H.L.C. 829.

have to decide is whether or not a representation was made. Considerations pertaining to the sale deed are extraneous to this issue. Until the question of estoppel is decided against the plaintiff, there will arise no occasion to consider the applicability of S. 92 of the Indian Evidence Act. I find absolutely no conflict between Ss. 92 and 115. The case in *Pitchammal* v. *Ponnambala Bhattar* (3), cited by appellant's learned vakil, is distinguishable and the observations relied on are obiter. There is another way of looking at the question. When a party seeks to give evidence of a subsequent oral agreement modifying the terms of the written grant, he puts forward that agreement as true and relies upon the truth of that agreement. In the case of an estoppel, the party who pleads it does not profess to show that the representation made is true. On the contrary his case, very probably, is that the representation is false but that the person who made it should not be allowed to show that it is false. Sections 92 and 115 deal with two entirely different topics and I am unable to discover any conflict between the two.

In dealing with the question whether a transaction amounted to a sale or a mortgage, Melvill, J. in the course of his judgment in *Baksu Lakshman* v. *Govinda Kanji* (4) observed thus :

" If the holder of an absolute bill of sale were not only to allow the vendor to remain in possession, but were to take interest from him on the alleged purchase money, or allow him to go on improving the property, I conceive that any Court would hold that the so-called vendee was estopped from endorsing his bill of sale. The answer to him would be, not that his conduct was evidence of an oral agreement converting the sale into a mortgage, but that, whether there had been such an agreement or not, he had by his conduct led the defendant to believe that he would treat the transaction as a mortgage, and that, on the strength of such belief, the defendant had been induced to pay money which he would not otherwise have paid, and that under such circumstances the plaintiff was estopped from denying that the original transaction was one of mortgage. In such a case it is clear that evidence of conduct would be strictly admissible under S. 115 Evidence Act."

(3) [1912] 15 I. C. 326.
(4) [1880] 4 Bom. 594.

It has been suggested by the appellant's vakil that the view of Melvill, J. was overruled in *Maung Kyin* v *Ma Shee* ( ) and that therefore the passage extracted above from his judgment cannot be taken as stating the law on the point expressly decided by Melvill, J. I cannot agree that the particular passage referred to above does not correctly state the rule of estoppel.

I am clearly, therefore, of the opinion that the plaintiff must succeed on the question of estoppel.

The case may be considered from still another point of view. The 2nd defendant's conveyance was executed on the 1st of August 1919, but was not immediately registered. Misled by the conduct of the 2nd defendant (conduct to which I have already referred) the plaintiff himself took a sale deed on the 10th September and got it registered on the 11th. The 2nd defendant, ignoring what had happened and with the fraudulent object of enforcing the sale in his own favour, then presented his conveyance for registration on the 13th of September and got it registered on the 20th of October. The effect of registration is to confer validity on the document from the date of its execution. Is the 2nd defendant then to be allowed to rely upon his own fraudulent conduct to give his conveyance preference over the sale deed of the plaintiff executed later but registered earlier? For this reason also the plaintiff is entitled to succeed.

There is just a minor point which has been raised by the appellants and in relates to the discussion of Issue III in the Munsif's judgment. The 2nd defendant admittedly paid Rs. 350 and he will be entitled to that sum, Rs. 350 will be accordingly substituted for Rs. 227-3-7. The judgment of the lower appellate Court will be modified to that extent. The second appeal in other respects fails, and subject to the modification above, is dismissed with costs.

This second Appeal having been posted again to be spoken to. There is no objection to the second appeal being dismissed without any reservation of the nature contained in the last poragraph of my judgment,

(5) [1918) 45. Cal. 320=44 I. A. 236= 15 A.I.J. 825=33 M.L.J. 648=3 P.L.W. 185=6 L.W. 777=22 C. W. N. 257=23 M. L. T. 36=27 C. L. J. 175=20 B.L.R. 278=(1918) M. W. N. 300=9 L. B. R. 114=42 I. C. 642= 11 Bur. L. T. 21 (P. C.).

The second appeal is therefore dismissed with costs.

Appeal dismissed.

★ A. I. R. 1926 Madras 42

PHILLIPS AND ODGERS, JJ.

V. Ranganatha Aiyar — Plaintiff — Appellant.

v.

Srinivasa Aiyangar and *others*—Defendants—Respondents.

Second Appeal No. 110 of 1922, Decided on 16th March 1925, against the decree of the Dist. Court of East Tanjore, in Appeal Suit No. 6 of 1921.

★ (a) *Adverse Possession—Continuity of possession is not disturbed by attachment of the property under Civil P. C.—Civil P. C., O. 21. R. 54.*

An attachment under the Civil P. C., does not confer any interest in the property and cannot disturb the continuance of physical possession of the holder at the time. Hence, a mere attachment cannot affect the continuity of adverse possession. 11 *M. L. J.* 344 *Foll.* (*Case law discussed*). [P 43 C1]

(b) *Adverse Possession — Symbolical possession delivered in execution proceedings does not interrupt possession if possessor was not party to execution proceeding.*

Per Odgers, J.—Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings, in which symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession. [P 44 C 2]

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar*—for Appellant.

S. T. Srinivasagopalachari—for Respondents.

Phillips, J.—The suit house originally belonged to the 1st defendant's father, Narayana Aiyangar, and his brother, the 2nd defendant, Alagasinga Aiyangar. A partition was effected between the brothers in 1881, but not by metes and bounds. Narayana's share was sold to one Dikshitar, on 1st May 1905. Alagasinga's share was sold to the plaintiff on 10th March 1906. On 30th March 1906, Narayana's share was delivered to Dikshitar by symbolical delivery. On 25th March 1907, Dikshitar sold his share to Alagasami's son, the 3rd defendant. On 3rd July 1917, the plaintiff attached Alagasinga's share, in execution of a decree. On 4th March 1918, Narayana put in a claim petition. On 10th May 1918, the claim was allowed and on 19th August 1918, the present suit was brought, under O. 21, 63; meanwhile on 3rd April 1918, Alagasinga had brought a suit to recover possession of his share, a suit which has been dismissed.

The lower Courts have found that there has been adverse possession, by Narayana's son, the 1st defendant, for 12 years before suit, and now in this Second Appeal, two questions arise: (1) Whether the attachment by the plaintiff on 3rd July 1917, puts an end to the adverse possession of 1st defendant, namely, whether the possession of 1st defendant, from that date till this suit was filed, continued to be adverse, and uninterrupted; (2) Whether the symbolical delivery of 30th March 1906, put an end to the 1st defendant's adverse possession or not. The decree, in which symbolical delivery was given, was against Narayana alone and 1st defendant, his son, was not a party to it.

The first point has been expressly decided, in *Sitharami Reddi* v. *Venku Reddi* (1). In that case, the defendants had been in possession, for less than 12 years, at the time of attachment, but continued in possession, until the suit was brought, more than 12 years, after their possession commenced. It was held in this Court that the attachment could not have the effect of arresting the running of time against defendants. If that ruling is adopted, it is clear that the plaintiff's suit is barred by limitation. But it is urged for the appellant that the decision in *Pandian Pillai* v. *Vellayappa Rowther* (2), is authority to the contrary and this contention appears to have some force for, in that case, the facts were very similar and it was decided against the parties claiming adverse possession. Reference is made, in the judgment, to *Sitharami Reddi* v. *Venku Reddi* (1), and it is not dissented from, nor criticized in any way, apparently because it was held that no question of interruption of possession or of its continuance, despite the attachment, arose. Although, therefore, the decision appears to be in direct contravention of the decision in *Sitharami Reddi* v. *Venku Reddi* (1) it based on other grounds, grounds which are not too clear, because, in the judgment, the facts do not appear to be correctly set out, owing to the apparent transposition of the words "plaintiff" and "defendant" in two places. Reliance is also placed on *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite* (3), and that

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(1) [1901] 11 M. L. J. 344.
(2) [1917] 33 M. L. J. 316=42 I. C. 438=6 L. W. 588.
(3) [1911] 35 Bom. 79=8 I. C 639=12 Bom L. R. 956.

no doubt is an authority, directly in favour of the appellant; for, it was there held that in such a suit, namely, under S. 283 of the old Civil P. C., it must be proved "that on the date of the attachment, which was subsequently raised by order of the Court, on the application of the 1st respondent, their judgment-debtors had a subsisting right to the property." For this proposition *Harishankar Jebhai* v. *Naran Karsan* (4), is relied on, but a reference to the latter shows that in that case the date of the order on the claim petition was treated as the date on which the adverse possession ceased. If that date is taken in the present case, namely, 10th June 1918, the plaintiff's suit is barred by limitation. This latter proposition is supported by the authority of the Calcutta High Court in *Phul Kumari* v. *Ghanshyam Misra* (5), where it was held that the order of the Court was the basis of the subsequent suit. We have not been referred to any other authority than *Vasudeo Atmaram Joshi* v. *Eknath Balakrishna Thite* (3), which is directly in point; and inasmuch as that case purports to be based on a prior decision, which was not to the same effect, there is no argument in the judgment, which goes to show that the decision in *Seetharami Reddi* v. *Venku Reddi* (1), is incorrect.

It is suggested that we should refer this point for the decision of a Full Bench; but I do not think it is necessary in view of the following circumstances. In the first place, the decision in *Seetharami Reddi* v. *Venku Reddi* (1), has never been dissented from, although it was given so long as 1901, and on the merits I respectfully agree with the conclusion. Attachment of immovable property is effected, by an order prohibiting the judgment-debtor, from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge: (O. 21, R. 54, Civil P. C.). It has always been held that an attachment does not confer any interest in the property and it is difficult to see how a mere attachment can disturb the continuance of physical possession of the holder at the time. There are many authorities for holding that adverse possession is not disturbed, except by actual ouster. For instance, in *Pankaj Mohan* v. *Bipin* (6), where the Court ordered the property to be put in possession of a Receiver, but possession was not actually given, it was held that possession was not disturbed. Again in *Singaravelu Mudaliar* v. *Chokkalinga Mudaliar* (7), it was held that a declaration that the party in possession had no title has not the effect of interrupting the continuity of his adverse possession; at page 751 of the same volume, it was held that a decree which was not executed did not disturb possession. In view of these decisions, it is difficult to hold that a mere attachment under which possession is in no way disturbed can affect the continuity of adverse possession. Appellant relies on two cases reported in *Rajah of Venkatagiri* v. *Isakapalli Subbiah* (8) and *Sarat Chandra* v. *Bibhabati Debi* (9); but in both these cases the attachment was not one made under the Civil P. C., but was made by a Magistrate, in proceedings under Chap. 12 of the Criminal P. C. and must be distinguished on the ground that an attachment under that chapter implies an actual taking possession of the property by the Magistrate, or by some one under his orders. I am therefore of the opinion that the decision in *Seetharami Reddi* v. *Venku Reddi* (1) is correct, and see no necessity for referring the case to a Full Bench, as there is no actual conflict of opinion in this Court. In this view, it is unnecessary to decide the second point raised, which was not raised in the lower Courts The appeal is accordingly dismissed with costs.

Odgers, J.—Two points have been raised in this appeal:—(1) Is symbolical possession, (i. e.) delivery by the Court of immovable property, in the execution of a decree sufficient to interrupt adverse possession? and (2) does an attachment of immovable property serve to interrupt adverse possession?

The plaintiff, who brings the suit under O. 21, R. 63, after the disposal of a claim petition, in favour of defendant's father

(4) [1894] 18 Bom. 260.
(5) [1908] 35 Cal. 202=35 I. A. 22=7 C. L. J. 36=12 C. W. N. 169=14 Bur. L. R. 41=10 Bom. L. R. 1=5 A. L. J. 10=17 M. L. J. 618=2 M. L. T. 506 (P. C.).
(6) A. I. R. 1924 Cal. 118=38 C. L. J. 220.
(7) A. I. R.1923 Mad. 88=46 Mad. 525=(1922) M. W. N. 676=16 M. L. W. 544=31 M. L. T. 298=43 M. L. J. 737.
(8) [1903] 26 Mad. 410.
(9) [1921] 34 C. L. J. 302=66 I. C. 433.

pleads that since the 10th March 1906 the plaintiff's father and himself had been in possession of a moiety of the immovable property in question and he brought the suit, for a declaration that the other moiety belongs to the 3rd defendant, or to Defendants 2 and 4 and that it was liable to be attached, in execution of the decree in O. S. No. 154 of 1912.

The 1st defendant who is the only contesting defendant, pleaded that he and his father had been in adverse possession to the plaintiff and the other defendants of the whole of the property in question for a period of over 25 years. The dates material to the points set out are: On the 8th of June 1881, there was a partition between the 1st defendant's father and his coparcener, Alagasinga of the property in question. On the 1st of May 1905 there was a Court auction sale of the 1st defendant's share, to one Dikshitar. On the 30th of March 1906, there was symbolical delivery of 1st defendants' share to Dikshitar. On the 25th of March 1907 there was a private sale by Dikshitar to the son of Alagasinga who was the 1st defendant's coparcener above referred to and previously on the 10th of March 1906 there was a private sale of Alagasinga's share to the plaintiff's father. On the 3rd of July 1917 there was an attachment by plaintiffs of Alagasinga's share. On the 4th of March 1918, there was a claim petition by the 1st defendant's father who was in possession. On the 3rd of April 1918 the plaint in Second Appeal 109 was presented by Alagasinga. On the 10th of June 1918 the claim of 1st defendant was allowed and the attachment was raised, and on the 19th of August 1918 the plaint in the present second appeal was presented by the plaintiff.

It will be observed that both the plaints are more than 12 years from the date of the symbolical delivery of the plaintiff's share to Dikshitar, but the attachment by the plaintiff on the 3rd of July 1917 is within 12 years.

Now, as to the first point, reliance is placed by the appellant on the cases reported: in *Kocherlakota Venkatakristna Rou* v. *Vadrevu Venkappa* (10) and *Sri Radha Krishna Chandarji* v. *Ram Bahadur* (11). In the first case it was held that the effect of symbolical delivery was in the case of the judgment-debtor himself absolute; but where the judgment-debtor is not the party in possession, adversely to a third party (as here), delivery made in the absence of that third party and not personally to him cannot by itself affect his possession, nor amount to an ouster or dispossession of him and his possession will continue uninterrupted; but if he was present and the delivery takes place adversely to the claim of such third party, it may be equally operative as against him. It was contended that the present case is the case of a stranger resisting the suit, not of a stranger trying to recover as 1st defendant was not a party to the suit. In *Sri Radha Krishna Chandarji* v. *Ram Bahadur* (11) it was held that symbolical possesssion will avail and dispossess defendants sufficiently, because they were parties to the proceedings, in which it was ordered and given: *Juggobundhu Mukerjee* v. *Ram Chunder Bysack* (12), is affirmed. The case in *Tobeda Khotnum* v. *Tulsi Charan Das* (13), was also relied on. The learned Judges there say that the decisions show that symbolical possession does not in any way affect the possession of or give start to a fresh period of limitation against persons who are not parties to the suit or execution proceedings. The learned Judges refer to a Privy Council case, reported in *Sri Radha Krishna Chanderji* v. *Ram Bahadur* (11) where their Lordships say that:

"Symbolical possession is sufficient to interrupt adverse possession when the adverse possessor is a party to the execution proceedings, in which symbolical possession is given; as regards persons not so parties, only actual dispossession can interrupt their adverse possession."

This in my opinion is sufficient to dispose of the point, adversely to the appellant if we can assume that 1st defendant was no party to the execution proceedings.

A greater part, however, of the argument before us has been centred on the second point, viz., as to the effect of attachment, as interrupting adverse possession, there being no doubt, as already pointed

(10) [1904] 27 Mad. 262.

(11) [1918] 34 M. L. J. 97=23 M. L. T. 26=16 A. L. J. 33—7 L. W. 149—27 C. L. J. 191—22 C. W. N. 330=(1918) M. W. N. 163=20 Bom. L. R. 502=43 I. C. 268=4 Pat. L. W. 9 (P. C.).

(12) [1880] 5 Cal. 584=5 C L. R. 548 (F. B.).

(13) A. I. R. 1923 Cal. 82=36 C. L. J. 472.

out that on the date of the suit the period requisite to establish adverse possession had elapsed. It is said that there are two cases, neither of them reported in the authorized reports, on each side of the line. For the appellant it is frankly admitted that the case reported in *Seetharami Reddi* v. *Venku Reddi* (1) is against his position. There, the learned Judges distinctly and in so many words lay down that attachment could not have the effect of arresting adverse possession, by strangers holding adversely, when the properties were attached by the plaintiffs, as belonging to certain of the defendants in the case, against whom the strangers were holding. It is said that the case in *Pandiyan Pillai* v. *Vellayappa Rowther* (14) is diametrically opposed to this, and the head-note certainly gives some colour to this view. The learned Judges however dispose of the case in another manner. The decision in *Seetharami Reddi* v. *Venku Reddi* (1) was brought to their notice; but they merely remark:

"An old decision of this Court not reported in the authorized reports; namely, *Seetharami Reddi* v. *Venku Reddi* (1) supports Mr. Devadoss."

They preferred to dispose of the case on a different ground, namely:

"that a decision in a regular suit, instituted to contest the order in the claim proceedings, places the parties in status quo ante, either by vacating the order, made in the said execution proceedings, or by confirming it. The result is the plaintiff is directed not to interpose obstacles in carrying out the further steps necessary to reap the fruits of the attachment. Both the parties are bound by that pronouncement; consequently no question of interruption of possession or of its continuance despite the attachment arises."

So far from intending to overrule or disapprove of the decision in *Seetharami Reddi* v. *Venku Reddi* (1), it appears to me, from this last sentence, quoted from the judgment, that the learned Judges held that the question did not arise. In my opinion, therefore, as far as authorities have been brought to our notice, the case in *Seetharami Reddi* v. *Venku Reddi* (1) stands uncontradicted. It is a case that has stood over for 23 years, and it seems to me that it would be improper for us to decline to follow it, unless there was some very cogent reason for doing so.

Now, it has been constantly held that an adverse possession is a question of fact It has been argued for the appellant that the nature of an attachment is such, that on an attachment taking place, the Court receives the properties into its custody, and what this means may be seen by the form of attachment given in Appendix E, Form 24 of the Code of Civil Procedure. It only directs abstinence from transferring or charging the property by gift, sale, or otherwise during the continuance of the attachment. It certainly does not physically interrupt the possession of persons already on the property, and in my view it cannot be said even theoretically to do so. If it were allowed to interrupt any possession one can see that a wide door is open to fraud and oppression. The case in *Vasudeo Atmaram* v. *Eknath Balakrishna* (3) supports the appellants. That was a suit to establish the appellant's rights to sell the property in dispute, as that of the judgment-debtor's, and it was held that the appellant must prove that on the date of the attachment, which was subsequently raised, the judgment-debtor had a subsisting right to the property; and that the suit must therefore be tried, as if it were a suit for possession, by the judgment-debtor. The learned Judges add "So regarded, it is not the case here of the judgment-debtor having been dispossessed, or having discontinued possession while in possession of the property." The learned Judges there specifically rely on *Harishankar Jebhai* v. *Naran Karsan* (4) where the critical date is taken to be that of the order of 11th August 1908, which directed the removal of the attachment. That date corresponds to 10th June 1918 in the present case and is inclusive of the present point; and that date is more than 12 years from 30th March 1906. An old case in *Krishnama Rajah* v. *Narayanaswami Rajah* (15) lays down that the effect of an attachment does not change in any way the possession of the property so as to bring the case within the 12 years limitation.

A further point was taken, viz., that the suit as allowed by O. 21, R. 63, although called a suit, was in fact nothing but a continuation of the claim proceedings, and the appellant relied on *Krishnappa Chetty*

(14) [1917] 6 L. W. 588=42 I. C. 438=33 M. L. J. 316.

(15) 4 M.H.C. 281.

v. *Abdul Khader Sahib* (16). In that case the Privy Council decision in *Phul Kumari* v. *Ghanshyam Misra* (5) was referred to ; and in the opinion of Sadasiva Aiyar, J., such suits have not any of the essentials of original actions, but merely forms of appeal allowed by the Civil Procedure Code, to be brought in the guise of original suits." The Judgment of their Lordships has, however, been commented upon, by a Full Bench of this Court, in *Ramaswami Chettiar* v. *Mallappa Reddiar* (17), where Wallis, C. J., said :

" The Privy Council, no doubt, referred in one place to the suit under S. 283 to establish the right of the unsuccessful party to the claim petition, as an action of appeal and to the plaint in such a suit, as a plaint for review of a summary decision; but this language must be read, with reference to the question before them."

Oldfield, J., in the same case, points out that all their Lordships were concerned with was the question of Court-fees, in connexion with which the character of the relief asked for by the plaintiff would be decisive.

For these reasons I am of opinion that attachment does not interrupt adverse possession, or rather possession which is ripening into adverse possession. This second point also fails and we must give effect to the decision in *Seetharami Reddi* v. *Venku Reddi* (1) above quoted. I agree with my learned brother that there being, in my opinion, good and sufficient authority against the proposition that adverse possession can be interrupted by attachment, there is no necessity for reference to a Full Bench. Consequently the second appeal must be dismissed with costs.

Appeal dismissed.

(16) [1915] 38 Mad. 535=25 I. C. 11=26 M.L. J. 449.

(17) [1920] 43 Mad. 760=(1920) M.W.N. 572= 39 M.L.J. 350=28 M.L.T. 170=59 I.C. 947=12 L.W. 475 (F.B.).

★ A. I. R. 1926 Madras 46

SPENCER AND ODGERS, JJ.

Deivachila Aiyangar — Appellant — Plaintiff.

v.

Reghupathi Venkatachariar and *others*—Respondents—Defendants.

Appeal No. 175 of 1922, Decided on 5th February 1925, against the decree of the Sub-J., Tuticorin, in O. S. No. 42 of 1920.

(a) *Hindu Law—Alienation—Joint family—Father cannot bequeath by Will joint family property.*

Father cannot dispose of by Will joint family property; 43 *Mad.* 824. *Foll.* [P 47 C 1]

★ (b) *Hindu Law—Joint family—Father and son being coparceners former cannot appoint testamentary guardian for son for the coparcenary property.*

The appointment by a father of testamentary guardians for his son to manage properties with regard to which the father and son are coparceners is illegal ; 41, *Mad.* 561 (*F. B.*,)*Foll.* [P 47 C 2

★ (c) *Guardian and Ward — Mere fact of guardian acting along with others not authorized to deal with the property does not invalidate transaction.*

If a mother acted bona fide, in the capacity of the natural guardian of her son, any disposition made by her is not invalid, for the mere reason that other persons, who were not authorized to deal with the property, joined in the transaction. [P 47 C 2]

(d) *Guardian and Ward—Guardian should not permanently alienate immovable property to provide maintenance for person entitled to be maintained only for life—But such aliention is voidable only—Hindu Law— Guardianship.*

It is a breach of trust on the part of a guardian to make permanent alienations of immovable property, for the purpose of providing for the maintenance of a person who is only entitled to be maintained for her life-time, according to the law. But such alienation is voidable only and not void. 39 *All.* 61 and A. I. R. 1922 *Mad.* 112 *Foll.* [P 47 C 2]

T. Rangachariar, *A. Krishnaswami Aiyar*, *N. K. Thirumala Chariar* and *S. Rajagopalachariar*—for Appellant.

S. Varadachariar and *P. V. Krishnaswami Aiyar*—for Respondents.

Spencer, J.—Plaintiff is the appellant. He brought this suit for recovery of ancestral property that had come into possession of his step mother's brother's family through her Will,dated the 9th December 1903. The plaintiff's father died on 30th July 1900 while plaintiff was a minor. The plaintiff's mother, Nachiar Ammal, was his father's junior wife and Chinnappen Janaki was the name of the senior wife. The 1st defendant and the 3rd defendant's husband are brothers of Chinnappen Janaki, the plaintiff's stepmother. The 2nd defendant is the 1st defendant's son. On 23rd July 1900 the plaintiff's father executed a written Will, appointing his junior wife, Nachiar Ammal, his sister Alagu Janaki and his aunt's son, Ranga Aiyangar, as managers

of his properties after his death and guardians of the minor plaintiff. In case of difference of opinion among them, the decision of Nachiar Ammal was to be final. There was a bequest of 1 acre 63 cents, in favour of Ranga Aiyangar, and there was also a provision of 6 kottas of paddy and Rs. 25 cash, per year, for the maintenance of the testator's first wife, Chinnappen Janaki, with the provision that if she did not accept this allotment, she would have Rs. 1,200 down in cash. The plaintiff's first witness, who is a purohit and also a paternal relation of the plaintiff, deposed that after the plaintiff's father died, Chinnappen Janaki and her brother came and obstructed the performance of the funeral ceremonies and refused to let the corpse be removed from the house, until she was given some lands for maintenance, in lieu of the paddy and cash provided in the Will. This evidence, as to coercion of the plaintiff's guardian, given by this witness, was not rebutted by anything for defendants. On the 4th August 1900 the three guardians, appointed under the Will, entered into an agreement, in which Chinnappen Janaki joined (Ex. II), which contains a statement that the plaintiff's father, on his death bed, revoked his written Will and orally directed that nanja lands worth Rs. 2,000 and Rs. 1,200 in cash, for providing a residence and other nanja lands specified in the schedule, in lieu of the sum of Rs. 1,200, should be given to Chinnappen Janaki for maintenance, with all rights of disposal. After this, the senior widow, Chinnappen Janaki, brought a suit (O. S. No. 150 of 1902) for a declaration of her right and for transfer of the patta belonging to the properties allotted to her and obtained a decree ex-parte as the plaintiff's guardians did not defend it. The plaintiff's stepmother died on 28th December 1903, after willing away the property, in favour of her brothers. Now, plaintiff has come of age and sues for recovery of the joint family property, which has been improperly alienated. In the lower Courts, his suit was dismissed.

The written will of the plaintiff's father was clearly invalid, in so far as it purported to dispose of by will joint family property, [vide *Subbarami Reddi* v. *Ramamma* (1)] and the appointment under it of testamentary guardians, to manage the properties of the plaintiff (a minor coparcener) was also illegal [vide *Chidambaram Pillai* v. *Rangasami Naicker* (2).] The alleged oral Will, were it true, was also invalid, for the same reason that the plaintiff's father had no power to dispose of immovable property, belonging to the joint family after his death.

The learned Subordinate Judge found, under Issue VI (a), that the properties covered by Ex. II are joint family properties and this finding has not been challenged. He upheld the alienation under Ex. II, both as being a proper provision for maintenance and as being a family settlement of a disputed claim.

The appellant's pleader argues that the plaintiff's mother, acting as his natural guardian, had no power to delegate her authority by taking in two other persons to act with her. If she acted bona fide in the capacity of the natural guardian of her son I should not be inclined to hold that any disposition made by her was invalid for the mere reason that other persons who were not authorized to deal with the property joined in the transaction, but the more important question to be decided is whether the alienation of joint family properties can be justified, under the circumstances of this case. Regarding it, as an act of a guardian of a minor, against whom a claim for maintenance had been preferred, was it a prudent act to buy off an uncertain claim for future maintenance for life, by making a gift of ancestral property in perpetuity ? Chinnappen Janki might have died immediately after receiving the gift ; in fact she lived only for three years more, by which time she had parted with her rights in the property. Prima facie, I consider that it was a breach of trust, on the part of the plaintiff's guardian, to make permanent alienations of immovable property, for the purpose of providing for the maintenance of a person who was only entitled to be maintained only for her lifetime, according to the Hindu Law.

In Lowin's Law of Trusts, 12th Edition page 710, the general principle is stated to be that, if a trustee does, without suit, what would have been ordered by the Court and what is compellable by suit, his

(1) [1920] 43 Mad. 824=12 L. W. 249=59 I. C. 681=(1920) M. W. N. 529.

(2) [1918] 41 Mad. 561=7 L. W. 454=34 M. L. J. 381=23 M. L. T. 266=45 I. C 905=(1918) M. W. N. 265 (F.B.).

act is valid. If the plaintiff's mother had been appointed guardian by the Court, under the Guardians and Wards Act, she would have had to apply under S. 34, clause (e), for appropriating such a portion of the income of the ward's property, as the Court might direct, towards the maintenance of the persons dependent on him. She would have had no power to transfer any part of the immovable property, without the previous permission of the Court (vide S. 9) and no Court would have given permission, for a permanent transfer of immovable property, without the strongest reasons being forthcoming. The obligation of the minor to maintain his father's senior widow was only co-extensive with the widow's lifetime, and the power of the guardian to alienate the family property must also be regarded as co-extensive with that obligation.

It is argued that the plaintiff's guardian's act can be justified, as having saved the plaintiff from being sued for maintenance. As a matter of fact, it did not prevent the senior widow, from afterwards suing the plaintiff, and if no provision had been made, such as that contained in Ex. II and if the widow had sued for maintenance, it is impossible to believe that any Court would have decreed a permanent transfer of ancestral properties, to meet a claim for maintenance for life.

In my judgment, therefore, the permanent alienation, made under Ex. II, was wholly unjustifiable and must now be set aside. The action of the plaintiff's guardians in not defending O. S. No. 150 of 190 must, in this view of the case, be regarded as grossly negligent.

The appeal is, therefore, allowed and the plaintiff will be given a decree as prayed for in his plaint, except as to his claim for mesne profits, from 20th December 1903. As regards mesne profits, the alienation by the plaintiff's guardian being voidable as explained in *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (3) and *Subba Goundan* v. *Krishnamachari*(4) and not having been repudiated before the institution of this suit, I agree with my learned brother, in thinking that the plaintiff is entitled to mesne profits, at the rate found by the lower Court to be fair, from the date of the suit only and the decree will provide accordingly. The decision in *Suraj Ranjan Choudhury* v. *Premachand Choudhury* (5) to which our attention was drawn at the eleventh hour, is not in point. There is no doubt that a plaintiff could not under any circumstances recover mesne profits for more than 3 years before suit, as that remedy would be barred by Art. 109, Limitation Act. That is all that the case is an authority for. As each side has succeeded in part, each will bear his own costs in the appeal.

Odgers, J.—I agree. My learned brother has dealt with the reasons, why the first ground on which the lower Subordinate Judge supported this claim, namely, that it was a proper provision for maintenance, cannot be supported. I am also of opinion that the second ground, namely, that it was a family settlement, or as it was well stated, as being the price of family peace, equally cannot be supported. That the senior widow had a claim for maintenance is of course not disputed. The only question was, as to its quantum ; and, in my opinion, it cannot be said that it was a bona-fide buying off, or a settlement of family dispute, when that was the only question.

After our judgment in this appeal had been pronounced, a discussion arose, regarding the mesne profits, which ought to be allowed to the plaintiff, who has succeeded in the appeal before us.

It is contended for the appellant that mesne profits should be allowed, from the date of the alienation, by the plaintiff's guardian, which we have held, in our judgment to be wholly unjustifiable and have accordingly set aside. On the other hand, the respondent contends that the alienation being only voidable and not void, mesne profits can only be awarded, from the date when the alienation is set aside, i. e., by reference back, to the date of plaint. The question, therefore, arises as to whether the alienation evidenced by Ex. II is void ab initio, or only voidable. There is no doubt on the authorities that the alienation by a Hindu widow of her husband's estate, as against a reversioner, is good until the sale is set aside. For instances, in *Rangasami Gounden* v. *Nachi-*

(3) [1917] 39 All. 61=35 I. C. 475=14 A. L. J. 1161.

(4) A. I. R. 1922 Mad. 112=45 Mad. 449=42 M.L. J. 372=15 M. L. W. 537=30 M. L. T. 217=(1922) M. W. N. 269.

(5) [1918] 22 C. W. N. 263=43 I. C. 781=27 C. L. J. 257.

appa Gounden (6), it was held that "when the alienation of the whole or part of the estate is to be supported, on the ground of necesssity, the consent of such reversioners, as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof, which, if not rebutted by contrary proof, will validate the transaction as a right and proper one." See also *Bijoy Gopal Mukerji* v. *Krishna Mahishi Devi* (7), where their Lordship say referring to the alienation of the Hindu widow:—" Her alienation is not, therefore, absolutely void, but it is prima facie voidable, at the election of the reversionary heir." That being the state of the law, with regard to the alienation of a deceased husband's estate by a Hindu widow, does it make any difference, if the alienation is not by a Hindu widow as such, but by her as guardian for her minor son, who takes it as the estate of the deceased father? Apparently, there is no difference in principle and it has been held by the Calcutta High Court in *Krishna Dhone* v. *Bhagaban Chandra* (8), that a sale of a minor's property in fraud of his rights is only voidable and is valid till avoided. After the argument was concluded, we were referred by Mr. Bashyam, to a statement in *Saraj Ranjan Choudhury* v. *Premchand Choudhury* (5). That was a case of limitation, where the question arose, whether Art. 109 of the Limitation Act was applicable to a suit for mesne profits, where possession had been obtained by the defendant, under a sale subsequently set aside. The appeal was originally heard by Doss and Richardson, JJ., who differed in opinion. Doss, J., at p. 267 says: "It is only when the sale is finally set aside by a suit, or the decree is finally reversed on appeal, that the possession by virtue of the ultimate judicial declaration becomes wrongful not merely from the time, when such declaration is pronounced, but ab initio, i. e., from the time, the unsuccessful party or the purchaser was installed into possession; and he held that the plaintiff could recover mesne profits, for the whole time during which the defendant had been in possession. Richardson, J. differed, holding that the claim for mesne profits for more than 3 years before suit was barred. On the hearing of the Letters Patent Appeal by three Judges the opinion of Richardson, J. prevailed. If therefore the dictum of Doss, J. is treated, as applicable to the facts of the present case, of which I am not convinced, it would appear to have been overruled. In *Subba Goundan* v. *Krishnamachari* (3) there was a suit instituted by the coparceners, to set aside a sale of ancestral, immovable property by the manager, on the ground that the sale was not for family necessity. Here again it was said by the learned Judges (Kumaraswami Sastri and Devadoss, JJ.) that in the case of sales by a father or managing member of a joint family, for alleged necessity, the sale will be good till avoided as it is open to the other co-parceners to affirm the transaction. The learned Judge there followed the ruling in *Bhirgu Nath Chaube* v. *Narsingh Tiwari* (3) and limited the claim for mesne profits to the period from the date of suit, as there was repudiation before the suit. I do not think that the fact that the plaintiff could not, until he had attained majority, elect to either affirm or disaffirm the transaction, can make any difference in principle. By reason of his disability the law gives him no title to assert his legal rights until his disability is at an end. The learned vakil for the plaintiff referred to a decision of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (9), but nothing can be gleaned from the judgment of their Lordships of the Privy Council in that case, as to the period, for which mesne profits should be allowed. Their Lordships held that as the sale deeds in question were invalid as such the claim for mesne profits was well founded and the amount would be, as ascertained in execution proceedings. The decision, therefore, does not affect the present case. On these considerations and on the state of the authorities, I am of opinion that in this case the mesne profits should be allowed, from the date of suit and I would direct accordingly.

Appeal allowed.

(6) [1919] 42 Mad. 523=46 I. A. 72=36 M. L. J. 493=17 A. L. J. 536=29 C. L. J. 539=21 B. L. R. 640=23 C. W. N. 777=(1919) M. W. N.262=26 M. L. T. 5=50 I. C. 498=10 L. W.105 (P. C.).

(7) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424=5 C. L. J. 334=9 Bom. L. R. 602=2 M. L. T. 133=17 M. L. J. 154=4 A. L. J. 329 (P. C.).

(8) [1916] 34 I. C. 188.

(9) [1908] 35 Cal. 420=35 I. A. 48=10 Bom. L. R. 230=12 C. W. N. 393=7 C. L. J. 335=5 A. L. J. 184=18 M. L. J. 100=3 M. L. T. 344=14 Bur. L. R. 49 (P. C.).

★ A. I. R. 1926 Madras 50

VENKATASUBBA RAO, J.

Periamurugappa Asari and *another*—Defendants—Appellants.

v.

Manicka Chetty—Plaintiff—Respondent.

Second Appeals Nos. 1463 and 1754 of 1922, Decided on 5th November 1924, against the decree of the Sub.-J., Cuddalore, in A. S. No. 73 of 1921.

★ (a) *T. P. Act, S. 52—Decree obtained collusively—S. 52 does not apply.*

The fact that the decree was made in pursuance of a compromise does not exclude the application of S. 52, provided however that such compromise is not tainted by fraud or collusion. A suit may be collusive even at its very inception or a decree may be obtained by collusion in a suit which was honestly begun. [P. 50, C. 2]

★ (b) *T. P. Act, S. 52—Misdescription of properties—Effect of.*

Misdescription of the properties in the suit will make S. 52 inapplicable : 15 *C. L. J.* 391, *Foll.* [P. 51, C. 1]

C. Padmanabha Aiyangar and *T. D. Srinivasachariar*—for Appellants.

K. Bashyam Aiyangar—for Respondent.

Judgment :—[After dealing with a different appeal not necessary for the report the judgment proceeded :—] There is a further question that arises in the other second appeal. O. S. No. 480 of 1913 had previously been filed by the carpenters, that is, the present defendants. In that suit they claimed S. No. 32 on the ground that it was carpenter's inam and asked that the defendants in that suit should be directed to give up possession of it. There were four defendants and the 1st defendant, Arunachallam Chetty, was interested in Plots 1 and 2. That suit was filed on 27th August 1913. In execution of a decree against Arunachallam Chetty, these plots were sold and Thinnappa Chetty purchased them in Court auction on the 10th September 1914. Although the interest of Arunachallam Chetty passed to Thinnappa Chetty the latter was not brought on the record of that suit and a decree was passed against the original defendants including Arunachallam Chetty on 16th November 1915.

The contention of the appellants is that the alienation in favour of Thinnappa Chetty was made pendente lite and his purchase is therefore affected under S. 52 of the Transfer of Property Act by lis pendens. Both the District Munsif and the Subordinate Judge have overruled this contention but on different grounds. The District Munsif has held that the doctrine of lis pendens has no application, because the decision in the previous suit was the result of a collusive agreement entered into between the parties to that suit. I cannot agree with the view which the Subordinate Judge has taken, to which I shall presently refer. He has not given any finding on the point whether there was collusion. I have therefore examined the evidence myself under S. 103, and O. 41, R. 24, Civil Procedure Code, and I have come to the conclusion that the District Munsif's finding is correct. If it is proved that the carpenters and Arunachallam Chetty, the plaintiffs and the 1st defendant respectively in that suit, entered into an agreement for the purpose of defeating the rights of the auction purchaser, Thinnappa Chetty, and that in pursuance of that agreement a decree was allowed to be passed in favour of the carpenters these facts would be sufficient to establish collusion which would render the rule of lis pendens inapplicable. The fact that the decree was made in pursuance of a compromise does not exclude the application of S.52, provided, however, that such compromise is not tainted by fraud or collusion : *Annamalai Chettiar* v. *Malayandi Appaya Naick* (1). A suit may be collusive even at its very inception or a decree may be obtained by collusion in a suit which was honestly begun. *Krishnappa* v. *Shivappa* (2), *Seth Hukum Chand* v. *Raja Ram Bahadur Sing* (3) and *Tangor Majhi* v. *Jaladhar Deari* (4). In this case I am satisfied that during the progress of the suit, which was honestly instituted, the parties entered into a collusive agreement with the express object of defeating the rights of the auction purchaser at the Court sale. In paragraphs 26 and 30 of the Munsif's judgment, he deals with this point fully and I entirely agree with the reasons which he gives for his conclusion. The evidence of P. W. 2 fully supports the view of the District Munsif and he was right in acting upon it. The circumstances and probabilities also show that the decree was the result of a col-

(1) [1906] 29 Mad. 426=1 M. L. T. 145=16 M. L. J. 372 (F.B.).
(2) [1907] 31 Bom. 393=9 Bom. L. R. 530.
(3) [1919] 4 Pat. L. J. 580=53 I. C. 333=1919 P. H. C. C. 305.
(4) [1909] 14 C. W. N. 322=5 I. C. 621.

lusion. It is unnecessary to go into this matter more fully.

I have said that the Subordinate Judge also has held on the question of lis pendens against the defendants but for different reasons. In his opinion the subject-matter of the previous suit and the present suit is not identical and he has on that ground held that S. 52 has no application. I do not think that this view can be supported. The contest in both the suits related to the same land. It was described as S. No. 32. The carpenters attempted in the previous suit to get possession of what is known S. No. 32—of its identity there can be no doubt—alleging that it was carpenter's inam. In the present suit again the dispute was about this very plot, and the question had to be determined whether it was or was not carpenter's inam. It is doubtless true that in the previous case no plan was filed and no boundaries were given. But it is reasonably certain that the claim was put forward in regard to the plot now in dispute. The theerva was given as Rs. 0-13-0 and the extent was given as 0·26. This description applies to the suit land. I do not think that there was in the previous suit such misdescription as to render the doctrine of lis pendens inapplicable : *Lokenath* v. *Achitananda* (5).

As, however, I have held that Thinnappa Chetty is not bound by lis pendens for the reasons given by the Munsif, S. A. No. 1754 of 1922 fails and is dismissed with costs.

Appeal dismissed.

(5) [1909] 15 C. L. J. 391=2 I. C. 85.

★ A. I. R. 1926 Madras 51

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

Salakshi Ammal — Plaintiff—Appellant.

v.

Doraimanikka Nadan and *others*—Defendants 1 to 5—Respondents.

Appeal No. 324 of 1923, Decided on the 5th March 1925, against the decree of the Sub.-J. of Tanjore in O. S. No. 78 of 1922.

(a) *Will—Construction—Charitable trust—Two sons appointed as trustees—Restriction on alienation of trust properties—Trustee allowed to enjoy properties hereditarily—Trustees get as joint trustees.*

Where Will provided as follows in respect to a trust created by it : the lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons or their heirs by means of sale, otti, hypothecation, security, partition, etc. but they should enjoy them hereditarily and conduct the above-mentioned charities."

Held : there was nothing to show that testator intended his sons to take the office of trustee as tenants-in-common. On the contrary, the words in the will that they should not partition or sell the properties but they should enjoy them hereditarily suggest that he wanted them to take them with all the incidents of joint family property. [P. 51, C. 2, P. 52, C. 1]

★ (b) *Hindu Law—Trust by father of his self-acquired property—Sons appointed trustees—Sons become joint trustees as they would become joint tenants in case of gift.*

When a father makes a gift of or bequeaths self-acquired property of his to his children who are members of a joint family, the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. [A. I. R. 1923 *P. C.* 160, *Rel.*] There is very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. In the case of properties given to them absolutely, of course, they will have full powers of alienation ; in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in property or in the trust must be the same, viz., joint estate.

[P. 51, C. 2, P. 52, C. 1, P. 54, C. 1]

T. M. Krishnaswami Aiyar—for Appellant.

A. Krishnaswami Aiyar and *P. S. Chandrasekhara Aiyar* — for Respondents.

Kumaraswami Sastri, J.— This appeal arises out of a suit which relates to the trusteeship of a charity founded under the Will of one Sappanimuthu Nadan who died leaving two sons. The material portion of the will, so far as it relates to the trust properties, runs as follows :

" The lands mentioned herein as relating to the said charities should not in any way be alienated by the above-mentioned two persons or their heirs by means of sale, otti, hypothecation, security, partition, etc., but they should enjoy them hereditarily and conduct the above-mentioned charities."

After the death of the testator his two sons were conducting the charities. One of the sons died leaving a minor son who died leaving the plaintiff, his mother, as his heir. This suit is filed by

the plaintiff who was the widow of one of the deceased sons and whose right is as mother of her son for a declaration that she is jointly entitled as trustee to conduct the management of these properties.

The defence is that on the death of her son, the 1st defendant, who was the only male member of the undivided family, was entitled to the office and that plaintiff has no right to succession.

The Subordinate Judge dismissed the suit on the preliminary ground that the plaintiff had no right as the office was a joint office and that the 1st defendant was entitled on the death of his brother and brother's son. After the testator's death there was a partition deed executed between the two sons which it is necessary to consider before dealing with the contentions raised. This deed refers to properties, which they got under the Will, and so far as the trust properties are concerned the only reference to them is in Cl. 6 which runs as follows :

" In respect of the properties mentioned in the D Schedule we shall act in common as stated in the Will. "

The question is, having regard to the terms of the Will, whether the two sons of the testator took the trusteeship and the management as members of a joint family or whether each of them took separate interests in it as tenant-in-common. So far as gifts by a father of self-acquired property to his sons by Will are concerned, the decision of this Court are to the effect that in the absence of a contrary intention expressed or implied from the terms of the Will the sons must be presumed to take the property as joint tenants. The reason is that in the case of a grant to two persons who form members of a joint family the ordinary presumption is that the grant to them is as coparceners. I may refer to *Nagalingam Pillai* v. *Ramachandra Tevar* (1), *Ethirajulu Naidu* v. *Mukunthu Naidu* (2), *Venkatramiah Pantulu* v. *Subramaniam Pillai* (3), *Indoji Jithaji* v. *Kothapilli Ramacharlu* (4) and *Rajah of Ramnad* v. *Sundara Pandiaswami Tevar* (5). There is no doubt a conflict of authority between the various High Courts on this question. The view taken in Allahabad and in Bombay is that, where property is given to persons without stating what interest they are to take, they are to take as tenants-in-common. This question as to the presumption to be raised in cases of gifts by a father to his sons recently came before the Privy Council in the case of *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (6) and their Lordships state the rulings of the various High Courts. As regards Madras authorities this is what their Lordships say : " In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed shall be ancestral or self-acquired on the principle of *huges es dasi huges es disponeri* and that unless there is an expression of his wish that it would be deemed self-acquired, it is ancestral. The Privy Council summarized the Madras decision as stating that, where the father does not state that the sons shall take the property as if it was self-acquired property of the sons, it is to be deemed to be ancestral in their hands ; or, in other words, that, unless a tenancy-in-common can be inferred from the grant, the presumption is that they are joint tenants. I do not think that on this state of the authorities I can go behind the decisions though my attention has been drawn to a recent decision in O. S. No. 56 of 1922 where Mr. Justice Ramesam seems to doubt the correctness of *Nagalingam Pillai* v. *Ramachandra Tevar* (1). It was an obiter dictum. So far as Madras is concerned the question cannot be set at rest except by a decision of the Privy Council. The question is how far the doctrine in these cases which relates to property bequeathed by a father to his sons would apply to cases where the father creates a trust and appoints his sons as trustees with hereditary rights. On principle I can see very little difference between the conferring of the office of trustee as regards a trust founded by the father by dedication of properties and the gift of properties to the sons. No authority has been cited which creates a difference merely by reason of the difference in the powers of the donees. In the case of properties given to them absolutely

(1) [1901] 24 Mad. 429=11 M. L. J. 210.
(2) [1905] 28 Mad. 363=15 M. L. J. 299.
(3) [1912] 16 M. L. T. 489= 26 I. C. 393.
(4) [1919] 10 L. W. 498=54 I. C. 146.
(5) [1914] 27 M. L. J. 694=27 I. C. 283.

(6) A.I.R. 1923 P. C. 160=45 All. 596=50 I. A. 265=26 O. C. 257=(1923) M. W. N. 591=21 A. L. J. 777=10 O. L. J. 513=33 M. L. T. 355 (P. C.).

of course they will have full powers of alienation; in the case of a trust they would have such powers as the law gives the trustee. The nature of the estate taken either in property or in the trust must in my opinion be the same. And I may also say that in the case of a trust the leaning of English authorities is in favour of joint tenancy. Trustees are treated as joint tenants with rights of survivorship. This is the principle enunciated in the Trust Act. So far as the present Will is concerned, reading the Will as a whole, I find there is nothing to show that that testator intended his sons to take the office of trustee as tenants-in-common. On the contrary, the words in the Will that they should not partition, or sell the properties, but they should enjoy them hereditarily suggest that he wanted them to take them with all the incidents of joint family property.

As regards the partition it seems to me that the two brothers when they divided did not intend to divide the office: they expressly leave the office to be controlled by the Will and, if they wanted to divide the office to the extent to which the law allows a division, they would certainly have fixed some turns of management, each brother managing it by turns. The question as to what the rights and liabilities of the brothers or their heirs would have been had there been such a division of management is not free from difficulty. But it is unnecessary for us to go into the question, because in the present case there has not been such a division and we are to look to the Will to see what their rights are. Returning to the Will, they take the right to management as joint tenants. There has been no partition between the brothers of this office, nor is there any suggestion in the pleadings that after the death of one of the brothers there has been such a severance, either by conduct or otherwise, between the widow and the 1st defendant, the surviving brother. It is therefore unnecessary to go into the question whether *Minakshi Achi* v. *Somasundaram Pillai* (7), which has been referred to by Mr. T. M. Krishnaswami Aiyar, rightly lays down the law if there was a partition. As there has been no partition of the office, and as the 1st defendant is the sole surviving male member of the family, I think the plaintiff has no right to manage the property along with the 1st defendant. The right survives to him alone. In the view I take the learned Subordinate Judge was right in dismissing the suit. The appeal fails and is dismissed with costs.

(7) [1920] 44 Mad. 205=39 M. L. J. 403.

Krishnan, J.—This appeal refers to a charitable trust founded by one Sappanimuthu Nadar. The trust has been created by a Will which has been filed in the case as Ex. A. Under that will he made his two sons, who were the only other members of the joint family of himself and his sons, the trustees of the trust. The words "creating the trust" are cited in the judgment of my learned brother just now delivered and I need not refer to that again. There is an express provision there that the properties are not to be alienated or even partitioned but that the two brothers were to take the properties jointly and enjoy them jointly and carry out the provisions of that trust which are set out. Subsequent to the death of Sappanimuthu Nadar there was a partition between the two brothers, and that partition is evidenced by Ex. B which has also been filed in the case. One of the brothers Kandaswami Nadar died subsequently leaving a minor son called Rajappa Nadar. He also died and the plaintiff Salakshi Ammal who is his mother and the widow of Kandaswami Nadar succeeded to a woman's estate in the properties which had fallen to the share of Kandaswami. She has brought this suit to have it declared that she was entitled jointly with the 1st defendant, the surviving brother, to manage this trust estate. The Subordinate Judge before whom the case came on for hearing had dismissed the suit without taking any evidence except the two documents already referred to, Exs. A and B. He has held that the 1st defendant is the sole surviving trustee now and that the plaintiff has no right to manage the trust. The plaintiff has appealed to us.

It has been argued before us very strenuously by Mr. T. M. Krishnaswami Aiyar that this decision is erroneous, that the right of trusteeship was vested in the brothers as tenants-in-common and that on the death of one of the brothers his right passed to his heirs, first to his son and then to that son's mother, the plaintiff. It is that question we have to consider in this appeal.

The partition deed, Ex. B, which has been referred to, has really no bearing on the case : because, when partitioning the family properties between the two brothers by Ex. B, they expressly reserved the trust properties from the partition, for they say in para. 6 " in respect of the charity properties mentioned in the D schedule, (that is the charity properties dealt with in the will), we shall act in common as stated in the will." So that as far as the partition deed was concerned, the arrangement in the will was left intact although the parties divided their family estate otherwise. For the disposal of this case therefore we have only to look to the will and see what arrangement has been made under the will for the purpose of carrying on the trust after the death of one of the persons named in the trust. The question therefore whether *Minakshi Achi* v. *Somasundaram Pillai* (7) is rightly decided or not is not before us at all. It would have been before us if the two brothers had attempted by their partition deed to divide the trust office or made some arrangement regarding it between themselves. Such a thing not having been done, we need not consider the question as to whether a trust office is partible at all between the trustees. Turning now to the wording of the will, it seems to me quite clear that on the words of the will the two brothers were constituted trustees of this charity as joint tenants and not as tenants-in-common as argued by Mr. T.M. Krishnaswami Aiyar. The ordinary presumption as regards trustees is that they are joint tenants : for, both under the English Law and under S. 44 of the Indian Trusts Act, on the death of one trustee all the rights of the trustees rest in the surviving trustees. As pointed out by my learned brother, the cases that he has referred to show that in Madras the view is taken that, when a father makes a gift of or bequeaths self-acquired property of his to his children who are members of a joint family, the ordinary presumption is that they take that property as joint tenants and not as tenants-in-common. It was suggested that this view was not a correct view but it has been followed in so many cases that until the Privy Council decide to the contary I am inclined to think that we should follow that view. It is true that Mr. Justice Ramesam has expressed doubt about the correctness of the ruling in *Nagalingam Pillai* v. *Ramachandra Tevar* (1) in his judgment in O. S A. No. 56 of 1922 but that is not a sufficient basis for us to refer the question to a Full Bench as after all that doubt is expressed as an obiter dictum. Assuming then that in the case of a gift by a Hindu father, who has sons who are members of a joint family, the presumption will be that the property is taken by the sons jointly, the presumption will be all the greater in the case of trust property as trustees are ordinarily to be treated as joint tenants. Here in this will it is clear that the author of the trust, the father, intended that the charity property should be kept intact and be enjoyed jointly by the trustees and their heirs. In these circumstances, there is no difficulty in holding that the rule of succession as regards joint property in a Hindu family must apply, and that when one trustee dies the members of the joint family will take the trusteeship according to the law of survivorship. That will exclude the claim put forward by the plaintiff who is only a female member of the joint family. I therefore agree with my learned brother in thinking that the Subordinate Judge was right in the view he has taken of this case and that the plaintiff's appeal fails and must be dismissed with costs.

Appeal dismissed.

★ A. I. R. 1926 Madras 54

DEVADOSS AND WALLACE, JJ.

S. Kambhotlu—Plaintiff—Appellant.

v.

Ashreef Hussain—Defendant — Respondent.

Second Appeal No. 81 of 1925, Decided on 15th April 1925, against the decree of the Addl. Sub.-J., Bezwada, in A.S. Nos. 89 and 91 of 1923.

★ *Tort—Damages—Police officer not receiving a complaint made to him is not liable in damages.*

Though a police officer is bound to receive a complaint when it is preferred to him or where the commission of an offence is reported to him orally he is bound to take down the complaint, his non-compliance with the duty imposed upon him gives no cause of action to the complainant against him. The non-discharge of a public duty by a public servant does not give a right of action in damages to any member of the public.

[P 55 C 1]

G. Lakshmanna for *V. Subramaniam*—for Appellant.

Devadoss, J.—The plaintiff sues the 1st defendant for damages for not making proper arrangements for receiving his complaint of theft. The point raised in the second appeal is that the lower Court erred in not holding that the plaintiff had a cause of action against the 1st defendant. The plaintiff, a High Court Vakil, went to complain of a case of theft and the allegation is that his complaint was not received by the policeman in his station as they were prohibited from receiving any complaint by the 1st defendant who is the respondent in the second appeal. Granting the facts to be correct, the question is whether the plaintiff has a cause of action against the 1st defendant. Mr. Lakshmanna contends that the police officer is bound to take down the report of a case made by a member of the public and, he not having received the complaint preferred by the plaintiff, is liable in damages to the plaintiff. No doubt a police officer is bound to receive a complaint when it is preferred to him or where the commission of an offence is reported to him orally he is bound to take down the complaint. But the question is whether his non-compliance with the duty imposed upon him gives a cause of action to the plaintiff. It cannot be said that the plaintiff has suffered any damage by the action of the defendant. If the defendant has not performed his duty as a public servant, he is liable to be dealt with by his superior officers for neglect of duty. But that would not give cause of action to the plaintiff to sue the defendant for damages because there is no duty on the part of the defendant to do anything in respect of the plaintiff. The non-discharge of a public duty by a public servant does not give a right of action in damages to any member of the public. Mr. Lakshmanna's contention is that inasmuch as his client had lost property by theft and as his case was not inquired into he has suffered damage. It is difficult to see what damage he could have suffered by a case of theft not being inquired into. The cases relied upon by him have no application to the present case. If a Sheriff's officer or an Amin of a civil Court does not arrest a judgment-debtor and allows him to escape, he may be liable in damages, for he fails to do something which he is required by law to do for the benefit of the plaintiff who is interested in arresting the judgment-debtor. No such duty is cast upon a police officer with regard to taking down complaints of offences. The general statement that for a breach of public duty an action would lie in damages is not supported by any authority which we can follow. We hold that the plaintiff had no cause of action against the 1st defendant even if the plaintiff had gone to him to complain of a case of theft and the defendant refused to receive the complaint. The second appeal is dismissed.

Appeal dismissed.

★ A. I. R. 1926 Madras 55

COUTTS-TROTTER, C. J. AND KRISHNAN, J.

(*Sreemat Tirumala Tirupati Sreemat*) *Prativadi Bhayankaram Venkatacharyulu Ayyavarlam Garu* and *others*—Appellants.

v.

Nandi Vada Venkatasubba Rao and *others*—Respondents

Appeal No. 168 of 1922 and Second Appeals Nos. 623 to 625 of 1921, Decided on 21st January 1925, against the decree of the Sub. J., of Masulipatam in O.S. No. 26 of 1918.

★ (*a*) *T. P. Act, S. 55—Agraharamdar granting kudivaram rights in consideration of rent and premium — Promissory note executed for premium—Grant amounts to lease and no charge is created for premium.*

When the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he has got no charge on the leasehold right he has so created for the premium so payable.

The owners of an Agraharam village owning both the melvaram and the kudivaram rights made a grant of the kudivaram right in consideration of a rent and also a premium or nazarana. The grant was in perpetuity. The grantee gave a promissory note for the amount o premium.

Held : the grant amounted to a lease and not sale and no charge was therefore created for the amount of premium. [P. 56 C, 1

(*b*) *T. P. Act—Act is exhaustive.*

The Act is intended to be exhaustive and Courts are not at liberty to follow English Common Law rules. [P. 56 C. 2]

K. Bhashyam Aiyangar—for Appellants.

V. Krishna Mohan and *V. Ramadass*—for Respondents.

Coutts-Trotter, C.J.—In this case the plaintiffs are the owners of an Agraharam village in the sense that they own both the melvaram and the kudivaram rights. In the year 1909 there was a grant of the kudivaram right to the 1st and 2nd defendants and in consideration for that they promised to pay a rent and they also promised to pay what is described as nazarana to the landlords and that may be roughly described as a premium for the granting of the kudivaram which no doubt was in perpetuity. They gave a promissory note, for the amount and the question is whether the debt—because it undoubtedly was a debt—was a mere personal debt affecting the makers of the promissory note or whether it is a charge on the land. In the view that we take of this case the further question, which arose at the trial, viz., whether the 3rd and 4th Defendants were bona fide purchasers for value without notice, does not arise. It is no doubt true that there is a direct decision in England *Shepheard* v. *Beetham* (1), a decision of Malins, V. C., which treats a premium as creating a lien upon the leasehold premises. Whether that decision is correct or not we are not concerned to enquire although it does seem certainly an astounding result. But, in our opinion, in India the matter is entirely regulated by statute. There is a fundamental distinction under the Transfer of Property Act between a transfer of immovable property and a transfer of the right to the enjoyment of immoveable property ; and a lease is defind by S. 105 of the Transfer of Property Act as a transfer of a right to enjoy immovable property made for a certain time, express or implied, or in perpetuity in consideration of the price paid or promised or of money, etc. It is perfectly clear, therefore, that the Transfer of Property Act regards a lease in perpetuity as merely a transfer of the right to enjoy property. Does it or does it not create a charge upon the land ? The answer is that the only charge, valid in Indian Law, on landed property, is to be found in the section of the Act which creates such a charge and S. 55 is obvivously confined to cases which deal not merely with the transfer of the mere right of enjoyment but with the transfer of the property itself, for any other lien or charge, the Act makes no provision at all. In our opinion we are bound to hold that we cannot but regard the Act as intended to be exhaustive and that we are not at liberty to follow English common law rules. On this ground we think the appeal fails and must be dismissed with costs. The Second Appeals (Nos. 623 of 1921, 624 of 1921 and 625 of 1921) will follow and are also dismissed with costs.

Krishnan, J.—The question that arises for our decision in this case is, whether, when the owner of a land grants a perpetual lease of it in consideration of rent to be paid, as well as a premium, he has got a charge on the leasehold right he has so created for the premium so payable.

The promissory note in this case was executed for such a premium and it is now sought in appeal before us to be enforced not against the makers of the note nor against the persons who took the lease but against certain third parties who have now become transferees or assignees of the lease right. Against them the amount of the note could be claimed if at all, only if there is a charge created in favour of the landlords on the property in their hands.

The English law is apparently that such a lien does exist ; but it is not necessary to consider that position here, for, we are concerned only with the Indian Law on the point. The appellant has to show us how he gets the charge. The document by which the lease was created gives him no charge whatever for the amount. Therefore the charge must be rested by him upon the general law of this country. Now so far as it appears the only lien that is recognised in the Transfer of Property Act in this country is a lien in favour of the vendor. That being so, a strenuous effort was made by the appellant's vakil to persuade us that the grant of a lease like this really amounted to a sale or transfer of a fractional right in the property for a price, namely, the premium payable for the grant, and he argued that as vendors of that right the plaintiffs have a charge on the leasehold estate which has been given to Defendants 1 and 2. It is impossible to accept this view for the Transfer of Property Act makes a very clear distinction between a sale and a lease. This is a transaction that falls clearly within the definition of a lease in the Transfer of Property Act, S. 105. I do not see how then it could be brought under the definition of a sale. The payment of premium

(1) 18 77] 6 Ch. D. 597=46 L. J. Ch. 763=25 W. R. 764.

is only one of the incidents of the lease just as payment of rent is. It is certainly not a price paid for the transfer of immovable property as defined in S. 54 of the Transfer of Property Act. It is impossible, it seems to me, to hold that the relationship between the plaintiffs and Defendants 1 and 2 was anything but that of a lessor and a lessee. Apart from the Transfer of Property Act it has not been shown that there is any common law in India on which the right of lien claimed could be founded. It is true that in one of the decisions brought to our notice, viz. *Kandaswami Pillai* v. *Ramaswami Mannadi* (2), there is an observation by the then learned Chief Justice that a lien like that which exists in England may be claimed here. But that observation cannot be treated as authority as it is only an obiter dictum of the learned Judge. When that case came on appeal before three other learned Judges of this Court those learned Judges held that the principles of equity in England could not be introduced into India for purposes of creating rights of parties like the one in question. The view of the Chief Justice cannot be treated as of weight after the expression of opinion by the appellate Judges. There is no other decision which has been brought to our notice where such a lien has been recognized in India.

I am, therefore, entirely in agreement with the learned Chief Justice in holding that whatever the position may be in England, we are not justified in introducing new conceptions of charges in India which are not supported by our Statute Law. When the Estates Land Act was passed the Legislature had to consider what kind of charges should be given to the landholder on a leasehold estate. That was the only instance in which the Legislature dealt with a lien of the kind claimed, and there we find that the lien was not allowed ; see S. 25 of the Estates Land Act. It seems quite clear that such a lien as is now set up cannot be supported. In the result, the appeal and all the second appeals must be dismissed with costs.

Appeals dismissed.

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(2) [1918] 42 Mad. 203=36 M. L. J. 313=51 I. C. 507=(1918) M. W. N. 194.

★ A. I. R. 1926 Madras 57

PHILLIPS, J.

The Madura, etc., Devasthanam—Appellants.

v.

Sundaram Annavi and *others*—Respondents.

Second Appeal No. 749 of 1922, Decided on 1st April 1925, against the decree of the Court of the 2nd Addl. Sub.-J., Madura, in A. S. No. 6 of 1921.

(a) Civil P. C., S. 100—Justifiability of dismissal of servant—High Court cannot interfere if question is merely one of degree and not of principle.

The question of whether there is or is not sufficient ground for dismissal is one of a servant for detrmination upon the particular circumstances of the case, and when the question is one of degree and not of principle, the finding of the lower Court must be treated as a finding of fact, conclusive and binding in special appeal. [4 *Mad. H. C.* 63. *Foll.*] But when the lower appellate Court has not proceeded on the right principles in coming to conclusion the High Court can interfere. [P 58 C 1]

★ *(b) Master and servant—Justifiability of dismissal of servant—Judge must consider whether facts justify dismissal and not whether he would have himself dismissed—Offence condoned may be taken into consideration when dealing with a subsequent offence.*

A Judge has to determine whether there was justification for the order of dismissal and not whether he personally would have dismissed for such conduct. When an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offences. [P 58 C 2]

G. V. Ananthakrishna Iyer and *P. S Narayanasamy Iyer*—for Appellants.

K. V. Krishnasamy Iyer—for Respondents.

Judgment.—The plaintiffs are holders of a piper service in a temple and have brought this suit for setting aside the order of dismissal passed by the 1st defendant. The first plaintiff has 1/4th share in the inam, the 2nd plaintiff has 1/4th share, Plaintiffs 3 to 6 have 1/4th share and the 3rd deft. has 1/4th share. Objection was taken to the framing of the suit on the ground of misjoinder of parties and causes of action. This should undoubtedly have been upheld because the charges of misconduct against the several plaintiffs are not identical and each plaintiff's case ought to have been dealt with

on its own merits, and it might well have been found that in so far as some of the plaintiffs are concerned the order of dismissal was unwarranted, whereas in respect of others it was fully justified. That alone is sufficient to constitute misjoinder but there is another fact which shows that there is more than one cause of action. In the case of Plaintiffs 3 to 6 the dismissal appears to have been based on acts committed by their father. The father seems to have died while these acts of misconduct were being inquired into and the order of the Devasthanam Manager is to the effect that the father who was at that time dead should be dismissed. Subsequently orders of dismissal were sent to his sons, Plaintiffs 3 to 6 who consequently had quite a different case to that of the other plaintiffs. However, this case has proceeded and in appeal the decree cannot be reversed on the ground of misjoinder. The first Court found that the dismissal of all the plaintiffs was fully justified. The appellate Court after finding that the acts of misconduct found by the first Court were true has come to the conclusion that the plaintiffs are entitled to a locus penitentiae and that the order of dismissal was therefore wrong. It has no doubt been held in *Krishnasamy Tatacharry* v. *Gomatum Rangacharry* (1) that the question of whether there is or is not sufficient ground for dismissal is one for determination upon the particular circumstances of the case and that when the question is one of degree and not of principle, the finding of the lower Court must be treated as a finding of fact, conclusive and binding in special appeal. In the present case, however, I do not think that the Subordinate Judge has proceeded on the right principles in coming to his conclusion. He starts by finding that " there has been undesirable neglect of service to an extent which cannot be tolerated in a temple." but nevertheless finds that such conduct does not warrant a dismissal. He has treated the case not with a view to determine whether the facts warranted a dismissal but rather whether he personally would have dismissed them for that conduct. Different employers may have different feelings on a matter of this sort and where one dismisses a servant, another more kind hearted will give him one more opportunity to correct himself, and Court has to determine whether there was justification for the order of dismissal and not whether he personally would have dismissed for such conduct. The Subordinate Judge is also wrong in saying that "condoned faults ought not to have a cumulative effect in finally working out a dismissal." In the case it was found that the plaintiffs had been guilty of misconduct from the year 1904 up till 1912 and these acts of misconduct were repeated on 5 or 6 different occasions, the plaintiffs being punished or merely warned for each of these acts. When then, the Subordinate Judge holds as a matter of principle that the punishment to be awarded for a subsequent offence must be awarded without reference to a prior offence he is wrong. No doubt, when an offence has been condoned or dealt with and the offender retained in service, it is not open to the employer to subsequently dismiss him for that same offence, but if the servant offends again, it is perfectly justifiable for the employer to consider the prior offences in determining in what manner he should be dealt with for the subsequent offences. The Judge is therefore clearly wrong in this principle enunciated by him, and that is sufficient ground for my holding that this is not a pure finding of fact which is binding upon me in second appeal. I think it is clear also from a perusal of the learned Judge's judgment that he was really inclined to the view that the dismissal was justifiable but in view of the severity of the punishment—which means the loss of a large amount of land —he has allowed his kindness to intervene and has declared that the period of 9 years which elapsed between the date of dismissal and the date of judgment should be treated as suspension and that the dismissal should be set aside. Not only has he done this, but he has ordered the plaintiffs to pay the costs of the 1st defendant who dismissed them, although he has given a decree in plaintiffs favour. All these facts together with the recital in the judgment clearly show that the learned Subordinate Judge did not mean to hold, that the 1st defendant was not justified in dismissing the plaintiffs.

The District Munsif has found that the order of dismissal was justified and on the facts found it cannot be suggested that it was wrong. There was persistent neglect of service, insubordination, and disobedience of orders repeated from time to time

(1) [1867] 4 M. H. C. 63.

It would be impossible to say that a servant who was guilty of these offences is not worthy of dismissal. The decree of the Subordinate Judge must, therefore be set aside. I am asked to remand the appeal for a fresh finding, but I do not think that it is necessary in the present case as the facts have all been found and I can come to a conclusion myself.

There is one point in respect of which the Plaintiffs 3 to 6 are entitled to consideration. The order of dismissal, so far as they are concerned was clearly not justified. In the first place it does not appear that they had actually been appointed and in the second place the order of dismissal was passed for acts committed not by them, but by their father. In this suit it is somewhat difficult to split up the causes of action contained in the plaint, but in the circumstances I think that the decree of the first Court should be confirmed with the modification that there will be a declaration that the dismissal of the Plaintiffs 3 to 6 is invalid.

Plaintiffs 1 and 2 will pay the costs of the 1st defendant throughout, and plaintiffs 3 to 6 will bear their own costs throughout as in the case of a suit framed as this is it would be unfair to ask the 1st defendant to pay costs in respect of a cause of action not specifically pressed, when they have not succeeded in their main contentions.

The Memorandum of Objections, not being pressed, is dismissed with costs.

Appeal partly allowed.

★ A. I. R. 1926 Madras 59

DEVADOSS, J.

E. C. Kent—Petitioner.

v.

E. E. L. Kent—Respondent.

Criminal Revision Case No. 98 of 1925, Cr. Rev. Petition No. 90 of 1925, Decided on 27th March 1925, against the order of the Dist. Magistrate, Bangalore, in Mis. C. C. No. 18 of 1924.

★ (a) *Criminal P. C., S. 488 — "In the whole" mean one sum only and not separate sums for different purposes—Section, however, allows Rs. 100 to each of the wife and children.*

The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid. The words do not mean that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number. The words mean that the Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself. [P 61 C 1]

★ (b) *Criminal P. C., S. 488 — Mere offer to maintain is not sufficient.*

A mere offer to maintain does not amount to absence of neglect to maintain. [P 61 C 2]

★ (c) *Criminal P. C., S. 488—Order for alimony in existence — Jurisdiction under S. 488 is not ousted.*

The existence of a previous order for alimony is not sufficient to oust the jurisdiction of the Magistrate; for a mere order for maintenance is not equivalent to maintaining the wife; and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife: *Craxton* v. *Craxton*, 71 *J. P.* 399, *Dist.* [P 61 C 2]

Vere Mockett—for Petitioner.

E. L. Thornton—for Respondent.

Public Prosecutor—for the Crown.

Order.—This is an application to revise the order of of the District Magistrate, Civil and Military Station, Bangalore, directing the petitioner to pay Rs. 300 a month under S. 488 of the Code of Criminal Procedure. The petitioner is a well-to-do planter who neglected to maintain his wife and two children. The wife made an application to the District Magistrate and he has passed the order which is sought to be revised.

The first contention on behalf of the petitioner is that under S. 488 the Magistrate has jurisdiction to award only Rs. 100 in all for the support of the wife and the children. Mr. Mockett, who appears for the petitioner, relies upon the words "Rs. 100 in the whole" and argues that the Magistrate cannot award more than Rs. 100 in all for the support of the wife and the children and that the award by the Magistrate of Rs. 300, Rs. 100 for the wife and Rs. 100 for each of the children, is ultra vires. Cl. 1 of S. 488 reads as follows:—

"If any person having sufficient means neglects or refuses to maintain his wife, or his legitimate or illegitimate child, unable to maintain itself, the District Magistrate, etc., may, on proof of such neglect or refusal order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate not exceeding one hundred rupees in the whole, as such Magistrate thinks fit."

To contend that when a woman makes an application for herself and for children she could only be given Rs. 100 for the maintenance of herself and of her children whatever be the number, is opposed to the clear wording of the section. If the petitioner's construction of the section is correct, it would amount to this : if a person has an illegitimate child and an application is made under this section and Rs. 100 is awarded to that child, and if that person afterwards refuses to maintain his wife and his legitimate children, the wife and the legitimate children would have no remedy against him, for the sum of Rs. 100 has already been awarded for the support of the illegitimate child, and no further order can be made on behalf of the wife and legitimate children as no Magistrate can award more than Rs. 100 for all the persons whom he is bound to maintain.

This section was enacted to suit Indian conditions. A Muhammadan can legally marry four wives at the same time ; supposing he neglects or refuses to maintain one wife and her children, and supposing she obtains an order under this section and gets Rs. 100 and if he afterwards refuses or neglects to maintain any of the other wives and children, they would be helpless, and if he refuses to maintain all the four wives at the same time, is it to be said that the section requires that all the four wives should apply by a joint petition for payment of maintenance to them and their children ? Supposing a European has legitimate children by a deceased wife, and children by a living wife and also illegitimate children, supposing the illegitimate children obtain an order for their maintenance and the Magistrate directs the payment of Rs. 100 for their maintenance, and if the man after some time refuses to maintain his legitimate children by the deceased wife, are they to be without any remedy ? And still further, if he refuses to maintain his wife and legitimate children are they to be without any remedy ? I think the contention that a person can only be ordered to pay Rs. 100 for the support of his illegitimate children, for the support of his family by the deceased first wife and for the support of the living wife and her children is, on the face of it, an untenable one.

Mr. Mockett relied upon the summary jurisdiction of Magistrates, Act 58 and 59 Vict. c. 39, S. 5, Cl. (c) and contended that the sum awardable under that section was for the maintenance of the wife and the children with her, and a Magistrate has no power to award more than £2 a week. S. 5, Cl. (c) gives the Court of summary jurisdiction power to make an order among other things for the legal custody of the children under 16 years of age, and an order for maintenance under Cl. (c) which is as follows :—

"A provision that the husband shall pay to the applicant personally or for her use to any officer of the Court, or a third person on her behalf, such weekly sum not exceeding £2 as the Court shall, having regard to the means both of the husband and the wife, consider reasonable."

There is no provision in this section for the payment of any amount for the maintenance of any child unable to maintain itself. But the Justices in considering what amount should be awarded to the wife may take into consideration what would be required for the maintenance of the child or children in the custody of the wife: The maximum is fixed at £2 a week, as the object of the Act is to give relief to the wife. There are other enactments like the Bastardy Act and the Poor Law Act under which a father could be made to pay maintenance for his illegitimate and legitimate children.

The case of *Hill* v. *Hill* (1) does not help petitioner. Sir Francis Jeune, President of the Probate Division, observes as follows at page 142 :

" Therefore the whole sum ordered is to be paid to the applicant personally. There is in the Act no express power to order that sums shall be paid for children, even the children of his (the husband's) own marriage. But in considering what amount should be ordered to be paid by the husband, if the Justices were right in taking into account the expenses of maintaining any child or children of the marriage, they would be eqully justified in taking into account the expenses in respect of children whom the husband under the Poor Law, at any rate, was legally liable to maintain and they were right in ordering such amount to be paid —as only it could be paid—to the wife."

(1) [1902] P. 140=71 L. J. P. 81=86 L. T. 597=50 W. R. 400=66 J. P. 344=18 T. L. R. 393.

58 and 59 Vict., C. 39 was specially enacted for giving speedy relief to married women who, on account of desertion or neglect on the part of their husbands to maintain them, have to seek speedy remedy for provision for maintaining themselves. That Act is not similar to S. 488 which specially provides for the maintenance of "wife and child legitimate or illegitimate, which is unable to maintain itself."

In considering what amount should be paid for the wife it need not be taken into consideration whether she has children to be maintained or not. The position of the husband and his means and the position of the wife alone should be considered. In the case of each child the needs of the child should be considered. The words "in the whole" mean that only a sum of money not exceeding Rs. 100 should be ordered to be paid and no other payment, either in the shape of fees or medical expenses, etc., should be ordered to be paid, nor can the Magistrate order the husband to provide a house for the wife. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of the children, or so much for clothing or so much for medical expenses and so on, that the words "in the whole" have been put into the section. The Magistrate can only order one sum not exceeding Rs. 100 to be paid for the wife and for each of the children unable to maintain itself.

The section speaks of "wife or his legitimate or illegitimate child" and does not speak of "wife and child." The words have to be given their plain meaning. To construe the words as meaning wife and children is opposed to all rules of construction. If a man has the luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child could be awarded up to Rs. 100 provided the husband or the father has the means to pay the amounts.

The contention that S. 488 is modelled on the lines of 58 and 59 Vict. C. 39, S. 5, cannot hold water. S. 488 of the Code of 1898 is not a new provision enacted in 1898. The same provision was found in the Code of 1882 and the Codes of 1875 and 1872 and in Act XXV of 1861. S. 316 contained a provision corresponding to that of S. 488, Cl. 1. All that has to be proved in order to give jurisdiction to a Magistrate under S. 488 is that the child is unable to maintain itself and that the father neglected or refused to maintain it, and in the case of the wife that the husband refused or neglected to maintain her. Even a grown-up child, if unable to maintain itself, is entitled to get maintenance from the father if he has the means, vide *In re Parathivalappil Moideen* (2) and *In the matter of W. B. Todd* (3).

The next contention urged by Mr. Mockett is that there has been no neglect to pay for the maintenance of the wife and the children. This is a question of fact and the learned Magistrate has found that the petitioner herein has neglected to maintain his wife and children. A mere offer to maintain them is not sufficient and Mr. Mockett has admitted that nothing has been paid for the maintenance of the wife and children for at least some years. There is nothing in this contention.

The third contention raised by Mr. Mockett is that there is an order of the Probate, Divorce and Admiralty Division of the High Court in England whereby the petitioner is directed to pay his wife so much alimony per month, and it is seriously urged before me that this order is a bar to an application under S. 488 of the Criminal P. C. It is admitted that the wife finds it impossible to execute the order for alimony against the petitioner who is a planter in the Mysore State. Whether the order is executable or not is immaterial for the present purpose. The section gives jurisdiction to the Magistrate to award maintenance if he is satisfied that a person has neglected or refused to maintain his wife or child. The existence is not sufficient to oust the jurisdiction of the Magistrate for a mere order for maintenance is non-equivalent to maintaining the wife; and the order, whatever may be its force or nature, cannot take away the Magistrate's jurisdiction so long as the husband neglects or refuses to maintain the wife.

Reliance was placed upon *Craxton* v. *Craxton* (4) where Bargrane Deane, J.

(2) [1913] 25 M. L. J. 355=14 M. L. T. 225=21 I. C. 469=(1913) M. W. N. 997=14 Cr. L. J. 597.
(3) [1873] 5 N. W. P. H. C. 237.
(4) 71 J. P. 399=23 T. L. R. 527=51 S. J. 484.

observed : " There can be no desertion in law when a suit is pending once the Divorce Court has seised with the matrimonial suit. Justices have no right to interfere in the matter . . . . . Here the President had actually made an order, how then can the Justices claim to overrule it." In that case an order for alimony had been made by the President of the Probate Division and the Justices could not therefore pass an order under the Summary Jurisdiction Act. That case has no application to the present, for the proceedings in the Probate Division do not control the jurisdiction of a Magistrate in India.

As I have already observed, if it is proved to the satisfaction of the Magistrate under S. 488 that the husband has neglected to maintain his wife, the Magistrate has jurisdiction to order the husband to pay for the maintenance of his wife. In this case the order for alimony is unexecutable. Even if held to be executable, I am of opinion that so long as the husband does not maintain the wife either by payment of alimony or otherwise, the Magistrate's jurisdiction to order him to pay maintenance is not taken away.

The case in *Subbaramakkamma, Petitioner* (5) does not help the petitioner. In that case a decree for monthly allowance or maintenance had been obtained in the High Court and that decree was in force and the wife could not get a further and separate order for maintenance from the Magistrate. The case would be different if the execution of the decree for maintenance had become barred or had become unexecutable. This was distinctly held so far back as 1872. In a case, *John Meiselback, in the matter of* (6) a Bench consisting of Sir Richard Couch, C. J., and Ainslie, J., held that a decision of the civil Court refusing to enforce a contract or agreement against a sum for the maintenance of a woman cannot preclude either the woman from applying or a Magistrate from making an order under S. 316 of the Criminal Procedure Code for the maintenance of their illegitimate daughter. The learned Chief Justice observed : " The proceeding in the civil Court was of a different nature. It was founded on an alleged contract, and the decision of the civil Court, even if it had not proceeded as it appears to have done on the Law of Limitation, would not have concluded the woman from applying under S. 316 of the Criminal Procedure Code for the maintenance of the illegitimate daughter . . . . . The only question in this case is whether the matter was so put before the Magistrate that he had jurisdiction to make the order under S. 316 for the maintenance of the illegitimate daughter. She stated in her petition that both she and the daughter were starving and required maintenance, and she asked for a sum to be paid for maintenance. The Magistrate had power to make an order for the maintenance of the daughter." Under S. 316 of Act XXV of 1861 (now S. 488) the only questions were whether the child was a child of the man and whether he had neglected to maintain the child ; and on these facts being found the Magistrate had jurisdiction to pass an order even though there was a previous contract between the man and the woman for payment of maintenance.

Considering the position of the parties, the order for payment of Rs. 100 to each of the person's wife and two children is eminently a just order. I dismiss the petition with costs of the counter-petitioner.

Counsel's fee is Rs. 100.

Memorandum of costs will follow.

Petition dismissed.

(5) 2 Weir 615.
(6) [1872] 17 W. R. Cr. 49.

★ A. I. R. 1926 Madras 62

JACKSON, J.

(*Manem*) *Ayyanna*—3rd defendant—Petitioner.

v.

Pulavarti Veerabhadram—Plaintiff—Respondent.

Civil Revision Petition No 417 of 1923, Decided on 14th July 1925, against the decree of the Sub J., Cocanada, in Small Cause Suit No. 324 of 1922.

★ *Contract Act, S. 140—Bond mentioning two sureties—One only signing the bond—He is liable unless the signature of the other surety is a condition precedent.*

A guarantee drawn up in the plural number but signed by one surety only, is binding on the surety

who signed it unless he can show that he was to be liable only if the other surety or sureties signed.

[P. 63, C. 2]

G. Lakshmanna—for Petitioner.

K. N. Rajagopala Sastri for B. Satyanarayana—for Respondent.

Judgment.—The petitioner seeks to revise the decree of the Subordinate Judge of Cocanada in Small Cause Suit No. 324 of 1922.

The petitioner sued to recover Rs. 402-11-6. Defendants 1 and 2 who were immediately liable remained ex parte, and the suit was contested by the 3rd defendant who had executed a letter of guarantee, Ex. C. The learned Judge has found him liable under this letter and question for determination is whether inasmuch as the letter begins with "Manem Ayyanna and Dontu Setti Basavalingam offer respects," continues "In case money is not realized.....We agree to pay the said amount" and is signed only by Manem Ayyanna. Manem Ayyanna can be held responsible or whether on the other hand it should be held that Manem Ayyanna only contracted to be held responsible in case Dontu Setti Basavalingam also signed the letter. The learned Judge lays down the law on the point as follows :—

In a case of this kind, the person that actually executed the document would be liable unless it was intended that if the other persons did not join, his liability should not subsist."

It is contended on behalf of the petitioner that in such cases there is a presumption that the person who signed the document singly did not intend to be held responsible unless the others joined. In support of this argument, the remark of Brett, L. J., in *Ex parte Harding, In re Smith Fleming* v. *Co.* (1) is cited.

"And, therefore, the doctrine that one of a number of sureties who signs a guarantee only agrees to be liable in case all the others sign, has no application."

I have not been able to find this doctrine laid down, elsewhere, to the effect that there is a presumption that one of a number of sureties who sings a guarantee only agrees to be liable in case all the others sign In Cunningham and Shepherd's Commentary on the Indian Contract Act, 11th Edition, p. 56, it is observed that :

"Apparently it may be presumed that a party who has executed a bond did not intend to be bound unless the other person mentioned also executed it when the contract is in the nature of a guarantee."

The learned commentators refer for authorities to their note on the actual section—S. 144. But there I only find it laid down as follows :

"It appears to be a question of fact whether a promissor who has executed a bond which is in form joint is intended to be bound only if the other person named in it has also executed it :"

and the English authorities to which my attention has been called by the respondent seem to bear out that there is no presumption. In *Coyte* v. *Elphick* (2), Blackburn, J., says :

"There is no authority for saying that because a deed contemplates several parties joining as co-sureties, therefore one of them does not bind himself if he signs unless the others also sign. There is no authority for such a contention."

A note in Lord Halsbury's Laws of England, Vol. 15, p. 469, paragraph 901, is to the same effect :

"A guarantee drawn up in the plural number, and concluding as witness our hands' but signed by one surety only, is binding on the surety who signed it. *Norton* v *Powell* (3); where, however, one surety expressly or impliedly stipulates that the other surety shall also sign, this amounts to a condition precedent which must be fulfilled.

Therefore it is incumbent on the petitioner in this case to prove that, he did so stipulate. The learned Subordinate Judge is not quite correct in stating :

"There is no evidence which goes to show that at the time of the contract the third defendant expressly excluded his liability if his partner D. Basavalingam should not agree to sign therein."

What he means is that there is no evidence apart from the statement of the 3rd defendant as D. W. 1, and evidently, he was not prepared to accept that statement without corroboration.

I find, therefore, that there is neither presumption nor proof that the 3rd defendant was only to be bound in case his partner also joined. In these circumstances,

(1) [1879 12 C. H. D. 566 (557)=48 L. J. B. K. 115—41 1 L. T. 517=28 W. R. 158.

(2) 22 W. R. 541 (543)

(3) [1842] 4 Man. and G. 42—11 L. J. C. P. 202.

here is no reason to revise the decree of te lower Court.

The respondent has never based his case on the fact that the 3rd defendant and his partner constituted the firm and therefore the omission in the plaint to name them as such is, as the learned Judge remarks, not of much importance.

The petition is dismissed with costs.

Petition dismissed.

★ A. I. R. 1926 Madras 64

SPENCER, O. C. J. AND VISWANATHA SASTRI, J.

(*Savan*) *Durga Bai Ammal*—Plaintiff—Appellant.

v.

S. Ramanatha Rao and *another*—Defendants—Respondents.

Original Second Appeal No. 27 of 1925, Decided on 17th July 1925, from an order of Waller, J., D/- 27th January 1925, in Civil Suit No. 742 of 1924.

★ *Letters Patent (Mad.), Cl. 15—Order refusing to strike off pleadings is not appealable—Civil P.C., O. 6, R. 16.*

An order by a Judge sitting on the Original Side of the High Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff as being unnecessary and scandalous is not a judgment.

[P 64 C 1]

T. V. Muthukrishna Aiyar and *Mahomed Ibrahim Saheb*—for Appellant.

V. S. Govindachar—for Respondents.

Judgment.—The order appealed against was an order by a Judge sitting on the Original Side of this Court refusing to direct certain allegations in defendants' written statement to be struck out at the instance of the plaintiff as being unnecessary and scandalous.

In our opinion the Judge's order in this case was not a judgment within the meaning of Cl. 15 of the Letters Patent and consequently is not appealable. The application was not one which started independent proceedings ancillary to the suit: See the observations of White, C. J., in *Tuljaram Rao* v. *Alagappa Chettiar* (1), nor could its effect in any event be to put an end to the suit. The order, of course, concluded the proceedings in which the application was made, if that could be regarded as a separate and independent proceeding, but the same might be said of every order made by a Court in the course of the trial of a suit. The proceeding in which Waller, J.'s order was passed was part of the proceedings in the suit itself. Therefore I think that when the learned Chief Justice spoke of putting an end to the suit or proceeding, he was thinking of some kind of independent proceeding which could not be called a suit.

It was held in *Mahalingam* v. *Natesa Aiyar* (2) that an order refusing leave to amend pleadings was not a judgment within the meaning of Cl. 15 of the Letters Patent. The present order is of a cognate nature, the difference being only that there the plaintiff sought to amend his own plaint and here the plaintiff wishes to have the defendants' written statement amended.

The fact that no appeal is provided by the Civil Procedure Code against an order under O. 6, R. 16, is an indication that the Legislature intended that there should be no appeal in such cases.

The observation of Waller, J. in *Sonachalam Pillai* v. *Kumaravelu Chettiar* (3) that all orders passed after contest inter partes should be regarded as judgments was not necessary for the disposal of that case, which followed the decision in *Tuljaram Rao* v. *Alagappa Chettiar* (1) and appear to us to be too wide. The learned Judge adopted the view of Bittleston, J. in *DeSouza* v. *Coles* (4), from which White, C. J., had expressed his dissent in *Tuljaram Rao* v. *Alagappa Chettiar* (1). The appeal is rejected on the preliminary point of admissibility with costs.

Appeal rejected.

(1) [1910] 35 Mad. 1=21 M. L. J. 1=(1910) M. W.N. 697=8 I.C. 340=8 M.L.T. 453 (F. B.)

(2) [1915] 3 L. W. 107=32 I. C. 423=(1916) 1 M. W. N. 146.

(3) A. I. R. 1924 Mad. 597=47 Mad. 316=46 M. L. J. 138=19 M. L. W. 427=34 M. L. T. 32=(1924) M. W. N. 167.

(4) [1868] 3 M. H. C. 384.

★ A. I. R. 1926 Madras 65

PHILLIPS, J.

K. V. Subramania Aiyar and *others*—Plaintiffs—Appellant.

v.

Shanmugam Chettiar and *others*—Defendants Respondents.

Second Appeal No. 1163 of 1922, Decided on 6th April 1925, against the decree of the Dist. Court, West Tanjore, in A. S. No. 238 of 1920.

★ (a) *Evidence Act, S 78—Conflict between version of Act published in Gazette and that published by Superintendent, Government Printing—Gazette version must be preferred.*

Under S. 78 the publication in the *Gazette of India* is the proper method of proving an Act and if there is a conflict between the publication in the Gazette and that in the other copies of the Act printed by the Superintendent of Government Printing, preference should be given to that in the *Gazette of India.* [P 65 C 2]

★ (b) *Limitation Act. Art.* 177—*Even after Act* 26 *of* 1920 *period is* 6 *months.*

The period of limitation under Art. 177 remained at six months even after the amending Act (Act XXVI of 1920). A. I. R. 1923 *Bom.* 299 *Dist.* A.I. R. 1924 *Lah* 65; 1925 *All.* 77 *Foll.* [P 66 C 1]

T. M. Krishnaswami Aiyar and *A. V. Viswanatha Sastri*—for Appellants.

K. Bhashyam Aiyangar, V. C. Seshachariar, M. S. Venkatrama Aiyar and *P. S. Narayanaswami Aiyar*—for Respondents.

Judgment.—In this case the 1st respondent in Appeal Suit No. 238 of 1920 on the file of the District Court of Tanjore died during the pendency of the proceedings. An application was put in within three months for bringing on record his legal representative, but that application appears to have been dismissed on the ground that batta was not paid, and it now appears that the non-payment was entirely due to the negligence of the appellant's vakil's clerk. A subsequent application was put in three and a half months after the 1st respondent died asking for restoration of the first petition and also for bringing on record a certain lady as the 1st respondent's legal representative. That petition was dismissed on the assumption that in so far as it prayed for the addition of the legal representative it was out of time and also on the ground that there was no sufficient reason for restoring the original petition.

The main question that is now raised in second appeal is whether the Judge was right in considering that the second application was out of time, namely whether the period prescribed for such an application is six months, or only 90 days. The application is one under Art. 177 of the Schedule to the Limitation Act, and in the Limitation Act of 1908 the period prescribed is six months. In 1920 an amending Act was passed, and the question is whether that amending Act reduced the period of six months to 90 days, or left it at six months. The Allahabad and the Lahore High Courts are both of opinion that the period remains at six months notwithstanding this amending Act, whereas the Calcutta and Bombay High Courts are of the contrary opinion. In the case reported in *Gobind Das* v. *Rup Kishore* (1) the matter has been very carefully discussed and it was found that if the words of the amending Act (Act XXVI of 1920) were applied to the Act of 1908 as originally published in the *Gazette of India*, the period of limitation under Art. 177 would remain at six months. It appears that the other copies of the Act printed by the Superintendent of Government Printing, Calcutta, are paged differently, and in them against Art. 177 the word "Ditto" appears. The result of the amendment of Art. 176 which reduces the period of limitation to 90 days would have the effect of making Art. 177 read as having reduced the period similarly, namely to 90 days. The amending Act, therefore, has a different effect if applied to the original *Gazette of India* publication, or if applied to subsequent publications of Act IX of 1908. Under S. 78 of the Evidence Act there can be no doubt that the publication in the *Gazette of India* is the proper method of proving the Act and if there is a conflict between the two publications, preference will certainly be given to that in the *Gazette of India*. The later publications do not purport to be published by the authority of the Government of India but are printed by the Superintendent Government Printing, India.

There is also another argument used by the Allahabad High Court in *A. G. Skinner* v. *Mukkaram Ali* (2), and that is that Act XXVI of 1920 makes no specific reference to Art. 177 and consequently it can only be deemed to amend that article by implication, namely by altering

(1) A. I. R. 1924 Lah. 65=4 Lah. 367=6 L. L. J. 25.

(2) A. I. R. 1925 All. 77.

the period under Art. 176 and retaining the word "Ditto" against Art. 177. This view has been adopted both by Calcutta and Bombay on the ground that it was the intention of the legislature to amend Art. 177. Nothing appears to that effect in the preamble of the amending Act and there is no reference to Art. 177 in the body of the Act. The word "Ditto" opposite to Art. 177 in the Act of 1908 was equivalent to the words "six months" and when that word "Ditto" is allowed to stand without alteration after the amendment of 1920, it is difficult to understand why its meaning should have been changed. Consequently, even if the word "Ditto" were to remain as in the subsequently published copies of the Act, its original meaning would not be changed unless the legislature had declared its intention to alter it. On all these grounds I respectfully agree with the decisions of the Lahore and Allahabad High Court. The Bombay case in *Hussenuddin Nuruddin* v. *Dulakshidas Keshavlal* (3) contains only a very brief judgment based on the fact that the amending Act is applicable to the published Acts and not to the Act as printed in the *Gazette of India* and does not meet the argument mentioned above. The Calcutta decision is that of a single Judge who by reason of the view he takes is constrained to reject altogether the Act as published originally in the *Gazette of India* as being "not an accurate and true version of the Act which the legislature enacted." When the Evidence Act distinctly lays down that this is the method of proving an Act of the Legislature, I regret that I cannot agree with the view of the learned Judge that an Act so proved is not an accurate and true version. He goes further to hold that the Act can be proved by a means which is not contemplated in the Evidence Act and that such a proof is preferable to the proof laid down by the Statute. With all respect I cannot agree in this view. I therefore follow the decisions of the Lahore and Allahabad High Courts that the period of limitation under Art. 177 remained at six months even after the amending Act (Act XXVI of 1920). That being so, the learned District Judge was wrong in treating the second petition of the appellant as being out of time. The prayer for the restoration of the first petition was unnecessary. The main prayer was to bring on record a legal representative, and the application being within time, the prayer ought to have been granted.

I must, therefore, set aside the decree of the lower appellate Court and remand the suit to the Court for the hearing of the appeal after bringing on record the 1st respondent's legal representative. Costs will abide the result.

Court fee on the Second Appeal will be refunded.

Decree set aside: Suit remanded.

(3) A. I. R. 1923 Bom. 299.

★ ★ A. I. R. 1926 Madras 66

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Guntur Narasimham and *another*—Defendants—Appellants.

v.

Nyapati Narayan Rao Garu—Plaintiff—Respondent.

Letters Patent Appeal No. 58 of 1924, Decided on 12th March 1925, against the judgment of Krishnan, J., D/- 19th February 1924, in Second Appeal No. 796 of 1921.

★ ★ (a) *Transfer of Property Act. S. 53—Suit under S. 53 to contest alienation by debtor falls under Art. 120—Date of creditor's exercising his option is the starting point—Limitation Act, Art. 120.*

Per Venkatasubba Rao, J.—A suit under S. 53, Transfer of Property Act, to contest an alienation by a debtor is governed by Art. 120 of the Limitation Act and the starting point of limitation is the date on which the plaintiff decides to exercise his option of avoiding the transfer and not the date of transfer ; 43 *Mad.* 760 (*F. B.*) *Rel. on.*; 7 *L. W.* 280, *Expl.* [P 67 C 2]

Madhavan Nair, J.—The starting point for limitation is not the date on which the creditor exercises the option to avoid the transfer nor the date of transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him. [P 70 C 2]

★ (b) *Transfer of Property Act, S. 53—Suit under, is not a representative suit—Right is individual.*

A suit under S. 53 is not a representative suit and the inaction of one creditor, that is to say, his failure to file a suit within six years of his exercising the option does not bar the general body of creditors. The right under S. 53 is an individual right. [P 70 C1]

B. Jagannatha Doss for *V. Suryanarayana*—for Appellants.

N. Rama Rao—for Respondent.

Venkatasubba Rao, J.—The question to be decided in this appeal is one of limi-

tation. This suit was filed under S. 53 of the Transfer of Property Act. The plaintiff being the Receiver in insolvency represents the body of creditors of the insolvent. The transaction impeached is a mortgage, dated 27th July 1908, executed by the insolvent in favour of the defendant. The suit was filed on the 15th February 1918.

The first question that arises is: What is the article that is applicable? Art. 120 seems to be the appropriate article. The decisions seem to be to the same effect: See *Authikesavaloo Naicker* v. *Hussain Sahib Kadiri* (1) and *Venkateswara Aiyar* v. *Somasundaram Chettiar* (2). It was conceded before us, and in my opinion rightly, that the article applicable is Art. 120. The more difficult question, however is: What is the starting point of limitation? On this point, there is no authority. Phillips, J., in *Venkateswara Aiyar* v. *Somasundaram Chettiar* (2) expressed the view that the time runs from the date when the plaintiff had the knowledge of the facts entitling him to relief. This, though, an obiter dictum, is entitled to great weight as the point was fully considered by him. Krishnan, J., in the judgment under appeal, as I understand it, is not quite definite on the point. He thinks that limitation runs from the date when the creditor exercises his option; in the alternative, from the date when he has knowledge of the facts that give him a right to relief. As I read his judgment, he is more inclined to take the former than the latter view. It seems to me that he expressed the alternative view, as on the facts, whichever view was taken, the same result followed. Krishnan, J., having held that the suit was filed in time, the defendant has filed this appeal and Mr. Jagannadha Das has argued the case very fully on his behalf. His contention is that the date of alienation gives the starting point. He supports his contention by relying on what I may describe as grounds of convenience. Before adverting to these grounds, I shall deal with the point with reference to the two provisions of law that have a bearing viz., ...S. 53 of the Transfer of Property Act and Art. 120 of the Limitation Act. Under S. 53, a transfer that offends against the rule enacted in its s voidable at the option of any person defrauded, defeated or delayed. Under Art. 120 the suit may be brought within six years of the date when the right to sue accrues. The question resolves itself into this. When does the right to sue accrue? If the transaction is voidable at the option of a creditor, he may avoid it at any time at his pleasure. S. 53 does not say that, after the lapse of a certain time, he shall not be able to avoid the transaction. It does not prescribe a limit of time. What then constitutes the exercise of the option? In the words of Wallis, C. J., in *Ramaswami Chettiar* v. *Mallappa Reddiar* (3), a voidable transaction may be avoided by any open or unequivocal declaration of an intention to avoid it, see page 769. The right to sue accrues when this option is exercised. Under Art. 120 the suit may be instituted within six years from the date when the right to sue accrues. As that right accrues, as I have shown, when the plaintiff exercises his option, the suit may be filed within six years from the date of the exercise of the option. The proper construction of the sections compels us to take this view and it seems to me that this is what Krishnan, J., intended to hold. If so, I entirely agree with him.

The alternative view, namely, that time begins to run from the date when the plaintiff becomes aware of the facts that entitle him to relief, found favour with Phillips, J., in *Venkateswara Aiyar* v. *Somasundaram Chettiar* (2). But a perusal of his judgment shows that only two theories were put forward before him, namely: (1) the date of alienation gives the starting point and (2) the date of knowledge. These were the two rival views that were placed before him and he preferred the view that knowledge gives the starting point. His judgment leaves no doubt in my mind that, if what may be compendiously described as the option theory was suggested to him, be would have gladly adopted it. Indeed in this connexion he uses the word "option," but does not go the necessary length. Section 53, it is needless to point out, does not take note of knowledge at all. It speaks of option and not of knowledge. Under Art. 95 of the Limitation Act, which relates to a suit for

(1) [1915] 2 L. W. 479=29 I. C. 62=(1915) M W. N. 337.

(2) [1918] 7 L. W. 280=44 I. C. 551=(1918) M. W. N. 244.

(3) [1920] 43 Mad. 760=39 M. L. J. 350=28 M L. T. 170=12 L. W. 475=59 I. C. 947=(1920) M. W N. 572 (F. B.).

relief on the ground of fraud, knowledge no doubt would be a material element, for the prescribed period of 3 years runs from the date when the fraud becomes known to the party wronged. But the suit contemplated by S. 53 is not one for relief on the ground of fraud, and the knowledge of fraud, to which Art. 95 refers, is therefore not a material circumstance. Moreover, it is not necessary that there should be actual fraud to invalidate a transaction under S. 53, as the second clause of that section shows, which runs as follows:

"Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person and such transfer is made gratuitously or for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid."

In my opinion, therefore, fraud or knowledge of fraud is not a relevant consideration.

On a strict construction of the sections I have arrived at this result, and it is a matter for satisfaction that considerations of convenience and justice point to the same conclusion. From this point of view, I shall next deal with the three different standpoints suggested.

First, let me take the date of alienation being the starting point. Section 53 refers to an intention to defraud prior or subsequent transferees, co-owners and creditors. I shall take the case of creditors, as this is the most usual case. It is settled that the benefit of the section is not restricted to existing creditors alone. Even subsequent creditors may impeach the transaction. Suppose then, a trader makes an alienation of the property which offends against the terms of this section. Why should any creditor call in question the alienation, if the trader is possessed of sufficient funds to satisfy him? Why should a subsequent creditor be barred, although the alienation was made long previous to his debt having come into existence? Creditors are not generally interested in impugning the transaction entered into by their debtor. In spite of the fact that a property worth Rs. 10,000 has been alienated the debtor may yet be possessed of assets worth lakhs, and why should any creditor, take the trouble of impugning the alienation? Or again, the debtor may have alienated the property, but may still be expected to make large profits or to amass large wealth. The creditors are only concerned with this that the debtor must one day be in a position to repay the amounts due. To say that the right to avoid a transaction becomes barred at the lapse of six years from the alienation is practically to throw upon them the burden of impeaching every suspicious transaction, although for the time being, it may not be necessary to adopt this course of conduct. In the case of subsequent creditors whose interest accrues at a period too remote, the section will remain, on this construction, a dead letter. Further, if the date of alienation is the starting point, creditors may become barred, for no fault of theirs, as it is very likely that they may not in time become aware of the transaction itself without even, be it noted, any active steps being taken by the debtor to conceal the transaction from his creditors.

Let me now take the second theory suggested, the date of knowledge being the starting point. As I have said, it matters little to a creditor that his debtor has alienated some of the properties. Why should a creditor be driven to embark on litigation, merely because it has come to his knowledge that his debtor has entered into a transaction not above board? The property still remaining as I have said, may suffice or they may hope that the debtor may in time rally and no creditor can be expected to have before him a balance sheet disclosing actually the debtor's affairs.

The view then I have taken, namely, that the exercise of the option is the starting point imposes no unnecessary burden on the creditors. When they find that their interests demand that the transaction should be set aside, they exercise the option and avoid the transaction. Moreover, it is now settled that the option may be exercised otherwise than by the institution of a suit. Firstly, a creditor may attach the property alienated and he may do so, whatever may be the length of time that has lapsed from the date of alienation. Secondly, if on attachment, the transferee prefers a claim under O. 21, R. 58, Civil P. C., and the claim is allowed, the judgment-creditor may file the statutory suit prescribed by R. 63, without regard again to the lapse of time from the date of

alienation: See *Pokker* v. *Kunhamad* (4). Thirdly, if the claim is, on the other hand, disallowed and the transferee files the suit under R. 63, the creditor may defend it by showing that the transaction was in fraud of creditors: See *Ramaswami Chettiar* v. *Mallappa Reddiar* (3). In all these cases, the creditor exercises the option without resorting to suit, under S. 53, and it would be anomalous to hold that, although his right to file a suit is barred, his right still subsists to question the transaction by these other methods.

Mr. Jagannadha Doss strongly argued that the starting point should not be made to rest upon such a shifting ground as exercise of option. I see nothing objectionable in this. To take another instance from the Limitation Act, under Art. 60: the period of limitation for a suit to recover money deposited under an agreement that it shall be payable on demand, is three years from the date when the demand is made. The making of the demand is entirely dependent upon the volition of the plaintiff and the period of limitation may be indefinitely prolonged and a suit may be instituted without even a demand being made, in which case no question of limitation arises. The exercising of the option is analogous in this respect to the making of the demand and the option may be exercised by the filing of the suit itself, in which case the question of limitation will likewise not arise. Mr. Jagannadha Doss, in his exhaustive argument, contended that this will be a startling result. I do not, in the least, agree with him. On the other hand, the English cases show that this is assumed to be the normal position. *In re, Maddaver Three Town Banking Co.* v. *Maddaver* (5), a creditor brought an auction to set aside a conveyance several years after it was made, and although he had been aware of the facts during the whole period and gave no satisfactory reason for his delay, the Court of appeal held, affirming North, J, that his right to impeach the transaction was not barred. The only limitation recognized is that the debt should be subsisting. North, J., puts it thus:

"Where parties have been merely non-active, I do not see any reason why they should not take proceedings at any time, while the debt is a subsisting debt. The time might have arrived when the Statute of Limitations would be a bar, and, of course, when the debt was gone, no proceedings could be taken in respect of it."

Cotton, L. J., observes:

"The plaintiffs in this case say: "We are creditors whose debt is not barred and we seek payment out of property conveyed away by the debtor by a deed which the statute of 13, Eliz. C. 5, makes void as against us. The defendant relies on the delay of the creditor, but I am of opinion that this defence is not effectual."

See also May on Fraudulent Conveyances, page 120, where the learned author says:

"Since the right of a creditor to set aside a deed under 13 Eliz. C. 5, is a legal right and not merely a right to set aside the instrument on equitable grounds, the fact that the creditor has delayed to take proceedings to set aside the deed under that statute, although with full knowledge of the facts, is immaterial, so long as the delay has not been such as to create a statutory bar. Until the right to recover the debt is barred by the Statutes of Limitations, the legal right to avoid the deed exists, and no equity arises from the mere delay to enforce it."

Mr. Jagannadha Doss next contended that the nature of the action is representative and if one creditor is barred the whole body of creditors becomes barred. May a creditor bring a suit on his own behalf or must the suit be brought on behalf of all the creditors? This question does not strictly arise, although I may say that on this point the preponderance of authority, so far as Madras is concerned, is in favour of the view that a creditor may bring such a suit on his own behalf. See Krishnan, J's. judgment in *Pokker* v. *Kunhamad* (4) and Justice Sadasiva Aiyar's observation at p. 781, in *Ramaswami Chettiar* v. *Mallappa Reddiar* (3). Again under S. 11, Explanation 6, Civil Procedure Code, the section relating to res judicata, the result of a suit brought by one creditor, bona fide contested, may be binding on the transferee and on the general body of creditors. I express no opinion on this. But, assuming that, when there has been a suit, the principle of res

(4) [1919] 42 Mad. 143=36 M. L. J. 231=25 M. L. T. 47=(1919) M. W. N. 39=51 I. C. 714=9 L. W. 138 (F. B.).

(5) [1884] 27 Ch. D. 523=53 L. J. Ch. 998 =52 L. T. 35=33 W. R. 285.

judicata applies, it does not by any means follow that the inaction of the creditor, that is to say, his failure to file a suit within six years of his exercising the option, bars the general body of creditors. Under S. 53 of the Transfer of Property Act :

" Any person so defrauded, defeated or delayed may avoid the transaction."

An individual right is conferred upon each creditor by this section and the inaction or laches of one cannot deprive the others of their rights. The learned vakil for the appellant relied on the analogy furnished by *Varamma* v. *Gopaladasayya* (6), where, by reason of the nearest reversioner failing to sue, within the time limited, to set aside an alienation by a Hindu widow, all the reversioners existing as well as subsequently born were barred by limitation. The matter is not in pari-materia. Special considerations apply in the case of suits by reversioners and the analogy is misleading.

As the Receiver represents all the creditors, granting that the inaction of one may lead to the result contended for, it must be observed that, in this case, it is not suggested that any particular creditor exercised his option at a time too remote for the suit to be brought. Therefore, though I have dealt with the matter at some length, the question as to the nature of the suit under S. 53, Transfer of Property Act, does not, as I have said, on the facts arise.

I hold that the suit is not barred by limitation.

It is lastly urged that the suit is quite a frivolous one, as appears from the previous proceedings that transpired in insolvency, but this is a matter we cannot go into, as the suit remains to be tried on the other issues in the case.

The only order as to costs that we propose to make is that they shall abide the event.

Madhavan Nair, J.—I agree with my learned brother that the plaintiff's suit in this case is not barred by limitation, but with regard to the grounds for that decision, I regret I have to differ from him.

I agree that a creditor's suit under S. 53 of the Transfer of Property Act is governed by Art. 120 of the Indian Limitation Act ; but I think that the starting point for limitation is not the date on which the creditor exercises the option to avoid the transfer, but it is the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him. The result of holding that the starting point for limitation is the exercise of option by the creditor is that the creditor, in that case, would be entitled to wait any number of years he pleases before bringing the suit, which would mean that in effect, there would be no period of limitation at all for a suit under S. 53 of the Transfer of Property Act. Having regard to the spirit and provisions of the Indian Limitation Act which contains also a residuary article for all suits not specifically provided for, I think that we should not construe S. 53 of the Transfer of Property Act in such a way as to have the abovementioned effect, unless the language thereof clearly compels us to adopt such a construction.

S. 53, of the Transfer of Property Act runs as follows :—

" Every transfer of immovable property made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferrer, is voidable at the option of any person so defrauded, defeated or delayed."

The sole basis, as it appears to me, for the view that the starting point of limitation is the date of the exercise of option by the creditor is the use of the expression, " at the option " in the above section. In my opinion, it is not necessary nor is it right to interpret that expression in such a way as to make the exercise of option the starting point. The same expression occurs in Ss. 2 Cl. (i), 19 and 19 (A) of the Indian Contract Act. There it has been used simply to indicate at whose instance it is that the transaction referred to therein is voidable and has no reference at all to any question of limitation ; for Art. 114 of the Limitation Act provides that the period of limitation for a suit for the rescission of a contract commences from the date when the facts entitling the plaintiff to have the contract rescinded first became known to him. I think that the words " at the option of " which occur in S. 53 of the Transfer of Property Act should also be construed in the same manner and the question whether a suit under that section is barred

(6) [1918] 41 Mad. 659=35 M.L.J. 57=24 M.L.T. 115=8 L.W. 62=46 I.C. 202=(1918) M.W.N. 461 (F.B.).

should be judged solely from a consideration of Art. 120 of the Limitation Act.

Under Art. 120 the time from which the period begins to run is "when the right to sue accrues" I agree with my learned brother that the date of the transfer (alienation) sought to be avoided cannot be the starting point for limitation. If we hold that the date of the transfer is the starting point, then, in a case where the creditor comes to know of the transfer only more than 6 years after the date thereof, it would have to be held that the right to sue had not only accrued to him, but has terminated as well, before he himself knew anything about the transaction, which would mean that the creditor would have no opportunity of avoiding the transfer at all. It is not therefore right to hold that the starting point of limitation is the date of alienation. When once the creditor comes to know of the circumstances which entitle him under S. 53, to avoid the transfer, there can be no further impediment in the way of his bringing the suit and I think the right to sue accrues to him within the meaning of Art. 120, from the date of such knowledge. This view finds support in the judgment of Phillips, J., in *Venkateswara Aiyar* v. *Somasundaram Chettiar* (2). At page 283, the learned Judge says :

"That the cause of action arises on the date when the creditor seeking to set aside the alienation knows that he has been defeated, defrauded, or delayed."

It is true that it is not specifically stated in Art. 120 that this is the starting point and that only the general expression "when the right to sue accrues" occurs in that article, but it is a residuary article for all suits not specifically provided for and, as such, the language thereof has necessarily to be general. The interpretation to be put on that expression would, to a certain extent, depend on the particular class of cases to which the article is sought to be applied. As observed by Phillips, J.:

"In all cases of fraud, misconduct, etc., the period of limitation for a suit begins to run from the time when the fraud, misconduct, etc., becomes known : (vide Arts. 90, 91, 95, 96 etc.,) but no such provision could be inserted in Art. 120, for it is a residuary article and thus applicable to every variety of suit not otherwise provided for and is not confined to suits based on fraud. If such a suit coming within Art. 120 is based on fraud, the time when the right to sue accrues, must, I think, be determined in consonance with the principle governing the other specific suits based on fraud, and that is, that the time, when the fraud becomes known, becomes the starting point for limitation."

No doubt, it is stated by the learned Judge that a suit by a creditor under S. 53 depends upon the exercise of option by him, but he states this, in order to negative the contention that the right to sue accrues on the date of alienation itself. I think, Krishnan. J., also, in the judgment under appeal, takes the same view ; for he observes thus in the concluding portion of his judgment :

"The Receiver himself puts the cause of action as having arisen on the 31st July 1915, when one Sambiah and others learnt that the suit mortgage deed was a collusive document. It does not appear that Sambiah knew it earlier. Taking this view, it seems to me that the suit is not barred by limitation."

It is true that the learned Judge makes reference in an earlier portion of his judgment to the exercise of option by the creditor or by the Receiver, but the contest shows that he is there considering the question as to whether each of the creditors has got a separate right of suit under S. 53, or whether, if one creditor is barred by limitation from bringing the suit, the rest are also barred ; and I think that he did not intend to lay down that the exercise of option is the starting point for limitation. The decision in *In Re Maddevar, Three Towns Banking Company* v. *Maddevar* (5), does not, in my view, help us in deciding the present question. That case merely decides that delay on the part of the creditors to take proceedings even after full knowledge of the facts, is immaterial provided the delay is not such as to create a statutory bar.

It is true, as pointed out by my learned, brother,that there would be some anomaly if a creditor is allowed to set out, in a suit under O. 21, R. 63 of the Code of Civil Procedure, the fraudulent nature of the transfer as against the claimant, even though he may be barred by limitation from bringing a suit under S. 53 to have the transfer avoided, but it appears to me that the anomaly would still exist, even if we adopt the "option theory," for, supposing the creditor exercises the option on

a particular date and keeps quiet for more than 6 years without bringing a suit, under S. 53, I take it that in proceedings under O. 21, R. 63, such creditor may still set up the fraudulent nature of the transfer as against the claimant. This consideration, therefore, does not in my view give me any help in solving the present question.

For the reasons above stated, I am of opinion that the starting point for limitation is the date on which the circumstances entitling the creditor to have the transfer avoided first become known to him. In view of the fact that a few of the creditors in this case knew of the fraudulent character of the alienation in 1909, i.e., more than six years before the suit, it becomes necessary to consider whether the creditor's right of suit under S. 53 is an individual right which each individual creditor has or whether it is only a representative right in the sense that if one creditor is barred by limitation from bringing the suit, the others are also barred. I agree with my learned brother in thinking that the right of suit under S. 53 is an individual right which each creditor has. It is true that, if a creditor obtains a decree in a suit under S. 53, that decree accrues to the benefit of the other creditors as well, but I think S. 53 confers on each of the creditors the right of bringing a suit on his own behalf. As the Receiver represents the whole body of the creditors and as some at least of the creditors knew that the suit mortgage deed was a collusive document only within 6 years of the suit, I hold the suit by the Receiver is not barred by limitation.

In the result I agree that this appeal should be dismissed. I agree with him as regards the costs also.

Appeal dismissed.

★★ A. I. R. 1926 Madras 72

WALLACE AND MADHAVAN NAIR, JJ.

Sankaralinga Mudaliar and *others*—Appellants.

v.

Official Receiver of Tinnevelly—Respondent.

Appeal No. 435 of 1922, Decided on 22nd January 1925, against the order of the Dist. J., Tinnevelly, D/- 13th July 1922, in Civil Misc. Petition No. 566 of 1918.

★★ *Civil P. C., O. 38, R. 10—Attachment of interest of coparcener—Decree passed afterwards against him—Operation of survivorship is subject to satisfaction of decree.*

An attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching creditor in the same way as an attachment after decree. The operation of survivorship is not, however, altogether stopped by reason of the attachment, whether before or after decree, for if the attaching creditor does not execute his decree, or if the entire property is not needed to satisfy the decree, then the property or the surplus, as the case may be, will go to the othe. coparceners: 5 *Cal.* 148 *P. C.* and 26 *M. L. J.* 517, *Foll*; 38 *Bom.* 105 *Dissented from.* [P. 77, C. 1]

Wallace, J.—The accrual of survivorship is not prevented but operates subject to the prior rights of the attaching decree-holder and other decree-holders who are entitled to take advantage of the attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor coparcener. [P. 77, C. 1]

S. T. Srinivasa Gopalachari — for Appellants.

Marthandam and *Chidambaram*—for Respondent.

Madhavan Nair, J.—This is an appeal against the order of the District Judge of Tinnevelly in C. M. P. No. 566 of 1918 on his file in which the Official Receiver of Tinnevelly was the petitioner. The appellants, who were Respondents 1 to 3 in the lower Court, had brought a suit, O. S. No. 106 of 1913, in the District Munsif's Court of Ambasamudram against seven defendants, all members of a joint Hindu family. Pending the suit they applied for and got an attachment before judgment of the joint family properties. The suit was compromised and a razi decree, Ex. I, was passed on the 23rd of September 1914, which provided that the defendants therein should pay into Court Rs. 2,100 with interest within the 15th of April 1915, and that, in default, the attached properties might be sold and the amount realized. It also provided that the attachment before judgment which had already been made, would continue until the amount fixed by the decree was paid. Defendants 1 and 7 in that suit died subsequent to the decree. After their deaths an execution application was filed in the District Munsif's Court by the decree-holders, the present appellants, and an order for sale of the attached properties was made. Defendants 2 to 6 in the suit were also ordered as the legal representatives of the de-

ceased defendants 1 and 7. A petition for adjudicating Defendants 2 to 6 as insolvents was presented to the District Court of Tinnevelly on the 31st of January 1917, and they were adjudged insolvents by order of that Court, dated the 23rd of March 1917. The attached properties were sold in Court auction on the 28th of June 1918, in pursuance of the orders of the District Munsif and were purchased by the 4th respondent in the lower Court. The Official Receiver, who was not a party to the sale proceedings, filed the petition out of which this appeal arises, saying that, as the insolvent's assets had vested in him on the order of adjudication, the subsequent sale is not valid and binding on him and that the sale should, therefore, be set aside. There was also an alternative prayer to the effect that, if for any reason the sale could not be set aside, the decree-holders should be compelled to refund to him the amount they realized in execution.

The District Judge on the first occasion held that he, sitting as a Judge exercising insolvency jurisdiction, had no power to examine the validity or otherwise of an execution sale held by another Court and, therefore, dismissed the petition. On appeal, however, by the Official Receiver to this Court (C. M. A. No. 128 of 1919), this decision was set aside and the petition was remanded to the lower Court for fresh disposal. The District Judge has now held that the sale itself could not be set aside as the auction purchaser, 4th respondent in the lower Court, purchased the property bona fide and was, therefore, entitled to the protection given to bona fide purchasers by S. 34 (3) of the Provincial Insolvency Act (III of 1907), but he has granted the alternative prayer referred to above, i. e., he directed the decree-holders, the present appellants, to refund to the Official Receiver, the respondent before us, for the benefit of the whole body of creditors, the sum of Rs. 3,153-2-0 realized by them in execution. He also gave them leave to rank as unsecured creditors in the subsequent insolvency proceedings before the Official Receiver. Against this order of the District Judge the decree-holders have filed the present appeal; the Official Receiver has filed a memorandum of objections stating that the sale should also have been set aside as the auction purchaser could not in the circumstances of this case be considered to be a bona fide purchaser.

Two points have been urged before us by Mr. S. T. Srinivasa Gopalachariar, the learned counsel for the appellants, viz., (1) that on a proper construction of Ex. I, the razi decree, a charge has been created on the attached properties in his clients' favour and that, therefore, the properties vest in the Official Receiver only subject to his clients' rights under the decree, and (2) that even if there is no such charge, inasmuch as two out of seven judgment-debtors had died after the attachment before judgment and also after the decree, such prior attachment followed by the decree prevents the shares of the two deceased coparceners from surviving to the rest and that, therefore, those shares do not vest in the Official Receiver on the insolvency of the remaining coparceners as they had never vested in the insolvents themselves. He urges, therefore, that the Official Receiver had not rights at least as regards two-sevenths of the properties sold and that his clients were entitled to retain at least two-sevenths of the purchase-money realized.

As regards Point No. 1, Ex. 1 only states that the defendants should pay into Court within a prescribed time the decree amount with interest and that, in default of payment the plaintiffs should recover the amount "from the defendants and also by the sale of the properties now under attachment before judgment by the Court without having any necessity for re-attachment and from the defendants' other properties, and that the attachment before judgment should continue in force until the whole amount is paid according to this compromise decree." These provisions do not, in our opinion, constitute a charge on the properties and do not confer on the decree-holders any higher rights than those of money decree-holders who have effected an attachment of those properties for executing their decrees.

As regards Point No. 2, the learned counsel for the appellants has strongly relied upon a decision of the Privy Council reported in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) in support of his argument that the attachment before judgment in this case followed as it was by the decree prevented the shares of the

(1) [1879] 5 Cal. 148=6 I. A. 88 (P. C.).

deceased coparceners from surviving to the rest. As it appears to us that the answer to the question now raised depends really upon a correct understanding of the principle laid down by the Privy Council in the above case, it is necessary to consider the exact scope of that decision and to examine how the principle indicated therein has been understood and applied in subsequent decisions. In that case the father had executed a mortgage of properties belonging to the joint family consisting of himself and his two sons. The mortgagee brought a suit on his mortgage against the father and got a decree ordering the sale of the property. In execution of the decree the property was attached and an order to carry out the sale was made. Subsequent to this, but before the date fixed for the sale, the father died and the execution proceedings were thereafter continued against the sons who objected to the sale putting forward their claims as coparceners under the Mitakshara Law. The executing Court referred them to a separate suit and the properties were sold. In the suit by the sons to set aside the sale it was found that the nature of the debt was such as not to be binding on them. The Privy Council set aside the sale as regards the sons' two-third shares but sustained the sale to the extent of one-third which on a partition in his lifetime would have fallen to the share of the father. It may be stated that the reason for upholding the sale with regard to the one-third share was not that the mortgage executed by the father could be held to be binding on the estate to the extent of his own share because their Lordships expressly leave this point open. In their Lordships' own words the reason for the decision was that "at the time of Adit Sahai's (father's) death, the execution proceedings under which the mauza had been attached and ordered to be sold had gone so far as to constitute, in favour of the judgment-creditor, a valid charge upon the land, to the extent of Adit Sahai's undivided share and interest therein, which would not be defeated by his death before the actual sale." It is true that in the Privy Council case there were not only a decree and an attachment in execution of the decree but also an order for sale of the properties before the death of the judgment-debtor; but in the very next sentence their Lordships state that "they are aware that this opinion is opposed to that of the High Court of the North-Western Provinces, in the case of *Goor Pershad* v. *Sheodeen* (2)." In that case there was only a decree and an attachment in execution of the decree, but no order for sale before the judgment debtor's death, and it was held that the judgment-debtor had no property in the house in suit available after his death in execution of decree for the satisfaction of the judgment debt. The Privy Council, in expressly dissenting from this decision must, we think, be considered to have in effect held that an attachment in execution of a decree before the judgment-debtor's death would prevent his share from surviving to his other coparceners though no order for sale had been made prior to his death. That this is the true scope of the Privy Council decision has been recognized by more than one decision of this Court [vide *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Thadi Ramamurthi* v. *Moola Kamiah* (4)]. It may be mentioned that in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) also there was not only an attachment in execution of the decree but an order for sale before the judgment-debtor's death but the learned Judges indicate that the decision of the Privy Council would cover even a case where there was no such order; for they state at page 307, "in declaring that the ruling they were pronouncing was opposed to that of the High Court in the case cited, the Privy Council in effect pronounced that the interest of the judgment-debtor had, by the attachment, been brought under the control of the Court for the purpose of executing the decree so as to preclude the accrual of a title by survivorship in the event of the death of the judgment-debtor before an order for sale was made. In the case before the Court it appears the order for sale was made before the death of the judgment-debtor, but, whether this be so or not, we feel ourselves bound by the ruling of the Privy Council." In *Thadi Ramamurthi* v. *Moola Kamiah* (4) there was only an attachment in execution of the decree but no order for sale before

(2) [1872] 4 N.W.P. 137.
(3) [1881] 4 Mad. 302.
(4) [1914] 16 M.L.T. 123=24 I.C. 667=(1914) M.W.N. 733.

the judgment-bebtor's death. The lower Court in that case had dismissed the suit on the ground that, as the judgment-debtor, who was an undivided coparcener died before the order for sale was made, his interest survived to the defendant and was not available to the plaintiff for sale. The High Court in allowing the second appeal refers to *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Lakshmana Aiyar* v. *Srinivasa Aiyar* (5) and states that the question was concluded by authority. Regarding the Privy Council case the learned Judges observe thus :—

"In the case before the Privy Council it is true that not only was there an attachment but also an order to carry out the sale before the death of the coparcener. But in the course of their judgment the Judicial Committee expresses their dissent from a judgment of the North-West Provinces High Court in which it was held that, while the coparcener had died after his interest in the property was attached, but before an order for sale was made, there remained no interest in the judgment-debtor which could be brought to sale."

In *Muthuswami Chetty* v. *Chinnammal* (6) it is stated that :

"It has been repeatedly decided by this Court that attachment alone without an order for sale precludes the accrual of the title by survivorship in the event of the death of the judgment-debtor after attachment and before the order for sale."

It has been brought to our notice that the learned Judges in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams* (7) state that the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) and *Lakshmana Aiyar* v. *Srinivasa Aiyar* (5) cannot be relied upon in view of the decision of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) to the effect that an attachment merely prevented alienation and did not give title. They also state that the view was taken in *Sankaralinga Reddi* v. *Kandaswami Tevan* (9). These observations have been noticed and commented upon in two later cases of this Court reported in *Murugaiya Mudaliar* v. *Ayyathorai Mudaliar* (10) and *Thadi Ramamurthi* v. *Moola Kamiah* (4). These decisions, with which we respectfully agree, render it unnecessary for us to discuss the matter afresh. In *Thadi Ramamurthi* v. *Moola Kamiah* (4) which has already been noticed above, the learned Judges state in *Sankaralinga Reddi* v. *Kandaswami Tevan* (9) the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) was not dissented from, but it was expressly pointed out that under that decision the attachment has the effect of preventing the property passing by survivorship, and the fact that the attaching creditor does not, by attachment, create such a charge on the property as to acquire priority over other creditors coming in is in no way opposed to this view. This also is what was decided in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams* (7) wherein it was held that no charge was created by the attachment in favour of the creditor as against a subsequent creditor. There is no doubt an observation in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams*(7) that the decision in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) is opposed to this view. But whether that is so or not, no dissent was expressed from the decision to the effect that the attachment precludes the accrual of title by survivorship. The observation of their Lordships of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) relied upon in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc. Devasthanams* (7) has no reference to this question. That such is the effect of this decision seems to be borne out by the judgment in *Murugaiya Mudaliar* v. *Ayyathorai Mudaliar* (10) in which the learned Judges say that the case in *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Deveathanams* (7) had reference to the question whether in the circumstances of that case the judgment-creditors who had obtained orders of attachment were in a stronger position than those who had not obtained such orders." In the light of the above remarks, the observations in

(5) [1898] 8 M. L. J. 64.
(6) [1914] 26 M. L. J. 517=24 I. C. 320.
(7) [1909] 32 Mad. 429=2 I. C. 18=19 M. L. J. 401.
(8) [1897] 25 Cal. 179=24 I. A. 170=1 C. W. N. 639=7 Sar. 222 (P. C.).
(9) [1907] 30 Mad. 413=17 M. L. J. 334=2 M. L. T. 365.
(10) [1910] 9 M. L. T. 96=9 I. C. 286.

Subrao Mangesh v. *Mahadevi* (11) that the proposition laid down in *B. Krishna Rao* v. *Lakshmana Shanbhogue* (3) has no longer the support of the Madras High Court is not correct. In this connexion we would only add that, having regard to the decision of the Privy Council in *Moti Lal* v. *Karrabuldin* (8) it must now be taken that the word "charge" used by their Lordships in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) in the passage extracted by us must be understood only in a general and not in the strictly legal sense: (See also Mayne's Hindu Law, paragraph 332, 9th Edition).

Thus it will be seen that the decision in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) and the later decisions of this Court establish the position that an attachment in execution of the judgment-debtor's interest in joint family property will, in the event of his death subsequent to such attachment, preclude the accrual of title by survivorship as against the attaching creditor.

In the present case the attachment was before judgment. The judgment-debtor died after the decree but before any order for sale was made. The question is whether the fact that the attachment was before judgment makes any difference as regards the application of the above principle. There is a direct authority in *Muthuswami Chetti* v. *Chinnammal* (6) that it does not make any difference. In that decision it was held that an attachment before judgment has the effect of preventing the interest of the deceased judgment-debtor from passing by survivorship in a case where the judgment-debtor dies after the decree. The reason is thus stated by the learned Judges :

"When a decree is passed subsequently it is unnecessary to attach the property again and the prior attachment renders the property available for sale in execution. An attachment followed by a decree, therefore, precludes the accrual of the title by survivorship for the same reasons as an attachment after decree.

It has, however, been argued by the learned vakil for the respondent that the decisions in *Subrao Mangesh* v. *Mahadevi* (11) and *Sunder Lal* v. *Raghunandan Prasad* (12) take a contrary view and that they should be followed in preference to the Madras cases. *Subrao Mangesh* v. *Mahadevi* (11) is no doubt a direct decision in his favour, but with all respect we feel unable to follow that decision. In that case the learned Judges begin their judgment by stating that the determination of the case before them depends on the correct construction of the Privy Council judgment in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1). They then distinguish that case by saying that there, had been not a mere attachment before judgment but an attachment in execution and an order for sale. They also seem to think that their Lordships of the Privy Council use the word "charge" in the passage extracted by us in its strict legal significance : vide page 107. We have already stated that, in our opinion, their Lordships in effect held that an order for sale was not essential for defeating the survivorship and that it is not right to understand the word "charge" as having been used in the strict legal sense. The learned Judges seem to deduce from the Privy Council decision that some step should be taken in execution which will have the effect of defeating the survivorship, but what that step exactly is, in a case where there has already been an attachment before judgment and a decree following it prior to the judgment-debtor's death, they do not state. If as we have shown above a mere attachment in execution is according to the Privy Council, enough to defeat the survivorship and if in a case where there has been an attachment before judgment and a decree following it there need not be any further attachment after the decree : vide O. 38, R. 11 of the Code of Civil Procedure we fail to see what further step such a decree-holder should take in order to bring matters to the stage where a mere attachment in execution has been made. The learned Judges then rely on a decision of this Court in *Ramanayya* v. *Rangappayya* (13) for the position that an attachment before judgment has not the effect of defeating the survivorship and observe that though in that case the defendant had died before the decree, it does not make any difference whether he dies before or after the decree. This observation does not seem to us to be sound. It is true that until a decree is passed an attachment before judgment could not operate to render the attached

(11) [1913] 38 Bom. 105=21 I. C. 330=15 Bom L. R. 848.

(12) A. I. R. 1924 Patna 465 = 3 Pat. 250 = 5 P. L. T. 135.

(13) [1893] 17 Mad. 144.

property available for sale in execution, but if a decree is also passed before the defendant's death, it is unnecessary to attach the property again and the prior attachment renders the property available for such sale. The decision in *Ramanayya* v. *Rangappayya* (13) has been referred to and distinguished in a later case in *Muthuswami Chetti* v. *Chinnammal* (6) which has not been noticed by the Bombay High Court. In *Ramanayya* v. *Rangappayya* (13) itself the learned Judges clearly indicate that an attachment before judgment would become operative as soon as a decree is passed and that, if the defendant had died subsequent to the decree, they would have held that such prior attachment would defeat the survivorship.

We might also notice that it has been held in *Ganu Singh* v. *Jangi Lal* (14) that the effect of an attachment of property under the Code of Civil Procedure whether made before or after decree is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place—see page 534. In the same judgment it has been observed that "the main object of an attachment before judgment is to enable the plaintiff to realise the amount of the decree supposing a decree is eventually made, from the defendant's property."

For the above reasons we must hold, dissenting from *Subrao Mangesh* v. *Mahadevi* (11) and following *Muthuswami Chetti* v. *Chinnammal* (6), that an attachment before judgment followed by a decree prior to the judgment-debtor's death has the effect of precluding the accrual of title by survivorship as against the attaching-creditor in the same way as an attachment after decree. This, however, should not be interpreted to mean that the operation of survivorship is altogether stopped by reason of the attachment whether before or after decree for, if the attaching creditor does not execute his decree, or if the entire property is not needed to satisfy the deree, then the property or the surplus, as the case may be, will go to the other coparceners. The decision discussed above should, in our view, be only taken to mean that the other coparceners take the property subject to the claims of the attaching creditor.

With regard to the decision in *Subrao Mangesh* v. *Mahadevi* (11), it might also be mentioned that, while discussing the Privy Council case, the learned Judges seem to make a point of the fact that in the case before them there was no actual sale of the property even after the judgment-debtor's death and seem to indicate that, if there was such a subsequent sale, the prior attachment might preclude the operation of survivorship—vide page 109. We do not think that the Privy Council decision justifies the drawing of such a distinction, but, in view of the fact that in the present case there has been an actual sale after the judgment-debtor's death, it is not necessary to discuss the matter any further.

The other case relied upon by the respondent is the one in *Sunder Lal* v. *Raghunandan Prasad* (12) which follows *Subrao Mangesh* v. *Mahadevi* (11). In that case it was found as a fact that there was no attachment before judgment and also that the defendant died just after the hearing of the suit and before the judgment—see page 256. The occasion, therefore, for considering the question as regards the effect of an attachment before judgment in a case like the present did not actually arise though the learned Judges state that an attachment before judgment does not rank in the same position as an attachment after judgment. They simply follow the decision in *Subrao Mangesh* v *Mahadevi* (11) and this case, therfore, does not carry us any further.

In the result the lower Court's decree will be modified by a direction that the appellants are entitled to retain two-sevenths of the purchase-money realised by the sale of the properties and are bound to refund only the balance to the Official Receiver. For the amount that they have thus to refund and for any further claims that they may have as regards interests and costs they will rank as unsecured creditors in the insolvency proceedings before the Official Receiver. The parties will receive and pay proportionate costs throughout.

Wallace, J.—I am in general agreement with my learned brother as to the conclusion to be properly deduced from the case law quoted before us, viz., that an attachment before judgment, when followed by a decree passed prior to the death of the judgment-debtor coparcener, prevents, as against the rights of the attaching creditor, the accrual of the survivorship right to the surviving coparceners.

(14) [1899] 26 Cal. 531.

But I should like to say, though it is not necessary for the present disposal of this case, that I consider that the language used in *B. Krishna Rao* v. *Lakshman Shanbhogue* (3), *Thadi Ramamurthi* v. *Moola Kamiah* (4) and *Muthuswami Chetti* v. *Chinnammal* (6), cases, on which we rely, is too broad, if interpreted literally. I do not think that these cases intended to lay down more than that so far as concerns the attaching decree-holder's right to hold the share of the deceased coparcener liable for his debts it is not defeated by the survivorship right, and not any general principle that whenever there is an attachment of coparcenary property followed by, or preceded by, a decree, the survivorship right of coparceners to that property is barred. Obviously, for example, if the attaching decree-holder's debt, and the debts of other decree-holders who are entitled in law to take advantage for themselves of the attachment made by another decree-holder, are satisfied, and there remains a surplus out of the share of the deceased judgment-debtor coparcener, that surplus will accrue by survivorship to the other coparceners. The proposition that an attachment plus decree will in all cases and until the cessation of the attachment prevent the accrual of the survivorship right does not, I think, necessarily follow from the cases quoted and is a proposition which will lead to many practical difficulties in partition and other proceedings. I think the correct way of stating the law is that the accrual of survivorship is not prevented but operates subject to the prior rights of the attaching decree-holders who are entitled to take advantage of his attachment to have their decree debts satisfied in execution proceedings against what was the share of the deceased judgment-debtor coparcener. The control over that share which the Court has by virtue of the attachment will be used by it for that end, and will not be relaxed until the end is attained. It is this exercise of this control, which, in my view, constitutes the "valid charge" over the property of which the Privy Council speaks in the *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1) case which "charge" must spring out of the attachment which puts the property under control of the Court, and not out of any subsequent step in execution; only the attachment, if before judgment, must have been followed up by a decree passed before the death of the judgment-debtor coparcener, since it is the decree which declares the extent of the right which the attaching creditor has agaist the property.

I agree in the order proposed by my learned brother.

Decree modified.

★★ A. I. R. 1926 Madras 78

DEVADOSS AND WALLACE, JJ.

(*Chinna Vavanan*—Petitioner—Appellant.

v.

Chettiappa Chetti and *others*—Respondents.

Appeal No. 104 of 1922, Decided on 15th January 1925, against the appellate order of the Sub-J., Dindigul, in Appeal No. 34 of 1921.

★★ *Civil P. C., S. 144—Purchaser party to suit but getting no benefit under decree—Decree reversed on appeal—Sale should be set aside.*

A bona fide purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside. But the protection which is given to a bona fide purchaser should not be extended to a defendant or a party to the suit even though he gets no benefit directly under the decree; in other words, it is only a bona fide purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected; 10 *All.* 166 *P. C., Rel. on.*

[P 80 C 2 & P 81 C1]

Per Wallace, J.—This salutary principle of restitution should be enforced as the rule, and exceptions to that rule should be allowed only so far as authority by which we are bound, has allowed them. [P 81 C 1]

B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Appellant.

T. M. Krishnaswami Aiyar and *N. Ramachandra Aiyar*—for Respondents.

Devadoss, J.—The appellant was the 1st defendant in O. S. No. 1412 of 1917. The suit was by a mortgagee against the mortgagor (1st defendant) and the purchaser was impleaded as 2nd defendant as he had a mortgage subsequent to that of the plaintiff. The appellant was ex-parte in the District Munsif's Court. A decree was passed in favour of the plaintiff and the hypotheca was sold and was purchased by the 2nd defendant. The ex-parte decree was reversed on appeal and the 1st defendant applied to have the

sale set aside. The 1st defendant having been adjudicated an insolvent, the Official Receiver continued the proceedings before the District Munsif. The District Munsif held that the 2nd defendant was not a decree-holder and, therefore, the sale was not liable to be set aside. On appeal by the Official Receiver the Subordinate Judge held that the order of the District Munsif was right and dismissed the appeal. The Official Receiver has preferred this appeal.

The contention of the appellant is that the purchase by the 2nd defendant is liable to be set aside as the decree in execution of which he purchased the property was set aside on appeal. It is well settled that, if a decree-holder purchases the property of the judgment-debtor in execution of his decree, which is afterwards set aside, his purchase is liable to be set aside at the instance of the judgment-debtor. The contention for the respondent is that the 2nd defendant is not a decree-holder and therefore his purchase is good against the judgment-debtor. In *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) it was held that a sale to a bona fide purchaser in execution of a decree was not liable to be set aside if the decree was afterwards reversed on appeal. Their Lordships observed at page 172: "It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the bona fide purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order." The question is whether the protection given to bona fide purchasers extends to persons who are parties to the suit in which the decree is passed, but who are not given any relief under the decree. In order that a purchaser may have the benefit of the sale under a decree which is afterwards set aside, he must be a bona fide purchaser. If he is not a bona fide purchaser then the purchase by him is liable to be set aside. A stranger to the decree is not bound to enquire into the merits of the plaintiff's claim or into the validity of the decree; but a party to the suit is in a different position, and it is his duty to enquire into the nature of the plaintiff's claim and the validity of the decree passed in plaintiff's favour. Supposing the plaintiff asked for relief in the alternative against two defendants, if the 2nd defendant satisfies the trial Court that the 1st defendant alone is liable and on the strength of that a decree is passed, and his property is brought to sale, and if on appeal the decree is set aside and the 2nd defendant is held liable, can it be said that the 2nd defendant is entitled to keep the property of the 1st defendant purchased by him in Court auction notwithstanding the reversal of the decree? Supposing a defendant contests the plaintiff's suit on the merits and a decree is passed not against him but against another defendant and if the property of the defendant against whom the decree is passed is brought to sale, and if the defendant who put forward the contention that the plaintiff's claim is a fraudulent one purchases the property and if the decree is afterwards set aside, can the defendant who purchased the other defendant's property be entitled to say that his purchase is good notwithstanding the fact that he was aware of the fraudulent nature af the plaintiff's claim? It may be said in such a case that he is not a bona fide purchaser. The decision in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) applies only to bona fide purchasers. In that case, the purchasers, whose purchase was upheld by the Privy Council, were strangers to the decree. It does not appear from the report whether they were, or were not, strangers to the suit. It cannot be assumed that the decision has no application to purchasers who are parties to the suit, but in whose favour no decree has been passed, from the mere fact that Sir Barnes Peacock uses the expression "bona fide purchasers who are no parties to the decree." A party to a suit cannot be said not to be a party to the decree if he gets no relief under it. If a party to a suit is on record, the decree is bound to make mention of him; and the principles of res judicata or of estoppel may apply to him whether he gets or not any relief under the decree. The decision, therefore, in my opinion covers the case of a party in whose favour no relief is given under the decree.

The contention of Mr. Krishnaswami Aiyar is that the principle of restitution is applicable only to decree-holders who

(1) [1887] 10 All. 166=15 I. A. 12=5 Sur. 129 (P. C.

purchase the property of the judgment-debtor in execution of, or who get some benefit under, their decree, and persons in whose favour a decree is not passed are not bound to make restitution of what they have got by purchase in a Court auction. The cases relied upon by him do not support the contention that the defendant, in whose favour there is no decree, is entitled to keep the property which he purchased in execution of the decree against another defendant even if the decree be upset either in appeal or in any subsequent proceeding. In *Syed Nathadu Sahib* v. *Nallu Mudaly* (2) it was held that where a property is purchased at a sale in execution of a decree, the purchase is subject to the final result of the litigation between him and the judgment-debtor. In *Moitheensa Rowthan* v. *Apsa Bivi* (3) the purchaser was a stranger to the decree. In *Raghavachari* v. *Pakkiri Mahomed Rowther* (4) the purchaser was not a party to the suit. As observed in *Duraiswami Aiyar* v. *Annaswami Aiyar* (5), "the principle of doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost." It is contended for the respondent that this must be limited to the decree-holder who gets benefit by reason of his decree. But I am unable to accept this view. In this case, if the hypotheca had fetched a very large price and if a balance remained after satisfying the plaintiff, the balance would go to satisfy the 2nd defendant who is a puisne mortgagee. Even though a defendant may not have a decree in his favour, in many cases, he may get ultimately a benefit under the decree. In such cases it cannot be said that he is a stranger to the decree. The decision in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) does not seem to have been brought to the notice of the learned Judges who decided *Duraiswami Aiyar* v. *Annaswami Aiyar* (5). The American decision in *Quan Wo Chung Co.* v. *Laumeister* (6) in laying down: "all that the one has gained and all that the other has lost is due to the agency of the Court and therefore no injustice is done in restoring the party wrongfully dispossessed without stopping to investigate the rights of the party who has thereby gained the possession," has stated the principle too broadly. I think the correct principle is that a bona fide purchaser who is not a party to the suit or proceeding in which the auction sale is held, is entitled to hold the property even though the decree or order in execution of which the auction sale is held is subsequently reversed or set aside.

In *Yellappa* v. *Ramachandra* (7), Farran, C. J., observes: "The Privy Council, in a case very analogous to the present, has decided that where a person, stranger to the proceedings, purchases property bona fide at an auction sale held in execution of a decree, his sale cannot be set aside on the ground that the existence of a cross-decree rendered the sale in execution improper." If the contention of the respondent is good, then a defendant, in whose favour there is no decree, would be entitled to keep the property which he purchased in Court auction, even though he knew that there was a cross-decree in favour of the defendant whose property was sold in execution. I thing the principle of the decision in *Rewa Mahton* v. *Ram Kishen* (8) and in *Yellappa* v. *Ramachandra* (7) is against the contention of the respondent.

This point was especially raised and decided by a Bench of the Calcutta High Court in a case reported in *Narendra Chandra* v. *Jogendra Narain* (9). In that case Mukerjee, J., after an exhaustive examination of English and American cases observed: "An examination of these cases show that protection is afforded to the purchaser only when he is a stranger to the suit." This principle is not only consonant with equity, but it also saves the Court the trouble of enquiring whether the defendant, in whose favour there is no decree at the time of the sale, would be entitled to some benefit after the sale. I think the protection which is given to a bona fide purchaser should not be extended to a defendant or a party

(2) [1903] 27 Mad. 98.
(3) [1911] 36 Mad. 194=21 M. L. J. 969=10 M. L. T. 373=12 I. C. 444=(1911) 2 M.W.N. 425.
(4) [1916] 30 M. L. J. 497.
(5) [1900] 23 Mad. 306=10M. L. J. 307.
(6) 17 Am. S. 262.
(7) [1896] 21 Bom. 463.
(8) [1887] 14 Cal. 18=13 I. A. 106=4 Sar. 746 (P. C.).
(9) [1913] 20 C. L. J. 469=27 I. C. 139=19 C. W. N. 537.

to the suit even though he gets no benefit directly under the decree; in other words, it is only a bona fide purchaser who is not a party to the suit or proceeding that is entitled to keep the property purchased by him. In all other cases the purchase is liable to be defeated on the reversal of the decree in execution of which the sale is effected

In the result the appeal is allowed and the sale to the 2nd defendant is set aside with costs throughout.

Wallace, J.—I have had the advantage of perusing the judgment of my learned brother and I am not prepared to differ from his opinion in the case. I was at first inclined to hold that in such a case the principle of restitution, that is the restoration to his status quo ante of a person wrongfully dispossessed by the agency of the Court, should be enforced only against the party at whose instance the decree has been enforced, but on further consideration I think, as at present advised, that this salutary principle of restitution should be enforced as the rule, and that exceptions to that rule should be allowed only so far as authority by which we are bound has allowed them. The Privy Council in *Zain-ul-Abdin Khan* v. *Muhammad Asghar Ali Khan* (1) has laid down that a bona fide purchaser not a party to the decree forms an exception to the rule, and we are not referred to any case which has definitely extended the exception to auction purchasers who are parties to the suit or decree, but who had not themselves enforced the decree and brought about the auction sale.

I, therefore, agree in the order proposed by my learned brother.

Appeal allowed.

★★ A. I. R. 1926 Madras 81

SPENCER AND RAMESAM, JJ.

Venku Shettithi and *others*—Plaintiffs—Appellants.

v.

T. Ramachandrayya and *others*—Defendants—Respondents.

Appeal No. 182 of 1921, Decided on 24th March 1925, against the decree of the Sub-J., South Kanara, in Original Suit No. 21 of 1919.

1926 M/11 & 12

★★ *Limitation Act, Art. 134—Transferee from mortgagee knowing his vendor having only mortgage interest but purchasing property absolutely—Art. 134 applies.*

Article 134 applies even where a deed of transfer is a sale deed and what was bargained by the transferee is also an absolute sale though he knew that the transferrer has only a mortgagee's interest: [*A. I. R.* 1923 *P. C.* 175, *Foll.*] The omission of the words "in good faith" which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871 is not without any significance and the onus is not on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation.

[P 81 C 2]

C. V. Anantakrishna Aiyar—for Appellants.

B. Sitarama Rao—for Respondents.

Spencer, J.—I agree. I am unable to regard the omission of the words "in good faith" which appeared in the corresponding articles of the Limitation Acts of 1859 and 1871, as being without any significance, so as to throw the onus on a purchaser of the full interest from a mortgagee to prove that he acted in good faith before he can plead limitation. The same Art. 134 governs both properties conveyed in trust and properties mortgaged when they have been transferred afterwards for valuable consideration. In the case of trust property the Privy Council has decided in *Subbaiya Pandaram* v. *Muhammad Mustapha* (1) that a purchaser for valuable consideration with notice of the trust can under Art. 134 plead 12 years' adverse possession as a defence to a suit brought by the trustee. I see no reason to suppose that trusts were intended to be put in a worse position than mortgagors as regards recovery of alienated property. The only distinction between the position of a purchaser from a mortgagee and a purchaser from a trustee is that a mortgagee as such has the mortgage interest, which is assignable, in the property, whereas a trustee as such has no transferable interest. This distinction is pointed out in *Subbaiya Pandaram* v. *Muhammad Mustapha* (2), but nevertheless it was held in that case that a transferee of trust property need not prove good faith before taking advantage of Art. 134, and the decision was confirmed

(1) A. I. R. 1923 P. C. 175=46 Mad. 751=50 I. A. 295=21 A. L. J. 730=25 Bom. L. R. 1275—28 C. W. N. 493=45 M. L. J. 588=33 M. L. T. 285=(1924) M. W. N. 26=2 Pat. L. R. 104=L. R. 4 P. C.180=18 M. L. W. 903 (P. C.).

(2) [1916] 32 M. L. J. 85=5 L. W. 690=40 I. C. 50=21 M. L. T. 62.

by the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha* (1). My judgment in *Kunnuswami Tanjirayan* v. *Muthuswami Pillai* (3) was quoted with approval in *Muthaya Shetti* v. *Kanthappa Shetti* (4), and we have not been shown any reason for doubting its correctness beyond a footnote at page 516 of Rustomji's Commentary on the Law of Limitation (3rd Edition). The view of the majority of the Full Bench which decided *Seeti Kutti* v. *Kunhi Pathumma* (5) that Art. 134 does not apply to cases where the transferee from a mortgagee does not get possession of the property will not help the appellants before us who are out of possession and ask for delivery of possession. In every case where Art. 134 is set up as a defence by a transferee from a mortgagee it is material to see what interest the mortgagee purported to transfer to him : [vide *Rego* v. *Abbu Beari* (6) and *Muthaya Shetti* v. *Kanthappa Shetti* (4) : *Veerabhadra Tevan* v. *Veerappa Tevan* (7) and *Baluswami Aiyar* v. *Venkatasami Naicker* (8)]. Ex. II, dated July 16, 1878, purports to be an absolute sale of the properties in A schedule and not a mere assignment of a mortgage interest in them. In think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by this document, seeing that if Ex. I, dated January 12, 1872, were to be treated as a sale with an option for repurchase after 4 years and before 6 years, the date for repurchase had passed and the property had become vested entirely in the purchaser on January 12, 1878. The present suit was rightly found by the Subordinate Judge to be time-barred and the appeal must be dismissed with costs.

Ramesam, J.—This appeal arises out of a suit for redemption of a mortgage. The plaintiff's predecessors-in-title, namely, one Parameshwari Hengsu and others mortgaged such of the properties as are comprised in Sch. A and the properties in Sch. A-1 to one Manjunatha Naika by Ex. I, dated the 12th January, 1872, for Rs. 14,000. The mortgagee conveyed the properties in Sch. A by Ex. II, dated the 16th July 1878, to one Venkappa, the ancestor of the defendants and the defendants obtained them for their share at a family partition. The mortgagors assigned the equity of redemption in the mortgaged properties by Ex. B, dated the 12th September, 1906, to one Booba Shetti, from whom it devolved on the plaintiffs under the Aliyasanthana Law. We are not now concerned with the properties in Sch. A-1 as to which the interest of the mortgagee also has come to the plaintiffs' hands by various transactions. The Subordinate Judge dismissed the suit. In appeal the claim for the properties in Sch. A-2 has not been pressed and no reference need be made to them and we are only concerned with the properties in Sch. A. Two points have been argued by the learned vakil for the appellants : (1) Whether Ex. I is a mortgage by conditional sale or a sale with an agreement for repurchase ? (2) Assuming it is a mortgage, whether the suit is barred by limitation under Art. 134 of the Limitation Act ?

In the view I take of the second question, I think it is unnecessary to discuss the first. For purposes of discussion I will assume in favour of the appellant that Ex. I ought to be construed only as a mortgage by conditional sale. The question now is whether the properties having been sold by Ex. II, Art. 134 of the Limitation Act does not apply.

Mr. Anantakrishna Aiyar, the learned vakil for the appellants, contends that Art. 134 of the Limitation Act can only apply where the transferee from the mortgagee took the properties in the belief that the transferrer was absolutely entitled to them. That this was the law under the corresponding articles of the Acts of 1859 and 1871 admits of no doubt. See *Radhanath Doss* v. *Gisborne* (9). But the words "in good faith," which appeared in that article, have been omitted in the Acts of 1877 and of 1908. The question is whether it can be contended that under the Acts of 1877 and of 1908 the knowledge on the part of the purchaser of the true nature of the interest of the transferrer prevents the application of Art. 134. Mr. Anantakrishna

(3) [1917] M. W. N. 5=38 I. C. 194=5 L. W. 250.
(4) [1917] 34 M. L. J. 431=7 L. W. 482=23 M.L.T. 291=45 I. C. 975=(1918) M. W. N. 334.
(5) [1917] 40 Mad. 1040=33 M. L. J. 320=22 M. L. T. 236=(1917) M. W. N. 609=43 I C 31=6 L. W. 464 (F. B.).
(6) [1897] 21 Mad. 151.
(7) [1912] 15 I. C. 609.
(8) [1916] 40 Mad. 745=40 I. C. 531=32 M. L. J. 24.
(9) [1871] 14 M.I.A. 1=15 W.R. 24=6 B.L.R. 530=2 Suther. 397=2 Sar. 636 (P. C.).

Aiyar relied on *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10). Though the remarks at page 738 of that decision are somewhat in favour of the appellant, the point was not actually decided in that case. The next decision relied on by him is *Tholasinga Mudali* v. *Nagalinga Chetty* (11), where the obiter dictum in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10) was followed by Sadasiva Aiyar and Napier, JJ. The next case relied on by him is the decision in *Muthaya Shetti* v. *Kanthappa Shetti* (4). In that case, it is observed : "If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee he cannot acquire title as the absolute owner of the property. After all Art. 134 is only a branch of the law of prescription and the question to be determined would be what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgage right would not be conclusive on this question. The real test would be : Did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it ? In *Pandu* v. *Vithu* (12) that is the test that was suggested." I do not see how these remarks of Seshagiri Aiyar, J., help the appellant. If the transferee purported to purchase the absolute interest, even though he knew that the transferrer had only the interest of a mortgagee the article would still apply according to this view. Bakewell, J., added that "if the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention." He made no reference to the case of *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10) unlike Seshagiri Aiyar, J. The finding shows that the deed of mortgage in that case was styled a sale deed though construed by the High Court as a mortgage by conditional sale. The period for redemption fixed in it had expired when the deed of transfer was executed and it was said that the vendee would naturally suppose that he was purchasing an absolute title. The finding accordingly was that the transferrer intended to transfer an absolute interest and that the intention of the parties was that there should be an absolute transfer of title of the property. This finding was accepted by the High Court and the second appeal was dismissed. I do not think that this case really supports the appellants.

Mr. Sitarama Rao for the respondent relied on the case, *Kannuswami Thanjirayan* v. *Muthuswami Pillai* (3) in which my learned brother took part. He pointed out that the decision in *Veerabhadra Tevan* v. *Veerappa Tevan* (7) was really a case of an assignment of the mortgagee's interest. He also referred to *Venkatachella Reddiar* v. *Collector of Trichinopoly* (13) which was a case of a transferee from a trustee. He agreed with the decision in *Pandu* v. *Vithu* (12) and differed from Chamier, J.'s opinion in *Ghasi Ram* v. *Kishna* (14) and held that the purchaser need not prove that he purchased in good faith, that is without constructive notice of the restricted nature of the vendor's title. In *Baluswami Aiyar* v. *Venkataswami Naicker* (8) it was held in the case of a transferee from a trustee that knowledge of the limited nature of the transferrer's title will not disentitle the transferee from taking advantage of Art. 134 of the Limitation Act. In the case of trusts this is the view also adopted in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (2) which was afterwards affirmed by the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha Marcayar* (1). These decisions were referred to by the learned Judges who decided *Muthaya Shetti* v. *Kanthappa Shetti* (4) as consistent with their view. To sum up, the possible cases that may arise in a matter of this sort are four : (1) Where the transfer on its face purports to be an assignment of the mortgagee's interest only. In such a case Art. 134 can never apply ; (2) where the transfer purported to be a sale deed, but as a matter of fact only an assignment of the mortgagee's interest was all that was bargained for. It may be conceded that in such a case also Art. 134 does not apply. And, this is all that was decided in *Muthaya Shetti*

(10) [1904] 1 L.W. 687=26 I.C. 1=(1914) M.W.N. 735.
(11) [1916] 1 M.W.N. 28=32 I.C. 265=3 L.W. 19.
(12) [1894] 19 Bom. 140.
(13) [1914] 38 Mad. 1064=33 I.C. 45.
(14) [1915] 13 A.L.J. 877=30 I.C. 564.

v. *Kanthappa Shetti* (4). (3) Where a deed of transfer is a sale deed and what was bargained by the transferee is also an absolute sale though he knew that the transferrer has only a mortgagee's interest. In such a case, though under the Acts of 1859 and 1871 Art. 134 may not apply I think under the Acts of 1877 and 1908 it applies. This is also the view taken by the Calcutta High Court in *Ram Kanai Ghosh* v. *Hari Narayan Singh* (15) which was also a case of a trustee. Seeing that the Privy Council have come to the same conclusion in *Subbaiya Pandaram* v. *Muhammad Mustapha* (1) I do not think any value can be attached to the dissent from the decision in *Ram Kanai Ghosh* v. *Hari Narayan Singh* (1) in *Singaram Chettiar* v. *Kalyanasundaram Pillai* (10). (4) Where the transfer is in the form of a sale deed and the transferee bargained for an absolute interest and acted bona fide throughout. To such a case there is no doubt that Art. 134 will always apply. Only the third case is the one in respect of which there seems to be some difference of opinion. But it seems to me that the preponderance of opinion in this High Court, in Bombay, in Calcutta and in the Privy Council is in favour of the view that Art. 134 applies. In the present case, though we may now construe Ex. I to be a deed of mortgage it is impossible to say that the purchaser under Ex. II acted otherwise than bona fide. According to the terms of Ex. I the debt was to be paid off after the 12th of January, 1876 and before the 12th of January, 1878 and in default of payment on the latter date, it was to operate as an absolute sale. Under the law as it then stood, the mortgagee might have honestly thought that he obtained an absolute title by the default of payment within the stipulated date and the transferee might have also similarly thought that the transferrer had an absolute title. That both where acting perfectly bona fide is clear from the recitals in Ex. II. It must be remembered that the Transfer of Property Act had not been enacted in 1878. The Privy Council heldin *Pattabhiramier* v. *Venkata Rao Naicker* (16) that the principle that a mortgage is for ever redeemable was not known to the ancient law of India. It is true that in a later case, *Thumbusami Moodelly* v. *Hossain Rowther* (17) their Lordships indicate a different rule in the case of mortgages after the year 18 8. But the parties to Ex. II might well have thought that in the case of mortgage documents between 1871 and 1875 the decision in *Pattabhiramier* v. *Venkata Rao Naicker* (16) applied. It is true the Madras High Court repelled such a contention, but this was long after 1878. In the above remarks I assumed that the parties to Ex. II knew that the proper construction of Ex. I is that it was a mortgage by conditional sale. But even this is extremely doubtful. Whatever view we may now take of Ex. I there is nothing to show that the parties to Ex. II did not honestly suppose it to be a deed of absolute sale which is what is purported to be. I think the present case is a case where the transferee acted bona fide according to the strictest meaning of the term, and Art. 134 applied. There is nothing to show that he did not pay the full value, according to the prices that ruled in 1878. I think the appeal fails on this ground and ought to be dismissed with costs.

Appeal dismissed.

(15) [1905] 2 C. L. J. 546.
(16) [1870] 13 M.I.A. 560=7 B.L.R. 136=15 W. R. 35=2 Suther 410=2 Sar. 623 (P. C.).
(17) [1875] 1 Mad. 1=2 I. A. 241=3 Suther 198=3 Sar. 531 (P. C.).

A. I. R. 1926 Madras 84

SPENCER AND KUMARASWAMI SASTRI, JJ.

Ry. V. Ayiswaryanandaji Saheb and *others*—Appellants.

v.

Ry. Sivaji Raja Saheb and *others*—Respondents.

Appeal No. 64 of 1920, Decided on 18th March 1925, against the decree of the Sub-J., Tanjore, in Original Suit No. 43 of 1913.

(a) *Hindu Law—Religious endowments—Trust properties—Devolution depends upon usage in absence of trust deed.*

The devolution of the trust upon the death o default of each trustee depends upon the term upon which it was created, or the usage of each particular institution where no express trust deed exists.

Where it appeared that the Rajah of Tanjore founded several religious institutions and acquired lands and gave them as endowments to temples, and that the pagodas were managed by the senior members as hereditary trustees.

Held: that the founders of the institutions intended that their successors who occupied the Raj should continue to have the sole management of the temples and pagodas and the endowments

attached to them and therefore to divide these properties among the many claimants to the estate of the Raja would be a policy inconsistent with the intentions of the founder of the institution when he endowed the temples with lands.

[P 87 C 2]

(b) *Hindu Law—Widow—Stridhan—Estate in the hands of Receiver—Whether widow's self-acquisitions form part of husband's estate depends on her intention.*

Whether the after-purchases form accretions to the corpus of a deceased husband's estate or stridhanam of the widow depends upon her intention, which has to be gathered in every case from her manner of dealing with the property.

[P 88 C 1]

When it is shown that the corpus of the estate has been all along in the possession of a Receiver there is no room for presuming that the widow intended to make the investments of the funds received by her part of her husband's estate, when she did not get her husband's estate into her possession. 10 *Cal.* 324 (*P. C.*); 25 *Mad.* 351; 28 *Mad.* 1; 14 *Cal.* 387 (*P. C.*) 20 *Cal.* 433 (*P. C.*) and *A. I. R.* 1922 *Mad.* 457, *Ref.* [P 88 C 1, 2]

(c) *Hindu Law—Succession—Illegitimate son is not an heir to collaterals of his putative father.*

Though the illegitimate son of a Sudra ranks as a sapinda of his putative father, and the latter is entitled to succeed to his property if he died without issue, he has never been regarded by any of the Courts in India as an heir to his putative father's collateral relations. 41 *Mad.* 44 (*F. B*) *Ref.* [P 88 C 2]

K. C. Gopala Desikan, A. Krishnaswami Aiyar, A. Krishnaswami Aiyangar and T. L. Venkatarama Aiyar—for Appellants.

T. R. Ramachandra Aiyar, C. Krishnaswami Rao, A. V. Visvanatha Sastri, T. R. Krishnaswami Aiyar, T. S. Ananthanarama Aiyar, S. Srinivasa Aiyar and *C. S. Venkatachariar*—for Respondents.

Spencer, J.—Sivaji, the last Rajah of Tanjore, died in 1855. After his death the East India Company took possession not only of the Raj of Tanjore and the private properties of the late Rajah, but also certain pagodas and devasthanams which had been in his possession and management up to the date of his death. It was held by the Privy Council that the East India Company's usurpation of this property amounted to an act of State of which the ordinary Civil Courts could not take cognizance. Subsequently the Senior Rani Kamakshi Bai Saheba petitioned Government for a restoration of the estate and also of the devasthanams. The estate was restored by proceedings of the Madras Government, dated 21st August 1862, which we have dealt with in another place. The order restoring the devasthanams was dated the 19th March 1863.

In her memorial, dated the 24th December 1862, Kamakshi Bai Saheba prayed that the pagodas and charitable institutions which had been founded from time to time by members of her family might be made over to her as the head of the family for the time being. She mentioned in her memorial that Mr. Phillips, the Commissioner of Tanjore, had in 1858 recommended the Government to make over these endowments to Sakharam Saheb husband of the Princess, and that the Government refused to accept the recommendation. The Government Agent, in forwarding Kamakshi Bai's memorial, recommended her prayer to be granted on the ground that it was highly desirable that all connexion with these religious institutions on the part of Government should cease. The Governor in Council concurred with the Agent's recommendation and ordered the pagodas to be made over to the Rani. In doing so, the Government did not indicate the course of succession to be followed in the management of these endowments after Kamakshi Bai's death. Accordingly she managed the institutions till 1892, when she died.

Upon her death Government again took possession of the devasthanams and put them under the management of the Temple Committee of Tanjore. The next Senior Rani Umamba Bai brought a suit (O. S. No. 3 of 1894) for the recovery of these devasthanams and their endowments basing her title on the fact that she was the Senior Rani and head of the family. She impleaded the Secretary of State for India, the members of the Tanjore and Kumbakonam Devasthanam Committees and the other Ranis as defendants in her suit. In a careful judgment, in which he set out the history of these institutions, Mr. Venkobachariar then Subordinate Judge of Tanjore came to the conclusion that the Government had no right to resume, or in any way interfere with, the management of the temples after granting them in favour of Kamakshi Bai, that they devolved as impartible property and that by the State grant restoring them Kamakshi Bai acquired heritable interests in the properties. He decreed the suit in plaintiff's favour. There was an appeal to the High Court, which was heard by Shephard and Davies, JJ. Those learned Judges dismissed the appeal holding that the estate taken by the Senior Rani was in the nature of self-acquired property in

her hands in the sense that her rights were derivative from Government and had no relation to inheritance on the death of the Rajah. They inferred from the fact that the plaintiff was chosen as the person to whom the trust should be made over in her capacity of widow of the late Rajah, that the intention of the Government was to grant her a widow's estate, that is, to put her in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah.

After the death of Umamba Bai the devasthanam estate was managed by each of the widows who in turn became senior widow until the last widow Jijamba Bai died in 1912. Disputes then arose between the children of the Rajah's sword, who are known as Mangala Vilas people, and the sons of the adopted son, who are Defendants 1 and 2. The former brought O. S. No. 43 of 1913 in which they claimed the right to be declared entitled to the possession and management of the devasthanams and their endowments and also to share in the immovable and moveable properties purchased by the widows of the late Rajah which became accumulation and accretions to the private estate of the Rajah, to which they claimed to succeed either as his heirs or as heirs to the widows who acquired these properties as stridhanam.

The learned Subordinate Judge, in disposing of these and other properties of the Rajah, held that the acquisitions of the various Ranis having been purchased in their own names, became their separate estates; and as regards the devasthanam properties, he held that the Government grant was to Kamakshi Bai by name as a single individual or sole trustee and that the endowments were therefore not capable of being made the subject of partition, but would pass to the head of the family for the time being, that individual at the time of suit being the 1st defendant, and he accordingly dismissed the suit.

In appeal Mr. Alladi Krishnaswami Aiyar argued that the trusteeships of the devasthanams should follow the same line of inheritance as the private estate of the Rajah and that the Mangala Vilas people, having been held entitled to share in the private estate should also be given a share in the management of the temples, the Government having by their grant destroyed incident of impartibility which once the attached to the estate. In support of his arguments he relied on *Rajah Venkata Rao* v. *The Court of Wards* (1), *Ramanathan Chetty* v. *Murugappa Chetty* (2), the principles upon which this case was decided having been approved by the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (3) on *Sethuramaswamiar* v. *Meruswamiar* (4) from which there was an appeal to the Privy Council in *Sethuramaswamiar* v. *Meruswamiar* (5), which reversed the decision of this Court in *Meenakshi Achi* v. *Somasundaram Pillai* (6) and *Thandavaroya Pillai* v. *Shunmugam Pillai* (7).

For the respondent our attention was called to the fact that in the written statement of the 3rd defendant, who was one of the Mangala Vilas people, it was asserted that these properties were impartible and should descend to the senior member of the senior line according to the custom obtaining in the family of the late Rajah. In the Saptur case *Ramaswami Kamaya Naik* v. *Sundaralingaswami Kamaya Naik* (8) it was made clear that the son of a legally married wife is a preferable heir to impartible property over the son of a sword wife or concubine. The decisions in *Trimbak* v. *Lakshman* (9) where it was observed that religious offices were naturally indivisible, and in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (10), where it was observed that if there are no emoluments attached to an office of trustee, there was no reason to partition the property amongst junior members, were also cited *Ramanathan Chetty* v. *Murugappa Chetty* (2), where Bhashyam Aiyangar, J., observed that the usage and custom in respect of

(1) [1879] 2 Mad. 128=7 I.A. 38=6 C.L.R. 152 =4 Sar. 81 (P.C.).
(2) [1903] 27 Mad. 192=13 M.L.J. 341.
(3) [1906] 29 Mad. 283=33 I.A. 130=10 C.W. N. 825=1 M.L.T. 327=3 A.L.J. 707=4 C. L.J. 189=16 M.L.J. 265=8 Bom. L.R. 498 (P.C.).
(4) [1909] 34 Mad. 470=20 M.L.J. 108=4 I.C. 76=6 M.L.T. 390.
(5) [1917] 41 Mad. 296=45 I.A. 1=7 L.W. 22 =4 P.L.W. 91=34 M.L.J. 130=16 A.L.J. 113=27 C.L.J. 231=22 C.W.N. 457=43 I.C. 803=20 Bom. L.R. 514 (P.C.).
(6) [1920] 44 Mad. 205=39 M.L.J. 403=12 L. W. 232=59 I.C. 464=(1920) M.W.N. 507.
(7) [1908] 32 Mad. 167=19 M.L.J. 59=2 I.C. 341=4 M.L.T. 486.
(8) [1894] 17 Mad. 422.
(9) [1895] 20 Bom. 495.
(10) [1897] 19 All. 428=(1897) A.W.N. 103.

religious trusteeships which were hereditary in a family, was generally that the office could be divided by getting the duties discharged in rotation by each member of the family and that the exceptions to that rule would only be a few cases in which the hereditary office may be descendible only to a single heir, was a case of family partition among Chetties of Sivaganga. It was not alleged in that case that there had been any trace of impartibility existing in the family prior to partition. In appeal in *Ramanathan Chetty* v. *Murugappa Chetty* (3) the Judicial Committee confirmed the decree of the High Court which provided for each member of the family taking one turn of management in succession, the grounds of their Lordships' decision being that there was an unbroken usage evidencing a family arrangement in this particular family and that that arrangement should hold good until altered by the Court or superseded by a new scheme. In *Meenakshi Achi* v. *Somasundaram Pillai* (6) the Chief Justice and Seshagiri Aiyar, J. observed that the course of decisions in this Presidency, which had the approval of the Judicial Committee, was opposed to the proposition that the office of a trustee in a public institution was indivisible and regulated by the same rules as the succession to impartible estates. The suit related to certain kattalais attached to a temple in the Tanjore district and the learned Judges held that a claim by the senior-most male member to manage alone among the heirs should be proved as a special custom. From the history of the case it appears that these kattalais were managed for some years by the Board of Revenue and that they restored the management and the enjoyment of the lands to two members of the family representing the senior and the junior branches. In such a case, the usage of the institution was obviously opposed to the principle of management by a sole trustee. In Mayne's Hindu Law, paragraph 439, it is stated that the devolution of the trust upon the death or default of each trustee depends upon the terms upon which it was created, or the usage of each particular institution where no express trust deed exists.

In 1863, when Government restored the management of these temples to Kamakshi Bai, it was thought that it was the universal custom of the country that the eldest male heir of a deceased trustee should succeed as trustee to the person from whom he inherited: See *Purappuvanalingam Chetty* v. *Nallasivan Chetty* (11). And in the Sivaganga case *Muttu Vaduganada Tevar* v. *Dora Singha Tevar* (12), the Privy Council recognized the principle that in regranting an impartible zamindari and issuing a sanad, the Government could retain the quality of impartibility in respect of any of the property thereby restored. From the history of these institutions described in Mr. Venkobachariar's judgment in O. S. No. 3 of 1894, Ex. A-197, it appears that the Rajah of Tanjore founded several religious institutions and acquired lands and gave them as endowments to temples, that the pagodas were managed by Serfoji as hereditary trustee and that on his death his son Sivaji succeeded to all the rights and privileges of his father including the management of the pagodas. I am of opinion therefore that the founders of these institutions intended that their successors who occupied the Raj should continue to have the sole management of the temples and pagodas and the endowments attached to them. It follows therefore that to divide these properties among the many claimants to the estate of the late Sivaji would be a policy inconsistent with the intentions of the founder of the institution when he endowed the temples with lands. I am further of opinion that when Government restored these properties to Kamakshi Bai as "head of the family for the time being," they indicated their intention that they should continue to be managed by a sole trustee. If it were necessary for the 1st defendant to prove that sole trusteeship is an incident of this hereditary trust, I should be prepared to find it proved.

In this view, the Subordinate Judge was right in recognizing the 1st defendant as being the lawful trustee who should manage these properties for his lifetime in his capacity of head of the family, and I consider that the appeal should be dismissed so far as these properties are concerned.

Next as regards the purchases of immovable and moveable properties made by the widows out of their savings, and

(11) [1863] 1 M. H. C. 415.
(12) [1881] 3 Mad. 290=8 I. A. 99=4 Sar. 239 (P. C.).

as regards their jewels, it must be remembered that the Ranis were only receiving a small income from the mokhasa estate and pensions of Rs. 800 a month sanctioned by Government, and that from 1867 till the date of suit a Receiver was in charge of the estate. Thus the present is not an instance of a widow in possession of her husband's estate making acquisitions out of income, in which case the Privy Council declared in *Nabakishore Mandal* v. *Upendrakishore Mandal* (13) that the acquisitions would become accretions to the husband's estate unless it were shown that she dealt with it in such a manner that it would remain her own [vide also *Mussumat Bhagbutti Daee* v. *Chawdry Bholanath Thakoor* (14)]

Whether the after-purchases form accretions to the corpus of a deceased husband's estate or stridhanam of the widow depends upon her intention, which has to be gathered in every case from her manner of dealing with the property [vide *Issri Dutt Koer* v. *Hansbutti Koerain* (1), where the authorities are reviewed, and later cases in *Akkanna* v. *Venkayya* (16) and *Subramaniam Chetty* v. *Arunachalam Chetty* (17) and *Babu Sheo Lochun Singh* v. *Babu Saheb Singh* (18)].

In every case it is a question of fact whether a widow has dealt with the income of her husband's property in such a manner as to make it an accretion to the corpus [vide *Rajah of Ramnad* v. *Sundara Pandiyasami* (19)].

As for presumptions, when it is shown that the corpus of the estate has been all along in the possession of a Receiver or of the Court of Wards, as was the case in *Saodamini Dasi* v. *The Administrator-General of Bengal* (20), and in *Parthasara thy Appa Rao* v. *Venkatadri Appa Rao* (21) and there, there is no room for presuming that the widow intended to make the investments of the funds received by her, part of her husband's estate, when she did not get her husband's estate into her possession.

As for Item 3 in Sch. D 1, which is an acquisition of Anusamba Bai Saheba who died in 1895 she wrote a letter A-186 to the Collector announcing her intention to create a trust in favour of the adopted son's son and received a reply, A-187, acknowledging her letter.

As regards jewels of Jijamba Bai, it is stated in the written statements of Defendants 1 and 2 that they were purchased out of the savings from her own income, and there being no evidence contra, the Subordinate Judge was right in treating them as her absolute property.

Lastly, assuming that these properties were the self-acquisitions of the widows, the appellants claim to be sapindas and to have a right to succeed to the stridhanam of widows who were married in an approved form, on the ground that it goes on their deaths without issue to the heirs of their husband.

In *Subramania Aiyar* v. *Rathnavelu Chetty* (22) it was held by a Full Bench that the illegitimate son of a Sudra ranked as a sapinda of his putative father, and that the latter was entitled to succeed to his property if he died without issue.

But the Full Bench recognized the fact that an illegitimate son had never been regarded by any of the Courts in India as an heir to his putative father's collateral relations, and that the authorities against such a proposition were very strong (see page 72). I am not satisfied that there are sufficient grounds to reconsider that statement of the law as it now stands. The reason for giving an illegitimate son a half share of what a legitimate son of a Sudra gets is morally justifiable on the ground that he has a legal right to be maintained by his putative father, but there is no legal obligation to maintain illegitimate children of collaterals.

(13) A. I. R. 1922 P. C. 39=42 M. L. J. 253=30 M. L. T. 234 20 A. L. J. 22=35 C. L. J. 116 (1922) M. W. N. 95 26 C.W.N. 322 = 3 P. L. T. 311=24 Bom. L. R. 346=15 M. L. W. 417 (P. C.)

(14) [1875] 2 A. C. 256.

(15) 1883] 10 Cal. 324=10 I. A. 150=13 C. L. R. 418 4 Sar. 459 (P.C.).

(16) [1901] 25 Mad. 351 12 M. L. J. 5.

(17) [1904] 28 Mad. 1. (F. B.).

(18) [1887] 14 Cal. 387 =14 I. A. 63=5 Sar. 1 (P C.).

(19) [1918] 42 Mad. 581=17 A. L. J. 153=36 M.L.J. 164=23 C.W.N. 549=29 C.L.J. 551=25 M. L. T. 409=21 Bom. L.R. 885 =49 I.C. 704 (1919) M. W. N. 511=10 L. W. 322 (P.C.).

(20) 1892] 20 Cal. 433=20 I. A. 12=6 Sar. 272 (P.C.)

(21) A. I. R. 1922 Mad. 457=46 Mad. 190=43 M. L. J. 486=16 M. L. W. 369=(1922) M. W. N. 532=31 . L. T. 221 F. B.).

(22) [1917] 41 Mad. 44 - 33 M. L. J. 224=6 L. W. 149 =42 I. C. 556=22 M. L. T. 94= (1917) M. W. N. 688 (F. B.).

be entitled to a partition of the estate or whether they were the stridhanam properties of the widows who made the acquisitions and are descendible to the stridhanam heirs ; and (3) if the properties are stridhanam properties, whether the plaintiffs and the 3rd and 4th defendants would be entitled to a share.

As regards the trusteeship of the devasthanam and other trust properties, I am of opinion that the Subordinate Judge is right. The devasthanam and other endowments were taken charge of by the Government along with the Raj and the private estate of the last Rajah on his death. We have in our judgment in the appeals from the main case traced the course of events from the confiscation of the Raj to the death of his last Rani. Kamakshi Bai Saheba, the senior widow and Rani, got possession of the private properties of the Rajah under the terms of the grant (Ex. A-46), dated the 21st August, 1862. She petitioned the Government for the restoration to her of the devasthanam and other trust properties, and the Government by their order, dated the 19th of March, 1863, put her in possession of such properties. From 1863 to 1892 Kamakshi Bai Saheba was managing the properties as the sole trustee, and although a Receiver was appointed in 1865 in the litigation between Kamakshi Bai Saheba and her cowidows, the Receiver did not take possession of the devasthanam properties and Kamakshi Bai Saheba was managing them as the sole trustee. On the death of Kamakshi Bai Saheba the Government took possession of the trust properties and Umamba Bai Saheba who was then the senior Rani filed Original Suit No. 3 of 1894 against the Secretary of State and the members of the Devasthanam Committees of Tanjore and Kumbakonam and the other surviving Ranis for a declaration of her right to succeed to the office and for possession of the properties. The Subordinate Judge in an exhaustive judgment decreed in favour of the plaintiff and the judgment has been filed as Ex. A-197 in the suit. He held that on a construction of the Government grant of 1863 the restoration of the management of the pagoda to Kamakshi Bai Saheba carried with it heritable right and that the right was transmissible to her heirs, the Government having no right to resume or interfere with the management of the temple after the death of Kamakshi Bai Saheba. He was also of opinion that succession to the management should be traced in the same way as succession to the impartible Raj ; that on the death of Kamakshi Bai Saheba the right did not vest jointly in the surviving widows and that plaintiff as the senior widow was entitled to succeed. Against this judgment there was an appeal filed to the High Court which is reported in *Kaliana Sundaram Aiyar* v. *Umamba Bayi Saheba* (23). The decision of the Subordinate Judge was confirmed and it was held by Shephard and Davies, JJ that the estate taken by Kamakshi Bai Saheba under the grant was in the nature of self-acquired property in the Rani's hands in the sense that her rights were derived from Government and had no relation back to inheritance on the death of the Rajah and that as she asked that the management should be put in her hands in the capacity as the head of the family for the time being, the inference was that the intention was to grant a widow's estate, that is, to put Kamakshi Bai Saheba in the position which she would have enjoyed had there been no confiscation on the death of her husband the Rajah. This decision does not, however, conclude the question as to whether on death of the last of the Ranis the trusteeship and management was to be in the senior member of the family or whether it was to be treated as a right which should be enjoyed by all the members who were to divide the private properties of the Rajah. So far as the terms of the grant go, the Government order putting Kamakshi Bai Saheba in management of the devasthanam properties differs in several respects from the grant of 1862 and the order of the 19th of March 1863, simply says that it is desirable that the connexion of Government with the pagodas should cease and they will accordingly be made over to Her Highness Kamakshi Bai Saheba.

In dealing with the question of management of the trust property, I think the first question to be considered is the usage as regards the management prior to the death of Sivaji Maharajah, the last Ruler of Tanjore. There can be little doubt, and it is not seriously contended before us by the appellants, that this temple and the charities which were founded by the successive Rajahs of Tanjore were in the

(23) [1897] 20 Mad. 421=7. M. L. J. 324.

possession and management of the Rajah for the time being and that till the death of Sivaji the office was always held by a single individual. When the Raj was seized by the Government as an act of State, the pagodas and the devasthanams were also taken possession of and managed by the Government ; but they were not desirous of taking upon themselves the responsibility of managing the temple and the devasthanam properties. The Government at one time wanted that the devasthanams should be made over to Sakharam Saheb, the son-in-law of Sivaji Maharajah, as sole trustee. Sakharam Saheb had married the elder daughter of the late Maharajah and on her death he married the younger daughter. As, however, there were disputes between Sakharam Saheb on the one side and Kamakshi Bai Saheba on the other, this proposal was not given effect to. In 1860 there was an idea of transferring the management to Avu Bai Saheba, the late Rajah's mother, but she was not willing to assume management. After Kamakshi Bai Saheba got possession of the private properties of the Rajah, she claimed the restoration of the devasthanams and the endowments on the ground that they were vested in her husband and that she was the then head of the family. Her request was supported by the Government Agent and the outcome of it was the order of 1863 transferring the management to her. From 1863 till her death in 1892 she was the sole trustee and it was till then nobody's contention that the office of trustee could partake of the nature of private property and that each of the surviving Ranis was to have the management by turns and although the Receiver took possession of all the private properties, the trust properties were left in the possession and management of Kamakshi Bai Saheba. On her death the next senior Rani was, as the result of the suit which I have already referred to, put in possession and management and on the death of each senior Rani the junior succeeded. I am unable to find anything either in the Government order or in the surrounding circumstances which changed the usage prevailing as regards these institutions, namely, the management by a single individual who was the head of the family for the time being and which rendered it subject to all the incidents of partible property.

In cases of religious institutions the main question to be considered is what was the usage of the institutions ; and where from the date of the foundation of these charities up to the date of the present suit the trust was managed by a single individual who was the head of the family not in possession of any partible property, I think it would require very strong evidence to show that there is anything in the grant by the Government of 1862 which introduced a new course of devolution and would make it subject to all the incidents of a trusteeship held by a member of a joint and undivided family. As I said before, there is nothing in the grant of 1862 which either expressly or by implication changed the usage of these institutions. They formed part of the Tanjore Raj and the Rajah for the time being was the trustee. As regards the private properties which were restored by the order of 1863 there are express words which make the grant subject to the ordinary Hindu Law applicable to partible properties and the properties were to descend according to Hindu Law. There are no such words in the grant of the devasthanam properties to Kamakshi Bai Saheba. The devasthanam having been part of the Tanjore Raj and the trusteeship having devolved on the Rajah for the time being, the right of management till the confiscation by the East India Company must be treated as impartible property and the office as one which was held only by a single individual.

It was, of course, open to the Government to destroy that character and to grant the office on such terms as to succession as it thought fit. The confiscation having destroyed all antecedent rights there can be no question of any vested rights as succession to the office. I am unable to infer from the mere fact that Kamakshi Bai Saheba applied for possession of the devasthanam properties as senior widow and was put in possession, the course of succession to the office changed. Even if there was no consfication, the office vested in the senior member of the Rajah's family. In cases of confiscation and regrant of property which is impartible, the law is that in the absence of anything in the regrant, the property which is regranted is subject to the old incident of impartibility. In *Baboo Beer Pertab Sahee* v. *Maharajah Rajen-*

der Pertab Sahee (24), the zamindari of Hunsapore, which was an impartible Raj and which descended to the eldest male heir according to the rule of primogeniture, was confiscated by the East India Company and was in the possession of the Government for some years. It was then granted to the younger member of the family of the deposed Rajah. It was held that although the zamindari was to be treated as the self-acquired property of the grantee, the grant being from the Ruling Power, in the absence of evidence of the intention of the grantors to the contrary, carried the incidents of the family tenure as a Raj. In *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar* (12), the Sivaganga Zamindari which was originally impartible was confiscated by the Government and regranted and it was held by their Lordships of the Privy Council that the regrant did not make the estate partible. A similar view was also taken by their Lordships in *Ram Nundun Singh* v. *Janki Koer* (25), where it was held that the confiscation and regrant of an impartible Raj to the various members of the family did not make the property regranted partible. The mere fact that there was a regrant would not, in my opinion, destroy the course of devolution followed till that date.

Great reliance was placed by Mr. Krishnaswami Aiyar for the appellants on the decision reported in *Ramanathan Chetty* v *Murugappa Chetty* (2), which was affirmed by their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (8). In that case the question was as to the validity of an arrangement come to by the members of an undivided family regarding the management by turns of a devasthanam which was hereditary in the family. The question turned upon the usage as regards the management, and Benson and Bashyam Aiyangar, JJ., in the course of their judgment, observe : " Except in the few cases in which the hereditary office may be descendible only to a single heir, the usage and custom generally is that along with other properties the office also is divided in the sense that the office is agreed to be held and the duties thereof discharged in rotation by each member or branch of the family, the duration of their turns being in proportion to their shares in the family property." Their Lordships of the Privy Council rest their decision on the usage as regards the trusteeship. Lord Macnaghten, in delivering the judgment of their Lordships, observes as follows :—

"In their Lordship's opinion the case is a very simple one. They think the unbroken usage for a period of nineteen years is as against the appellant conclusive evidence of a family arrangement to which the Court is bound to give effect."

It is on this sole ground that they held that there was nothing improper in the arrangement.

There can be little doubt that the Hindu text-writers treated a trusteeship or a right to the management of religious or charitable endowments as impartible property. In *Mancharam* v. *Pranshankar* (26) it was pointed out that the management of religious endowments is indivisible though modern custom has sanctioned a departure by allowing the parties entitled to officiate by turns. This decision was followed in *Trimbak* v. *Lakshman* (9). The inconvenience of such a custom was also pointed out. Candy and Ranade, JJ., observed :—

"It is clear that if the present claim of the appellant were recognized, each of the sons of the parties—and they have many—might claim a share not only in the family share but in the devasthanan share and office also, and this process might go on with each generation, frittering away the income, and making the service wholly ineffective. The lower Court appears to have assumed, without any such evidence as is suggested in *Mohunt Ramun Dass* v. *Mohunt Ashbul Dass* (27), that the office is partible with the income. The practice of many generations of the parties must be considered in settling the questions of impartibility, and that practice is in this case against partition with one single exception of what took place in 1838."

This case was cited with approval by their Lordships of the Privy Council in *Sethurimaswamiar* v. *Meruswamiar* ( ).

Where impartibility and management by a single individual who was the eldest member of the eldest branch of the family has been the rule from the foundation of the trust till the date of the present suit, I find nothing either in *Ramanathan Chetty* v. *Murugappa Chetty* ( ) or *Rama-*

(24 [1867] 12 M. I. A 1=9 W. R. 15=2 Suther 114=2 Sar. 348 (P. C.)

(25 [1902] 2 Cal. 828=29 I. A. 178=7 C. W. N. 57=4 Bom. L. R. 664=8 Sar. 351 (P. C.)

(26 [1882] 6 Bom. 298.

(27) [1864] 1 W. R. 160.

nathan Chetty v. *Murugappa Chetty* (3), which compels us to hold that the office should be treated as partible property and that on partition of the other properties of the family, this office should be held by turns. I may also point out that, having regard to the numerous descendants of the late Rajah who would, if the office is held to be partible, be entitled to turns of management and having regard also to the future growth of the family it would be against the interest of the trust to give the numerous parties turns of management and I am not prepared to to do so unless compelled either by the established usage of the institution or the terms of the regrant by the Government. I think the proper rule in such cases is to see whether there is any deed constituting the trust and regulating the course of devolution of the trust. If there is such a document, then the devolution will, of course, be regulated by the terms of the document constituting the trust. If there is no such document, the Court has to see what was the usage of the institution and to give effect to such usage. Where there is no uniform course of conduct, the interests of the institution should be the first consideration. If the management can, without detriment to the trust, be held by turns, it is open to the Court to decree management by turns. I have not been referred to any texts which state that the office of dharmakartha or trustee of a religious or charitable endowment is to be treated as joint property on partition and that turns have to be given to each member of the undivided family who gets a share in the partition irrespective of the interests of the charities. I do not find anything in the decision of their Lordships of the Privy Council in *Ramanathan Chetty* v. *Murugappa Chetty* (4) to warrant the rule that even in the case of public charities and trusts the claims of the dividing coparceners should override the interest of the institution and the observations of their Lordships in *Sethuramaswamiar* v. *Meruswamiar* (5) rather suggest that the rule laid down as to turns of management on partition applies only to private charities.

I find it difficult to accept the argument of Mr. Venkatachariar for the 2nd defendant that the management should be confined to the 1st and 2nd defendants by turns to the exclusion of the illegitimate sons. Either the office is impartible and descends on the eldest member of the senior line or it should be treated as partible and turns given to all those who are entitled to share in the family properties. There is no principle on which the office can be confined to the 1st and 2nd defendants to the exclusion of the Mangala Vilas branch.

As regards the properties left by the last Rani in respect of which partition is claimed, I do not think the plaintiffs are entitled to any share. I do not think that the properties acquired by the Ranis can be said to be accretions to their husbands' estate and to devolve upon the persons who would be entitled as reversioners to their property. From the year 1866 up till the date of this suit there was a Receiver in charge of the estate and none of the widows were in possession or management. I have in my judgment in the suit relating to the private properties of the late Rajah given my reasons for holding that the estate was not strictly a Hindu widow's estate, but that the grant by the local Government was on terms which were analogous to it. It was held in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (28) that whatever rights the widows would have enjoyed had they succeeded to the estate of the late Rajah under Hindu Law were destroyed by the grant of 1862 which was to be regarded as the root of title. Each Rani got about Rs. 9,600 a year as pension from the Government. The widows had their own properties and had also jewels, and there is nothing to show that the properties now claimed were acquired with the income of the estate left by their husbands and not with the savings from their pensions or dealings with their own stridhanam properties. Before the plaintiffs can claim the properties as accretions to the husbands' estate, they must show that the properties were purchased out of the income of the estate or out of the savings therefrom. There is no evidence that the acquisitions by the Ranis were treated as part of their husbands' estate or mixed up with it, but on the contrary we find that the Ranis were anxious to dispose of the properties which they had acquired. It is difficult to see how there can be said to be any accretions to the estate left by their husbands.

(28) [1868] 3 M. H. C. R. 424.

So far as this Presidency is concerned, the authorities are to the effect that there is no presumption that property acquired by a Hindu widow out of funds which were at her absolute disposal would form part of her husband's estate. I have dealt with this question in *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (21). In *Rajah of Ramnad* v. *Sundara Pandiyasami Tevar* (19) their Lordships of the Privy Council observe :—

" Their Lordships think the answer to this is that a widow may so deal with the income of her husband's estate as to make it an accretion to the corpus. It may be that the presumption is the other way. A case has been cited to their Lordships which seems so to say. But at the outside it is a presumption and it is a question of fact to be determined, if there is any dispute, whether a widow has or has not so dealt with her property."

The case referred to seems to be *Akkanna* v. *Venkayya* (16) which was referred to in the course of the argument by Mr. De Gruyther.

It is argued ay Mr. Krishnaswami Aiyer that the decision of the Privy Council in *Nabakishore Mandal* v. *Upendrakishore Mandal* (13) has settled the question which was left in doubt in *Rajah of Ramnad* v. *Sundara Pandyasami Tevar* (19). There is an observation of their Lordships at page 256 to the following effect :

" Now there can, their Lordships think, be no doubt that whatever stridhan she possessed was due to the accumulated savings from the income of the property which she received from her husband's estate, and though it is true that when that property had been received it would be possible for her so to deal with it that it would remain her own, yet it must be traced and shown to have been so dealt with, and in this case there is no sufficient evidence of this having been done."

It is argued that the effect of this observation is that the onus is on the other side to show that she did something which would indicate an intention of treating the accretions as her own and not as part of her husband's estate. The previous decisions of the Privy Council are not referred to by their Lordships and I do not think this case can be said to overrule all the previous decisions of their Lordships on the subject.

I am of opinion that the decision in *Saodamini Dasi* v. *The Administrator-General of Bengal* (20) is a clear authority for the view that a widow is not in possession of her husband's estate there can be no question of any purchase made by her being an accretion to her husband's estate. Their Lordships of the Privy Council observe :

" The appellant's counsel contended that the savings of a Hindu widow must be presumed to have been made for the benefit of her husband's estate. Without examining the precise result of the decisions, it is sufficient to say that in this case there is no room for any such presumption; for the corpus of the estate never came to the widow but was taken away by Sham Charan Mullick under the Will, and the income to which the widow succeeded was separated from it, and became and was dealt with as an entirely separate fund."

I think the result of the authorities may be summed up as follows : A Hindu widow has an absolute right of disposal over the income of the property which she inherits from her husband. She can either spend the same or accumulate it for her own benefit. In cases where she purchases properties or invests her savings and indicates by her conduct an intention that the properties purchased out of her savings should form part of her husband's estate, such savings should follow the same rules as regards devolution to her husband's estate and should be treated as accretions to the estate. Where she does not do so, she has absolute powers of disposal over such property and can sell or give the same to anybody she pleases without any right of the reversioners to question her alienations. Where the question is one of intention to be deduced or inferred from her conduct, the presumption is she intends to keep the property for her own absolute benefit and to have absolute powers of disposal over it. Where, however, a widow is not in possession of her husband's estate, there is no presumption that any of the properties which she gets are to be treated as accretions to her husband's estate nor can an intention be inferred that she wants to treat them as part of her husband's estate. On her death such properties would follow the same course of succession as her stridhanam properties.

The claim in this appeal relates to the properties left by ; (1) Umamba Bai Saheba

who died on the 4th of July 1900, possessed of items 1 and 2 in schedule D-1 to the plaint ; (2) Anusamba Bai Saheba who died on the 30th September, 1895, leaving Item 3 in Schedule D-1, and (3) Jijamba Bai Saheba, the last surviving widow. It is alleged that the properties in Schedule E to the plaint were left by Jijamba Bai Saheba.

As regards Item 3 in Schedule D-1 which is the acquisition of Anusamba Bai Saheba, the evidence is that on her death Serfoji got possession of the property and after him his son, the first defendant, got possession. She also wrote to the Government Agent that she wanted to give the property to the adopted son and she made a settlement. The evidence, oral and documentary, shows that on her death in 1895 Serfoji got into possesion in accordance with the settlement made by Anusamba Bai Saheba. The claim to Item 3 by the present plaintiffs is therefore clearly barred by limitation, even assuming that the plaintiffs are her heirs.

As regards the properties of Jijamba Bai Saheba, the last Rani, she has left a will disposing of her properties, and it follows that the plaintiffs can have no claim, she, in my opinion, having had full disposing power over the savings from her husband's estate, her pension, and her own stridhanam jewels.

As regards properties left by Umamba Bai Saheba : she died in 1900 and Jijamba Bai Saheba took possession of her properties. She claimed to be the heir of Umamba Bai Saheba and it does not appear that she claimed anything more than a cowidow's right to succeed. It is now settled law that there is no distinction as to the nature of the estate taken between property inherited by a woman from a male and property inherited from a female. In both the cases she takes not an absolute estate but only a qualified one. I need only refer to *Venkataramakrishna Rau* v. *Bhujanga Rau* (29), *Virasangappa Shetti* v. *Rudrappa Shetti* (30), and to the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (31) and *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (32). This being so, it follows from the decision of their Lordships of the Privy Council in *Lajwanti* v. *Safa Chand* (33), that a suit which is filed within twelve years of Jijamba Bai Saheba's death would not be barred. As Umamba Bai Saheba did not make any disposition of the properties, the question is who are the heirs to the properties left by her at the time of her death which were in the possession of her cowidow Jijamba Bai Saheba? The plaintiffs belonging to the illegitimate branch and being the descendants of the last Rajah, in existence, the question is whether under Hindu Law they can succeed to the estate of the Ranis, and this turns on the question whether in the case of Sudras the illegitimate sons have got any right to collateral succession.

It is argued by Mr. Krishnaswami Aiyar that in the absence of son, daughter and daughter's son the stridhanam property goes to the husband and his heirs, and that, if you come to the point where there are no such heirs as above named, you have to make no difference between the husband's property and the stridhanam property of the wife, and all her husband's heirs will be entitled to succeed. He therefore argues that even if the property left by Umamba Bai Saheba who died issueless was her stridhanam property succession must be traced as if it was the property of her husband and, as the illegitimate sons would succeed along with the legitimate sons to the properties of their father, they would also succeed to the stridhanam properties in the same proportion. Reference has been made to the decision of their Lordships of the Privy Council in *Bai Kesserbai* v. *Hunsraj Morarji* (34), where their Lordships refer to Mitakshara, Mayukha and the texts of Brihaspati as regards succession to stridhanam properties and hold that in the case of approved forms of marriage the heirs enumerated by Brihaspati who are blood relations of the husband would succeed to the woman's property. Reference

(29) [1895] 19 Mad. 107=6 M.L.J 1[illegible].
(30) [1895] 19 Mad. 110=6 M.L.J 3.
(31) [1903] 25 All. 468=30 I.A. 202=13 M.L.J. 330=5 Bom. L.R. 828=7 C.W.N. 831=8 Sar. 465 (P.C.)

(32) [1903] 25 All. 476=30 I.A. 209=13 M.L.J. 336=7 C.W.N. 840=5 Bom. 833=8 Sar. 535 (P.C.).
(33) A.I.R. 1924 P.C. 121=5 Lah. 192=51 I.A. 171=22 A.L.J. 304=L.R. 5 P.C. 94=20 L. W. 10=28 C.W.N. 960=(1924 M.W.N. 442 =2 Pat. L.R. 245=26 Bom. L.R. 1117=47 M.L.J. 935=6 P.L.T. 1 (P.C.).
(34) [1906] 30 Bom. 431=33 I.A. 176=10 C.W. N. 802=4 C.L.J. 9=8 Bom. L.R 446=3 A. L.J. 484=1 M.L.T. 211 (P.C.).

is also made to *Nanja Pillai* v. *Sivabagyathachi* (35), where it was held that the stridhanam property of a woman married according to the approved form who has left no issue will devolve on her husband, and on failure of the husband the property will go to his sapindas in the order laid down in Mitakshara with reference to the succession to the property of a male and to *Kanakammal* v. *Ananthamathi Ammal* (36), where a similar rule has been laid down Where the matter res integra I am disposed to hold that in the case of Sudras an illegitimate son is in the same position as a legitimate son except that he gets a lesser share The fact that an illegitimate son gets a lesser share would not by itself create a bar to collateral succession any more than the fact that an adopted son who exists along with a natural son born subsequently and who gets a lesser share would be barred. But there is a long catena of cases beginning with *Nisar Murtojah* v. *Kowar Dhunwant Roy* (37), which decide that an illegitimate son has no right to collateral succession. I have in *Subramania Aiyar* v. *Ratnavelu Chetty* (22) referred to all the authorities and dealt fully with the illegitimate son's rights and as regards the position of an illegitimate son to collateral succession. The right was negatived in *Krishnayyan* v. *Muttusami* (38) ; *Ranoji* v. *Kandoji* (39) ; *Parvathi* v. *Tirumalai* (40) ; *Shome Shanker Rajendra* v. *Rajasir Swami Jangam* (41) ; *Ramalinga Muppan* v. *Pavadai Goundan* (42) ; *Meenakshi* v. *Muniandi Panikkan* (43) ; *Dharma Lakshman* v. *Sakharam Ramjirao* (44), and *Zipru* v. *Bomtya* (45).

The plaintiffs are not entitled to Umamba Bai Saheba's property as heirs under Hindu Law. The appeal fails and is dismissed. The memorandum of objections is also dismissed I agree to the order as to costs proposed by my learned brother.

(35) [1911] 36 Mad. 116 =21 M.L.J. 850= 1911) 2 M.W.N. 168 =12 I.C. 128=30 M.L.T. 494.
(36) [1912] 37 Mad. 293=25 I.C. 901.
(37) [1863] Marsh 609.
(38) [1883] 7 Mad. 407.
(39) [1885] 8 Mad. 557.
(40) [1887] 10 Mad. 334.
(41) [1898] 21 All. 99 =(1898) A.W.N. 170.
(42) [1901] 25 Mad. 519=11 M.L.J. 399.
(43) [1914] 38 Mad. 1144=27 M.L.J. 353=1 L. W. 704=(1914) M.W.N. 672=25 I.C. 957= 16 M.L.T. 270.
(44) [1919] 44 Bom. 185=55 I.C. 306=22 Bom. L.R. 52.
(45) A.I.R. 1922 Bom. 176=46 Bom. 424=23 Bom. L.R. 1195.

This appeal having been posted to be spoken to this day on the question of costs allowed to the 1st respondent on the memorandum of objections filed by the 2nd respondent, the Court made the following

Order.—In modification of our original order we direct that the 1st respondent do get his costs of the memorandum of objections out of the devasthanam estate and the second respondent will bear his own costs of his memorandum of objections.

Appeal dismissed.

★ A. I. R. 1926 Madras 96

DEVADOSS AND WALLACE, JJ.

Lakshmi Ammal In re

Stamp Reference No. 1289 of 1924, Decided on 29th April 1925, against the decree of the City Civil Court, Madras, in Original Suit No. 512 of 1922.

★ *(a) Court-fees Act, S. 12 (2)—Appellate Court can demand proper Court-fee in the lower as well as appellate Court.*

The Court of appeal, when admitting an appeal, is entitled to demand under the provisions of S. 12 (2), proper Court-fee payable in the appellate Court as well as in the Court below by reason of the Judges in the Court below not having given a decision as to the proper amount of the Court-fee ; 22 *W. R.* 433, *Dist.* [P 98 C 2]

★ *(b) Court-fees Act. S. 12 (1)—Decision of Ministerial Officer as to Court-fee is decision of 'Court'.*

When a Court receives a plaint, petition or any other pleadings and files it as properly stamped, its act amounts to decision that the proper Court-fee has been paid. If according to the practice prevailing in the Courts the chief Ministerial Officer files a plaint, or a petition, or other pleading, as being properly stamped or that proper Court-fee has been paid, his act is an act of the Court within the meaning of S. 12 (1) ; 7 *Cal.* 348, *Appr.* [P 99 C 1]

(c) Civil P. C., S. 7 (4) (c)—Suit for refund of purchase money—Purchaser alleging fraud and inducement—Suit is in effect for cancellation of the sale deed.

Where a purchaser sues for a refund of purchase money on the ground that he was induced to purchase the property by fraud, the main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases S. 7 (4) (c) has no application. [P 99 C 2]

W. V. Rangaswami Aiyangar—for Appellant.

Anantha Krishna Aiyar—for the Government.

Devadoss, J.—The appellant purchased some property for Rs. 2,300 under a sale deed executed by the defendant and paid him Rs. 1,000 in cash and executed in favour of the defendant and his minor sons a mortgage deed for the balance of consideration for the sale. She brought a suit in the City Civil Court against the defendant alleging that the defendant had played a fraud on her by suppressing important facts and praying for a declaration that the sale deed and the mortgage deed were invalid and for the return of the Rs. 1,000 paid by her and for Rs. 300 as damages. The City Civil Judge dismissed the plaintiff's suit and the plaintiff preferred this appeal to the High Court. She paid the Court-fee on Rs. 1,300 being the amount claimed by her from the defendant. The Taxing Officer of this Court held that the Court-fee paid was insufficient and that the Court-fee on Rs. 2,300 should be paid on the ground that the substantial relief asked for by the plaintiff was the cancellation of the sale deed. The appellant paid the additional Court-fee. The Taxing Officer further demanded the difference between the Court-fee paid by her in the City Civil Court and the Court-fee payable by her according to his view. The appellant's vakil objected to paying this difference and hence the reference to this Court.

This being a matter of considerable importance, we gave notice to the Government Pleader to appear on behalf of the Government. The first contention raised by Mr. Rangaswami Aiyangar, the appellant's vakil, is that there was no decision by the City Civil Judge under S. 12 of the Court-fees Act as to the proper Court-fee payable on the plaint and that only in cases where there is a decision by the lower Court the appellate Court has power under S. 12, Cl. 2, to require a party to pay the additional Court-fee which the appellate Court may consider to be the proper fee payable on the plaint. The contention amounts to this: that when a plaint is received and filed by the Court without the presiding officer of the Court giving his decision as to the amount of the proper Court-fee payable, there is no decision of the Court under S. 12. In order to be certain as to the practice prevailing in the City Civil Court we called for a report from the City Civil Judge. The learned Judge reports:

"The principal Ministerial Officer attached to this Court, viz., the Sheristadar himself, personally receives all plaints and affixes the date stamp on them as soon as they are received. He then goes through the plaints and scrutinizes them carefully to ascertain whether they have been presented in time and whether they have been properly framed or stamped..... It is only in cases where the Principal Ministerial Officer feels any doubt and puts up the cases for formal orders by the Judge that the Judge applies himself to the question and gives his personal decision. This is the uniform course of proceeding that has been adopted during my time and I understand during the time of my predecessors as well."

So far as we are aware this is the practice obtaining in all mofussil Courts. Plaints and petitions are received by the Chief Ministerial Officer who files them if he is satisfied that they are properly stamped. If he finds that they are not properly stamped, he draws the attention of the pleader concerned to the fact and the deficiency is made up. If there is a difference of opinion between the Chief Ministerial Officer and the pleader concerned, the matter is placed before the Judge or the presiding officer of the Court who decides what the proper Court-fee is. If objection is taken by the opposite side as to the correctness of the valuation, or Court-fee, an issue is raised as regards that, and the Court decides what the proper valuation is and what Court-fee should be paid. The construction contended for by Mr. Rangaswami Aiyangar is not supported by the wording of S. 12. S. 12 (1) is in these terms:

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit."

He placed reliance upon the words "shall be decided by the Court." This does not mean that an issue shall be raised and decided by the Court. All that it means is that the Court, either the presiding officer or the Ministerial Officer who is charged with that duty, has to determine what the Court-fee is. Where the

Chief Ministerial Officer's decision is demurred to, the Judge or the presiding officer decides in open Court, after hearing the party concerned or his pleader, what the proper Court fee is. It cannot be said that when the Ministerial Officer, whose duty it is to check the pleadings filed in Court and whose duty it is to see whether proper Court-fee is paid or not, decides what the proper fee is, his decision is not a decision of the Court. Mr. Rangaswami Aiyangar places reliance upon the decision in *Kala Chand Sen* v. *Anund Kristo Bose* (1), in support of his contention. In that case the plaintiff paid a certain Court-fee on his plaint. The suit was decreed in favour of the plaintiff. The defendant appealed and paid the same Court-fee on his memorandum of appeal as was paid by the plaintiff on his plaint. When the appeal came on for hearing, the appellant raised the objection that the proper Court-fee was not paid on the plaint and therefore the plaint ought to have been rejected. The Subordinate Judge took the extraordinary course of requiring both the appellant and the respondent to pay deficient stamp duty, and on the failure of both to do so, he ordered both the plaintiff's suit and the appeal to be dismissed. The plaintiff preferred a special appeal to the High Court. The High Court set aside the order of the Subordinate Judge as it practically amounted to allowing the appeal inasmuch as he dismissed the plaintiff's suit. In the course of the judgment the learned Judges observe:

"It seems to us, therefore,that the Subordinate Judge ouhgt not to have allowed to be raised on this occasion a question which neither had been raised in the first Court where, if necessary, the amount of additional stamp might have been at once paid nor in the grounds of appeal."

The question raised here was not specifically raised there. Considering the course that the case took, the learned Judges thought that the defendant was in a way estopped from raising the question of Court-fee, inasmuch as he himself paid the same Court-fee on his appeal as was paid by the plaintiff on his plaint, and the order of the Subordinate Judge practically amounted to allowing the appeal which he could not have done when he found that the proper Court fee was not paid for the appeal. In *Shajan Bibi* v. *Earsin Dewan* (2) the question before us was not specifically raised. There the question was whether the suit was properly valued under the Suits Valuation Act and the High Court held that any objection as to valuation should have been raised in the Court of first instance as required by S.11 of Act VII of 1887 (Suits Valuation Act). In that case the lower appellate Court raised the question suo motu when it was not taken either in the Court of first instance or in the memorandum of appeal. The lower appellate Court held that the suit was not properly valued and directed the plaint to be returned to the Court of first instance as insufficiently stamped. The valuation of the appeal was the same as that in the first Court. The learned Judges observe at page 47:

"Without, therefore, expressing any opinion on the merits of the case, we hold that the learned Judge was not, in law, entitled to raise the objection and to decree the appeal on that ground."

These two cases have no application to the present case. In the present case the question is whether the Court of appeal, when admitting an appeal, is entitled to demand under the provisions of S. 12, Cl. 2, proper Court-fee payable in this Court as well as in the Court below by reason of the Judges in the Court below not having given a decision as to the proper amount of the Court-fee.

Our attention is drawn by the learned Government Pleader to the case in *Shama Soondary* v. *Hurro Soondary* (3). In that case the District Judge on appeal held that before he could go into the merits of the case, he must, under S. 12 of Act VII of 1870, require the plaintiff to pay any such additional amount as would make up the fee payable on the suit. The High Court upheld the decision of the District Judge. There the learned Judges declined to follow the ruling in *Kala Chand Sen* v. *Anund Kristo Bose* (1), holding that the expression of opinion relating to S. 12 of the Court fees Act was an obiter dictum, and could not be regarded as an authoritative declaration of law. They observe at page 351:

"No plaint can be accepted and registered until these preliminary questions of valuation and sufficiency of

(1) [1874] 22 W. R. 433.

(2) [1912] 16 I. C. 46.

(3) [1881] 7 Cal. 848=8 C. L. R. 528.

stamp have been determined by the Court, and, therefore, it seems to us that it would be straining the language of S. 12 to say that the question relating to valuation therein mentioned has only reference to a question raised as a distinct issue, and decided by the Court of first instance in the presence of, and as between, the parties to the suit."

It follows that where the Court accepts the plaint as properly valued, it must be taken that the Court has given its decision that the proper Court-fee has been paid. So long as the Court acts upon the footing that the proper Court-fee has been paid, its act amounts to a decision under S. 12, Cl. 1 of the Court-fees Act. If the Court is not satisfied that the proper Court-fee has been paid, it certainly would have insisted upon the proper Court-fee being paid. Where it receives plaint, petition, or other pleading, as properly stamped, its act must be taken to fulfil the requirements of S. 12, Cl. 1. This view is supported by the observations of Carnduff, J., in *Surendranath* v. *Sitanath Das* (4). The learned Judge observes at page 944 :

"It is true that there is on the record of this case no express decision that the fee of Rs. 7-8-0 was sufficient ; but it seems to me that such a decision is implied by the action of the Court in receiving the application on a stamp of Rs. 7-8-0 and passing any order upon the prayer contained in it."

We hold that when a Court receives a plaint, petition, or any other pleading and files it as properly stamped, its act amounts to a decision that the proper Court-fee has been paid. If according to the practice prevailing in the Courts the Chief Ministerial officer files a plaint, or a petition, or other pleading, as being properly stamped or that proper Court-fee has been paid, his act is an act of the Court within the meaning of S. 12, Cl. 1.

The next contention is that in this case the proper Court fee has been paid. Mr. Rangaswami Aiyangar contends that the plaintiff asked for the return of Rs. 1,000 inasmuch as she was led into accepting the sale deed owing to the fraudulent conduct of the defendant, and the contract of sale being invalid, she is entitled to the return of the money paid by her. This contention overlooks the plain fact that the plaintiff could not get back the money paid by her without setting aside the sale. The transaction is not merely a contract but a conveyance. The plaintiff has acquired title to the property under the conveyance executed in her favour. The return of the consideration for the conveyance to the vendee could only be after setting aside the conveyance. So long as the plaintiff has the title to the property in her she cannot reasonably ask for the return of the purchase money paid. She can claim damages for breach of guarantee, or breach of covenant of title, but that is not the prayer in the plaint. The plaintiff prays that the sale deed and the mortgage deed, dated 22nd October 1921, might be declared invalid and not binding on her. This prayer can only be granted on her valuing the suit as if for the cancellation of the sale deed and by paying the proper Court-fee. If the transaction were a mere contract and not a conveyance, the plaintiff would be entitled to get back the amount paid by her on the ground that she entered into the contract owing to the fraud of the defendant. But, where the property has actually passed from one party to the other, the vendee cannot claim the amount paid by him without setting aside the sale. It is urged that under S. 7, Cl. 4 (c) the plainitff is entitled to value the relief sought at Rs. 1,300, as that is the amount she claims. The main relief claimed is really the setting aside of the conveyance and the claim for money is only ancillary to it. To such cases S. 7 Cl. 4 (c) has no application.

The Court-fees Act has been amended by Act V of 1922 (Madras Act) and the following clause has been enacted :

"In a suit for cancellation of a decree for money or other property having a money value, or other document securing money or other property having such value : according to the value of the subject-matter of the suit, and such value shall be deemed to be :

if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed."

Here the plaintiff claims relief in respect of what was conveyed under the document. This new clause applies to the present case and I hold that the decision of the Taxing Officer of this Court is correct.

(4) [1913] 21 I. C. 943.

We are indebted to Mr. Anantakrishna Aiyar, the learned Government Pleader, for the valuable assistance he gave us in this matter.

Wallace, J.—I agree

The scheme of S. 12 of the Court-fees Act is to see that the revenue is not defrauded, that the proper fee payable to Government as the "price" of the trial of the suit has been paid. It is difficult to see how a decision on that point can rest upon the option of parties, or to say that the Act deliberately restrains Courts from interfering on behalf of the revenue unless the parties themselves, whose interests are in the main opposed to any increase in the Court-fee paid move in the matter. It is obvious that the section is intended to permit the Taxing Officer of a Court to raise the question suo motu, whether the parties have raised it or not. The Privy Council has clearly laid down in *Rachappa Subba Rao* v. *Shidappa Venkatrao* (5) that "The Court-fees Act was passed not to arm a litigant with a weapon of technicality against his opponent but to secure revenue for the benefit of the State. This is evident from the character of the Act and is brought out by S. 12 which makes the decision of the first Court as to value final as between the parties and enables a Court of appeal to correct any error as to this only where the first Court decided to the detriment of the revenue."

The wording of the section offers no difficulty since, in any case, the trying Court must decide the question of Court-fee implicitly or explicitly, before it can proceed to try the suit. If the Court is not satisfied that the plaint is properly stamped it must dismiss the suit unless the proper stamp-fee is paid :—see O. 7, R. 11 (c). If the question is not explicitly raised and the Court proceeds with the trial, the Court has implicitly decided that the stamp is sufficient. If the parties or the Taxing Officer specifically raise the point then the Court gives an explicit decision thereon. In either case, there is a decision of the Court ; but while, when the parties have raised the point, the express decision of the Court will be final between them, the section permits the appellate Court suo motu to raise the point in the interests of the revenue. This is the view laid down in *Shama Soondary* v. *Hurro Soondary* (3) with which I respectfully agree ; and the same view underlies the decisions in *Narain Singh* v. *Chaturbhuj Singh* (6) and *Surendranath* v. *Sitanath* (4) (the Calcutta High Court), and the decision of the Madras High Court in *Tekana Kavandan* v. *Alagiri Kavandan* (7), and it is not opposed to that of the Full Bench in *Amjid Ali* v. *Muhammad Israil* (8). The case reported in *Shajan Bibi* v. *Earsin Dewan* (2) raised and decided a question of jurisdiction only.

As to the second point it is clear that the mere declaration that the sale deed is not binding on the plaintiff will not enable the Court to decree the return of Rupees 1,000. The plaintiff is not entitled to have the sale deed remain in being and the return of the Rs. 1,000 also. If the defendant is to pay her the Rs. 1,000, the defendant must also be put in status quo ante the sale, that is, the sale must be cancelled. The sale is a bilateral contract, and one party cannot be rid of it merely by a declaration that it is not binding on her. She must release the other party also and place him in status quo ante. Hence the petitioner's suit is misconceived. She can have the declaration without the return of the money or she can have the money if the decree also cancels the sale deed. Her chief concern is the return of the money, and that she cannot have unless and until the sale is cancelled. Her suit is therefore one in effect for the cancellation of a sale deed and the new Cl. 1 of the Court fees Act applies

By the Court.—Time for paying the deficient Court-fee will be one week after the re-opening of this Court.

Reference answered.

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(5) [1918] 43 Bom. 507=46 I. A. 24=17 A.L.J. 418=25 M. L. T. 298=36 M. L. J. 437=29 C. L. J. 452=21 Bom. L. R. 489=24 C. W. N. 33=10 L. W. 274 (P. C.).

(6) [1898] 20 All. 362=(1898) A.W.N. 72.

(7) [1914] 25 I. C. 506.

(8) [1897] 20 All. 11=(1897) A.W.N. 157 (F. B.).

★ A.I.R. 1926 Madras 101

DEVADOSS, J.

K. N. Krishnaswami Bhagavathar—Defendant No. 1—Appellant.

v.

N. A. Thirumalai Iyer and *others*—Defendants—Respondents.

Second Appeal No. 773 of 1923, Decided on 21st October 1924, against the decree of the First Addl. Sub-J., Madura, in Appeal Suit No. 6 of 1922.

★ (a) *Transfer of Property Act, S. 75—Mortgage—Prior and puisne mortgagee—Puisne mortgagee not joined in the suit on prior mortgage can proceed against property, or the surplus sale proceeds at his option.*

Where a prior mortgagee makes the puisne mortgagee a party and brings the property to sale the puisne mortgagee can only proceed against the proceeds in Court after satisfying the claim of the prior mortgagee. In other words, his right of suit against the mortgagor is taken away by his being made a party to the suit of a prior mortgagee. But the sale cannot affect the title of a mortgagee who has not been made a party to the suit. He can, therefore, either proceed against the mortgaged property in the hands of purchaser by bringing it to sale or proceed against the sale-proceeds in Court after satisfying the claims of the prior mortgagees: [41 *Cal.* 654 (*P.C.*); 21 *Cal.* 70 and 30 *Cal.* 599, *foll.*] His right is only subject to that of the prior encumbrancer, but he has a prior claim over any simple money creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge. Although O.34,R. 1,requires all mortgagees to be brought on record that would not take away the right of a puisne mortgagee not so joined as party to claim any amount in Court on the ground that he has an interest in the mortgaged property. [P. 102, C. 1 & 2, P. 104, C. 2]

(b) *Practice—Precedents should be applied with reference to facts.*

When decisions are sought to be applied to new facts it must be seen in what connexion, and with reference to what facts the decisions or rulings were given. [P. 104, C. 1]

S. Varadachariar and *K. S. Jaya Rama Iyer*—for Appellant.

K. V. Krishnaswamy Iyer—for Respondents.

Judgment.—Defendants Nos. 1 to 3 mortgaged their property on 24th April 1912,by two deeds in favour of Defendants Nos. 5 and 6 and Defendant No. 7. First defendant executed a third mortgage in favour of the plaintiff on 5th September 1916. Defendants Nos. 5 and 6 brought O. S. No. 3 of 1908, impleading the 7th defendant- second mortgagee and obtained a mortgage decree. The third mortgagee, the plaintiff, was not a party to that suit. The property was sold in October 1919 and was purchased by the 4th defendant for Rs. 20,000. The 1st and 2nd mortgagees Defendants Nos. 5 and 6 and 7 were paid the amount due on the mortgages. Eighth defendant who had obtained a money-decree against Defendants Nos. 1 to 3 attached the surplus amount in Court and was paid by a cheque for Rs. 4,585. The plaintiff attempted to prevent the 8th defendant from cashing the cheque, but his attempts were of no avail. The money now in Court is about Rs. 1,000. The plaintiff has brought this suit on his mortgage and prays that the amount due to him on his mortgage may be paid out of the sum in Court and that the 8th defendant be directed to pay back into Court the sum drawn by him and that in the alternative the mortgaged property be sold for satisfying his debt and also prays for a personal decree against Defendants Nos. 1 to 3. The District Munsif gave a mortgage decree in favour of the plaintiff and held that the plaintiff was entitled to the surplus in Court realized in execution of the decree obtained by Defendants Nos. 5 and 6 and that the 8th defendant must refund the amount drawn by him. Against this decree 8th defendant appealed. On appeal the Subordinate Judge held that the plaintiff could only proceed against the property mortgaged to him and purchased by the 4th defendant and the proceeds of the sale held in execution of the decree in favour of the Defendants Nos. 5 and 6 were not subject to the mortgage right of the plaintiff and the amount remaining after meeting the claims of the 1st and 2nd mortgagees, Defendants Nos. 5, 6 and 7, was the property of the mortgagor and as such could not be proceeded against by the plaintiff. With regard to the amount in Court he held that it would be available to the plaintiff in case he is unable to realize his debt by the sale of the hypotheca. Fourth defendant has preferred this appeal.

The contention of Mr. Varadachari is that the sale proceeds in Court represent the mortgaged property and the plaintiff is entitled to proceed against the money in Court after the claims of the prior mortgagees have been satisfied. The surplus proceeds of the sale are sufficient to meet the claim of the plaintiff. It is urged that inasmuch as the plaintiff was not a party

to the suit of the prior mortgagees, his right to proceed against the property is unaffected and the proceeds in Court have been realized by the sale of the mortgaged property and the lien of mortgage right against the property attaches itself to the money in Court. It is also urged that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the surplus sale-proceeds in Court if the proceeds are sufficient to satisfy his claim. On the other hand, Mr.K.V.Krishnaswami Iyer contends that the remedy of the puisne mortgagee who was not a party to the suit of the prior mortgagee is only against the mortgaged property. He could either redeem the prior mortgagees? or ask for the sale of the property and bring the property to sale ; but he cannot claim to be paid out of tbe surplus sale-proceeds in Court as they are the property of the mortgagor. He further contends that the sale was subject to the encumbrance of the plaintiff and what was sold represented the interest of the prior mortgagees as well as that of the puisne mortgagee together with the equity of redemption and that the puisne mortgagee should only look to the purchaser for payment of his mortgage debt and has no claim against the surplus in Court as his mortgage has been included in the sale in Court auction.

What are the rights of the puisne mortgagee who was not a party to the suit and the execution proceedings under the prior mortgage ? If the prior mortgagee makes the puisne mortgagee a party and brings the property to sale, it is well settled that the puisne mortgagee could only proceed against the proceeds in Court after satisfying the claim of the prior mortgagee. In other words, his right of suit against the mortgagor is taken away by his being made a party to the suit of a prior mortgagee. Where a puisne mortgagee is not made a party to the suit of the prior mortgagee, does the puisne mortgagee lose any of his rights which he had as a mortgagee ? When property is sold under a mortgage decree, what is sold is the interest of the mortgagor at the date of the mortgage on which the suit is brought. If the subsequent mortgagees are made parties to the suit, the sale in execution, of the decree would convey the interest of the mortgagor as it was at the dateof the suit. In other w ords, what is sold under such a decree is the property of the mortgagor and the proceeds of the sale have to be applied in discharge of all the encumbrances and the mortgagees have to be paid in the order of priority. But the sale cannot affect the title of a mortgagee who has not been made a party to the suit.

Section 75 of the Transfer of Property Act says that every second or other subsequent mortgagee has, so far as regards redmption, foreclosure,and sale of the mortgaged property,the same rights against the mortgagor as against such prior mortgagee or mortgagees and the same rights against the subsequent mortgagees as he has against his mortgagor. A puisne mortgagee has the right to redeem the prior mortgage or mortgages and has the right to bring the property of the mortgagor to sale and such a sale will be subject to the right of the prior mortgagee or mortgagees. A prior mortgagee cannot redeem the puisne mortgagee without his consent but if he acquires the equity of redemption, he will be entitled to redeem the puisne mortgagee. The plaintiff was not a party to O. S. No. 3 of 1918 and the sale in execution of the decree in that suit cannot take away the rights of the plaintiff as mortgagee. The contention of the appellant is that the plaintiff has an option either to proceed against the mortgaged property by bringing it to sale or to proceed against the sale proceeds in Court after satisfying the claims of the prior mortgagees. The objection of the 8th defendant (respondent) is that the security for the debt cannot attach itself to the sale-proceeds in Court merely by the volition of the plaintiff ; that the plaintiff's remedy is against the mortgaged property ; and that when that mortgaged property was sold, it was sold subject to the plaintiff's encumbrance and he could not by making an election proceed against the money in Court realized by sale in which his own mortgage was included.

The contention that when property is sold in execution of a mortgage decree, it is sold subject to all the mortgages on it, is based upon two stray observations in *Chinnu Pillai* v. *Venkatasamy Chettiar* (1). Mr. Justice Coutts-Trotter (as he then was) laid down two principles as governing the cases. The first is that what passes to a mortgagee is a right to

(1) [1916] 40 Mad. 77 = 30 M. L. J. 347 = 19 M.L.T. 217=(1916) 1 M.W.N 245.

sell the mortgagor's interest as it stood at the date of the mortgage subject only to this, that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so and the earlier cannot redeem the later except by consent. Mr. Justice Srinivasa Iyengar in the course of his judgment observed : "To the suit of the second mortgagee the plaintiffs were not made parties. The second defendant's position is, therefore, that of an assignee of the first two mortgages and of the equity of redemption subject to the charge of the plaintiffs." At page 89 he further observed : "The second mortgagee is entitled to, and must bring a fresh suit against the purchaser in the first sale to sell the property to the satisfaction of the second mortgage-debt subject to which the first purchaser took." Mr. K. V. Krishnaswami Iyer contends that these observations make it quite clear that the sale in execution of a mortgage-decree is subject to the mortgage in favour of a puisne mortgagee and, therefore, the puisne mortgagee can only proceed against the property in the hands of the auction-purchaser and cannot proceed against the sale-proceeds in Court if a surplus remains after satisfying the claims of the prior mortgagee and that if it was possible to hold that the puisne mortgagee could proceed against the surplus assets in Court, the learned Judges would have said so. I do not think this is the correct way of interpreting the decision. The question whether the puisne mortgagee could proceed against the assets in Court was not raised before them. Nor were they called upon to consider whether the puisne mortgagee had any other right than that of proceeding against the mortgaged property. The question in that case was whether a puisne mortgagee could bring the property to sale after it was sold in execution of a decree obtained by a prior mortgagee. Mr. Justice Srinivasa Iyengar sets out the rights and liabilities of the mortgagees at the end of his judgment and the 7th principle he lays down is as follows : "If the first mortgagee sues first without making the second mortgagee a party, the second mortgagee is not affected and can bring his own action for sale making the mortgagor a party, if there had been no sale in the first mortgagee's suit or if there had been a sale, making the purchaser a party in his capacity of the ultimate owner of the equity of redemption." Reliance is also placed upon *Mula Veetil Sethi* v. *Achuthan Nair* (2). In that case a Full Bench of this Court held that the second mortgagee was entitled to the same rights as the first mortgagee with reference to his security having regard to the nature of his mortgage. After an exhausitve review of a number of decisions, certain propositions were considered as established. "(1) A second mortgagee is entitled to the same rights as the first mortgagee with reference to his security, having regard to the nature of the mortgage. (2) The purchase of the equity of redemption after the first mortgage and the second mortgage both stand on the same footing with respect to their respective rights against the first mortgagee when they have not been impleaded in the suit instituted by him on his mortgage. (3) Those rights are unaffected by the suit of the first mortgagee to which they are not made parties and the decree passed therein and the sale made in pursuance thereof. (4) The purchaser in such suit, whether it is a first mortgagee or a stranger, does not acquire the rights of the mortgagor as at the date of the first mortgage but only those that subsist in him at the date of the suit." This decision does not support the contention that the only remedy of the puisne mortgagee is against the mortgaged property. The words used by Mr Justice Srinivasa Iyengar in *Chinnu Pillai* v. *Venkatasamy Chettiar* (1) subject, to the charge of the plaintiffs at page 80 can only mean subject to such rights as the puisne mortgagee has. It does not mean that the property is sold subject to the charge in favour of the puisne encumbrancer. The expression is not tantamount to saying that the purchaser has undertaken to pay the subsequent encumbrancer but means that the purchaser buys the property subject to the rights which a puisne encumbrancer has in regard to that property. In applying case law to the case before us, care should be taken not to take one or two sentences of a judgment, apart from their setting and give to them a meaning which the Judge who delivered that judgment did not in-

(2) [1911] 21 M. L. J. 213=(1911) 1 M. W. N. 165=9 M. L. T. 431.

tend to convey or did not think it would be capable of conveying. It should also be borne in mind when the decisions are sought to be applied to new facts, to see in what connexion and with reference to what facts the decisions or rulings were given. The contention of Mr. Krishnaswamy Iyer is that these two decisions support his contention by their silence as to the right of the puisne mortgagee to proceed against what is realized in execution of a decree obtained on a prior mortgage. I do not think that the Judges who decided them had that point argued before them nor do I think they intended to lay down the broad proposition that the puisne mortgagee's right is only to proceed against the property in the hands of the purchaser.

The facts in *Barhamdeo Prasad* v. *Tarachand* (3) are these: Certain immovable property was mortgaged in May 1887 to the appellants in that case. The same property was mortgaged in September 1887 to the respondents. Again in July 1889 the property was mortgaged to the appellants. The appellants brought a suit in 1890 impleading the respondents and obtained a decree in execution of which the property was sold. After satisfying the decree the sale proceeds were deposited in Court. The appellants obtained a decree on their mortgage of 1889 without impleading the respondents as parties and in execution of that decree, without notice to the respondents they drew out of Court the surplus proceeds of the former sale. The respondents brought a suit in 1900 and claimed the money in Court. The question was whether that still was within time. Their Lordships of the Privy Council held that Art. 132 of the Limitation Act applied and that "The surplus sale-proceeds in execution of the previous mortgage-decree represented the security which the plaintiffs had under their mortgage of the 19th September 1887, and did not cease to represent that security owing to the fact that Ram Berhamdeo Prasad and Ram Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited." They also held that they were not against the view that there was a charge in favour of the plaintiffs in the hands of the appellants. Though the respondents were parties to the suit of the first mortgage, they did not take the trouble to appear. Notwithstanding that, their Lordships of the Privy Council held that the sale-proceeds in Court represented the security which they had and therefore, they were entitled to proceed against the surplus money in Court. This decision was on appeal from the decision in *Berhamdeo Prasad* v. *Tarachand* (4) wherein two Judges of the Calcutta High Court differed as to the right of the puisne mortgagee to proceed against the assets realized in execution of a decree in a prior mortgagee's suit, and Sale, J., agreed with Henderson, J., in holding that when property is sold under a decree obtained by the first mortgagee the puisne encumbrancer has a right to follow the surplus sale proceeds after the decree-holder's claim has been satisfied. These two cases lay down that the rights of the subsequent mortgagee who is not a party to the mortgage-decree under which the property is brought to sale is entitled to be paid out of the surplus sale proceeds, if any, remaining after the decree-holder is paid. In *Gobind Lal Roy* v. *Ramjanam Misser* (5), Lord Macnaghten in delivering the judgment of their Lordships observed in dealing with the contention of the counsel for the appellant that the puisne mortgagee should only look to the proceeds realized by the sale under a decree obtained by a prior incumbrancer: "That, however, in their Lordships' opinion is not the necessary consequence of a sale under a decree obtained by a prior mortgagee against the mortgagor in a suit to which the puisne encumbrancers are not parties." It follows from this that the remedy of the puisne mortgagee against the property is not taken away by a sale.

It is well settled now that the puisne encumbrancer who is not a party to a mortgage decree under which the sale is held can bring the property again to sale; and from the ruling in *Gobind Lal Roy* v. *Ramjanam Misser* (5), it is also clear that the right of such mortgagee can also be enforced against the sale-proceeds in Court. After the consideration of a number of cases on the point, the Full Bench of the Calcutta High Court

(3) [1914] 41 Cal. 654=41 I. A. 45=12 A. L. J. 82=19 C. L. J. 132=18 C. W. N. 345=15 M. L. T. 62=16 Bom. L. R. 89=26 M. L. J. 243=(1914) M. W. N. 38 (P.C.).

(4) [1906] 33 Cal. 92=9 C. W. N. 989.

(5) [1894] 21 Cal. 70=20 I. A. 165=6 Sar. 356 (P. C.).

held in *Debendra Narain Roy* v. *Ramratan Banerjee* (6), that a puisne mortgagee was entitled to sell the property secured by his mortgage where the property has been sold in execution of a decree obtained by the first mortgagee in a suit to which the puisne mortgagee was not a party.

In *Padmanabh Bombshenvi* v. *Khemu Komar Naik* (7), the facts were these : *P* held a mortgage on a certain land belonging to the 1st defendant. The mortgage was not registered. *M* obtained a registered mortgage on the same property from the 1st defendant. *M* obtained a decree upon this mortgage and applied for sale. *F* intervened but his claim was rejected on the ground that his mortgage was an unregistered mortgage. The land was sold by auction to the 4th defendant and the proceeds of the sale were applied partly in satisfaction of *M's* claim and a further sum of Rs. 164 was paid to one *S* who had obtained a money-decree against the mortgagor Defendant No. 1. The balance of Rs. 103 was paid into Court and subsequently returned to No. 1. *F* sued for payment of his mortgage-debt out of the proceeds of sale or from defendants. The lower Court held that the plaintiff could not be called upon to refund the money which had been paid to him out of the proceeds and the plaintiff had a cause of action only against the mortgagor and not merely for the balance of Rs. 103-8-11 but for the whole claim. The High Court held that *F* was in the position of a puisne mortgagee and as second mortgagee he had a right over the balance in Court. Sargent, C. J., in delivering judgment of the Court observed : "Although plaintiff's earlier mortgage was postponed to that of Defendant No. 2 by reason of its non-registration, the plaintiff still had the same rights over the balance as if he had been the second mortgagee in point of date.

The proceeds which are paid into Court after satisfying the first encumbrance become payable first to the other encumbrancers (if any) and then to the mortgagee, and so it is virtually provided by S. 97 of the Transfer of Property Act which directs that 'the residue is to be paid to the person proving himself to be interested in the property sold.' The learned Chief Justice relied upon the decision of the Privy Council in *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (8) to the effect that when the sale is effected under a power of sale in the mortgage-deed, the mortgagee exercising such power is a trustee so far as the surplus proceeds are concerned and held that the Court was not in a better position than he. When the mortgagee exercises his power of sale, he sells it free of encumbrances and the purchaser gets it free of all subsequent encumbrances But when a Court sells the property under a decree to which the subsequent mortgagee is not a party, it does not sell it free of the subsequent encumbrances. But that does not alter the principle of the decision. The attaching creditor in that case could not keep his hold on the money when the mortgagee came along, because the mortgagee had a prior claim by reason of his mortgage right. The mortgage right against the property is available against the proceeds into which it was converted. His right is only subject to that of the prior encumbrancer, but he has a prior claim over nay simple money creditor and the mortgagor. A simple money creditor who attaches the money in Court attaches it as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge.

The facts in *Karan Sing* v. *Ishtiaq Husain* (9) are : *A* mortgaged the same property first to B and then by the separate mortgage deeds to *C*. *B* and *C* both sued on the mortgages, each party without impleading the other, and obtained decrees. *B's* decree was executed first. The mortgaged property was sold and was purchased by *K*. *B's* mortgage was paid up and considerable surplus money remained which was deposited in Court. *C* then endeavoured to execute his decree against the surplus sale proceeds. He failed and the money was ultimately withdrawn by the mortgagor. *C* next proceeded with the execution of his decree against the property in the hands of *K*, the auction-purchaser, and *K* in order to retain possession paid up the amount of his decree. He then sued the representative of *A* to recover and the amount

(6) [1903] 30 Cal. 599=7 C. W. N. 766 (F. B.).
(7) [1894] 18 Bom. 684.
(8) [1880] 5 Cal. 198=6 I. A. 145=5 C. L. R. 213=4 Sar. 17 (P. C.).
(9) [1921] 43 All. 268=19 A. L. J. 16.

was paid. A Bench of the Allahabad High Court held that *K* was entitled to a decree. The learned Judges observed at page 269: "In our opinion upon the sale of the property the security held by Mahabbat Bahadur and others was transferred to the surplus sale proceeds which represented the mortgaged property." And they go on to say: "It cannot be said that the plaintiff purchased the property subject to the subsequent mortgage held by Mahabbat Bahadur and others. The sale was in execution of a decree obtained upon the prior mortgage held by Khurshed-un nissa and others. The only defect in the plaintiff's title was that it was still open to the second mortgagees who had not been made parties to the first mortgagee's suit, to redeem the prior mortgage, but it cannot be said that the plaintiff did not acquire the property itself, but only such rights as remained in the mortgagors and subject to the subsequent mortgages." This case is an authority for the position that the mortgagee's right to proceed against the surplus proceeds in Court is unfettered if he was not a party to the decree in execution of which the sale was effected. No doubt in that case it was found that the surplus proceeds were sufficient to meet the claims of the subsequent mortgagee, but that was not the ground upon which the learned Judges held that the mortgage right attached to the proceeds in Court.

It is urged by Mr. Krishnaswami Iyer that the Bombay and Calcutta decisions should be read in the light of the previous decisions of those Courts. His contention is that it was considered at one time that the first mortgagee alone could bring the property to sale and not any subsequent mortgagee and such sale was clear of all encumbrances and they naturally took the view that then the property was sold in execution of a decree obtained by a prior mortgagee, the puisne mortgagees could only look to the sale proceeds to satisfy their decrees. I am unable to accept this contention. Whatever might have been the view before, the law is settled as to the right of the puisne mortgagee to proceed against the mortgaged property sold in execution of a mortgage decree obtained without his being a party to it, and it cannot be said that the learned Judges overlooked such a well-established principle and laid down the ruling that the subsequent mortgagee could only look to the sale proceeds realized in execution of the decree of a prior mortgagee for the satisfaction of his claim.

When the mortgaged property is sold and is converted into money, the right of the puisne mortgagee is not thereby lost. I am assuming in this connexion that he was not a party either to the suit or to the execution proceedings in which the assets were realized. The property was his primary security and when that is converted into money, his security is not thereby lost, but is transferred from the property to the sale-proceeds, and his right is only subject to that of a prior mortgagee or mortgagees. The objection to the puisne mortgagee proceeding against such assets is that the assets represented only the value of the equity of redemption remaining at the date of the sale and, therefore, the puisne mortgagee cannot proceed against the proceeds in Court. This argument overlooks the fact that the equity of redemption, whatever be its value, is liable either in the hands of the mortgagor or of a purchaser from him to satisfy the claim of the mortgagee. Suppose two items of property are mortgaged to two persons: first to *A* and then to *B* and if *A* brings a suit on his mortgage without impleading *B* and brings one of the items to sale and some surplus remains after satisfying *A's* decree, can it be said that *B* cannot proceed both against the other item not sold in execution of *A's* decree as well as the proceeds in Court? Take another instance: if a village or a large estate is mortgaged first to *A* and then to *B*, if *A* brings a suit and obtains a decree on his mortgage without impleading *B* and asks for a sale of the property, the Court would sell such portion of it as would be sufficient to meet *A's* claim. And if after a portion of the property is sold and *A* is satisfied and surplus remains, can it be said that *B* cannot proceed against the rest of the property as well as the surplus money in Court? His right is not in any way affected by the state in which he finds the property after the prior mortgagee's claim is satisfied. He could certainly proceed against the rest of the property covered by his mortgage as well as against the money in Court. The contention of Mr. Krishnaswami Iyer is that he cannot have a right to both the property as well as against the surplus money in Court in

this case. But I do not think there is any objection in principle to the plaintiff proceeding both against the mortgaged property in the hands of the 4th defendant as well as against the surplus funds in Court. Reliance is placed upon the observation of Mr. Ghose in his well-known book of Mortgages, page 292, 5th Edition, for the contention that the property must be lost to the subsequent encumbrancer so as to enable him to proceed against the surplus sale proceeds: "It is hardly necessary to point out that if the mortgaged property is converted into money under circumstances which would prevent the mortgagee from following such property, security would attach to the money unless the conversion is attributable to the default of the mortgagee." Section 73 gives the right to a mortgagee to proceed against the surplus sale proceeds of a sale held on account of default of payment of revenue, provided the default was not occasioned by the mortgagee. This section applies only to sales for arrears of revenue and does not restrict in the case of sales under mortgage decrees the right of the mortgagee to the proceeds in Court, and cannot be interpreted as laying down the principle that it is only when the property cannot be pursued by the mortgagee that he can proceed against the money in Court. Reference is also made to a passage in Gour's Book on the Law of Transfer in British India, S. 1683. Referring to S. 73 of the Transfer of Property Act, he says the section is inaccurately worded, but it is evidently intended to provide only for cases in which the sale is made free from all encumbrances. In any other view, the mortgagee would have both the surplus as well as the right to follow the land in the hands of the purchaser and this confers on the mortgagee an additional security merely because the mortgaged property is brought to sale. It is difficult to see how it can be said that the mortgagee gets additional security when the property mortgaged to him is sold and the proceeds are held in Court. The property mortgaged to him was liable for his debt and if the property is sold and the sale-proceeds are held in Court it cannot be said that he gets additional security for his debt. Supposing in this case the plaintiff brings the property to sale and in consequence of the fall in price or the state of the money market the mortgaged property goes to the prior encumbrancers or the price offered is just sufficient to cover the claim of the prior mortgagees, can it be said that he is to be without any remedy? The surplus sale proceeds in Court cannot become the property of the mortgagor till all the mortgages are paid off. The sale proceeds in Court cannot be said to represent the equity of redemption for the whole of the property is security; the so-called equity of redemption is not merely the right of the mortgagor to redeem the property, but it also represents the difference between the value of the property and the amount due on the mortgage, and the difference in value cannot be absolved from the liability for the mortgage amount. That being so, it is difficult to see how the sale proceeds in Court in this case can be said to be additional security for the debt of the plaintiff. When the property was sold the 4th defendant purchased it, probably at its market value. But his title to the property is liable to be defeated when the plaintiff brings a suit to enforce his remedy under the mortgage. The question is not what the purchaser pays for the property. Whether he pays full value or not he only buys the interest of the mortgagor and the property which he buys is security for the debt of the puisne mortgagee who was not a party to the decree under which he purchased. Whatever may be the number of mortgages created on the property, the mortgagor can only have the surplus after meeting the claims of all his mortgagees. Supposing a mortgagor mortgages the property to three different persons, and supposing the first mortgagee brings the property to sale and the property is sold for a very large sum, and after satisfying the claim of the first mortgagee the surplus money is drawn out by the mortgagor, and supposing the second mortgagee who was not a party to the prior suit brings the property to sale without impleading the third mortgagee and sells the property and is not able to realize his debt in the second sale after meeting the claim of the first mortgagee, what is to become of the third mortgagee? Is the third mortgagee to go without any remedy for the simple reason that the mortgagor has wiehdrawn the money from Court which was subject to the mortgage rights of the second and third mortgagees? To hold that the mortgagor is entitled to

the surplus money in Court in such a case would be going against the law of mortgages under which the property as well as cash into which the property is converted is security for the debt due on the mortgages. In this case, therefore, there is no such thing as additional security by the mere fact that the property was sold and the sale proceeds are more than sufficient to meet the claims of the prior mortgagees. There is no warrant in law for holding that in such a case as this that the sale proceeds are additional security. After a careful consideration of the cases quoted at the Bar, I could not find any thing in equity or in law which militates against the right of the puisne mortgagee in a case like this to proceed both against the property in the hands of the purchaser as well as against the sale-proceeds in Court. It is not necessary in this case for the plaintiff to proceed against the property, as the surplus proceeds in Court were more than sufficient to satisfy the claims of the plaintiff under the mortgage. The 8th defendant who withdrew the money from Court must pay it back as the amount was subject to the mortgage rights of the plaintiff, and the 8th defendant who obtained only money-decree against the mortgagor could not claim any preference over the plaintiff.

It is contended for the respondent that O. 34, R. 13, can only apply to cases where all the mortgagees are parties. Under the Civil P. C., O. 34, R. 1, all persons having an interest on the mortgage security or in the right of redemption should be joined as parties. Mr. Krishnaswami Iyer's contention is that O. 34, R. 13, could only apply to cases where a subsequent encumbrancer is party to the suit and to the decree in execution of which the sale proceeds have been realized, and that when a puisne mortgagee is not a party to the suit R. 13 cannot apply. No doubt O. 34, R. 1. requires all mortgagees to be brought on record, but that would not take away the right of puisne mortgagee to claim any amount in Court on the ground that he has an interest in the mortgaged property. For the last clause of R. 13 (1) says: "The residue (if any) shall be paid to the person proving himself to be interested in the property sold." It does not say that such person should be a party to the suit. All it says is that after meeting the legitimate demands mentioned in Cls. 1 to 4 the balance shall be dealt with in a certain way and the last clause does not restrict it to persons who are parties to the suit in which the assets are realized.

Mr. Krishnaswami Iyer next contended that in this case the property was sold subject to the mortgage. Exhibit II, the sale certificate, does not support this contention. Though the hypothecation in favour of the plaintiff is mentioned therein it is distinctly stated that that hypothecation is subsequent to that of the plaintiffs in that suit and does not affect them. It is difficult to see how this can be construed into a sale subject to the encumbrance in favour of the plaintiff. What was sold under the decree in O. S. No. 3 of 1918 was the right of the mortgagor as it stood at the date of the second mortgage. This is clear from all the authorities and it is unnecessary to go over the ground again. Exhibit II cannot be construed into meaning that the sale was subject to the encumbrance in favour of the plaintiff.

Another point was urged on behalf of the respondent, that the present appeal is not by the plaintiff but by the purchaser and, therefore, incompetent. It is urged that the purchaser who is the 4th defendant has no right to come in and ask that the money in Court be paid to the plaintiff. Inasmuch as the plaintiff is also a party to the appeal this Court has power to pass a proper decree in a case like this. It is unnecessary that the 4th defendant should first pay up the amount due to the plaintiff on his mortgage and then proceed against the 8th defendant and Defendants Nos. 1 to 3 as was done in *Karan Singh* v. *Ishtiaq Husain* (9). This will only multiply proceedings in Court. The Court has power in order to avoid further litigation, to give a decree in favour of the plaintiff.

The last contention is that the 8th defendant could not be compelled to pay into Court the amount drawn by him as there was neither a charge nor a trust in favour of the plaintiff. I have already held that the plaintiff had a mortgage right over the money in Court. The 8th defendant is bound to pay back the money into Court which was subject to the mortgage right of the plaintiff.

In the result I set aside the decree of the Subordinate Judge and restore that of the District Munsif. The 8th defendant will pay the costs of the 4th defendant in

this Court as well as in the lower appellate Court. The other parties will bear their own costs.

Decree set aside.

★ A. I. R. 1926 Madras 109

PHILLIPS AND KRISHNAN, JJ.

Pachaiyappa Chetti—Defendant—Appellant.

v.

Sivakami Ammal—Plaintiff—Respondent.

Appeal No. 192 of 1922, Decided on 20th January 1925, against the decree of the Sub.-J., Vellore, in Original Suit No. 41 of 1921.

★ *Trusts Act, S. 5—When property is money pro-notes and bonds, transfer of possession is sufficient to create a trust.*

Where the property is money and promissory notes and bonds no registered instrument of transfer is necessary. The mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in the trustee is sufficient t create a trust. *A. I. R.* 1922 *Mad.* 57 *Dist.* [P. 110, C. 1]

A. Krishnasawami Aiyar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondent.

Phillips, J.—The plaintiff in this case is the daughter of one Ponnambala Chetty, who with his brother, Periyambala Chetti, formed an undivided family. They carried on money-lending dealings and entrusted those dealings to their brother-in-law, Sadayappa Chetty, the father of the present defendant. Sadayappa Chetty continued those dealings for some time and maintained accounts for the moneys in his hands. In 1906 the brothers, Ponnambala Chetty and Periyambala Chetty, effected a partition and the latter removed his share of the property from the hands of Sadayappa Chetty who, however, continued to deal with the property of Ponnambala Chetty until the latter's death in February 1912, and even after that date remained in possession of all his property. The plaintiff now alleges that Sadayappa Chetty held all these properties in trust for her and has brought this suit against his son, the defendant, for an account. These facts are not disputed, but it is contended that the plaintiff's suit for an account is barred by limitation. The Subordinate Judge has, however, found that S. 10 of the Limitation Act is applicable to this case, and has given a decree. In appeal we are only concerned with the question of limitation, it being contended for the appellant that S. 10 is not applicable because the property of Ponnambala Chetty had not become vested for any specific purpose either in Sadayappa Chetty or in the defendant. The main point relied on in appeal is that the property never became vested in Sadayappa Chetty for any specific purpose; and it is contended that as the property consisted of promissory notes, bonds and mortgage deeds, the provisions of S. 5 of the Trusts Act were not complied with, and no valid trust has been created. It is in evidence that shortly before his death Ponnambala Chetty directed Sadayappa Chetty to hold his property for the benefit of his wife and daughter; and there seems to be no reason to disbelieve the oral evidence on this point; for many witnesses speak to the fact and the discrepancies in their evidence are merely on matters of detail which is due to the fact that the witnesses are deposing to events which took place nine years ago It is also alleged that when Sadayappa Chetty died in December 1912, he informed the plaintiff and her mother that his son would continue to hold the property on their behalf. The arguments in appeal have been confined to the entrustment alleged to have been made by Ponnambala Chetty shortly before his death, and it is contended that, as some of the property consisted of mortgages which were immovable property, no valid transfer was effected as there was no registered instrument of transfer, and consequently, the property did not vest in Sadayappa Chetty, and a fortiori did not vest in him for any specific purpose. This argument, however, ignores the pleadings in the suit. The plaintiff alleged that the properties vested in Sadayappa Chetty, and after him in his son, the defendant, and were held in trust for her. The defendant admitting that the properties vested in him contended that the properties vested in him absolutely and that the plaintiff had no interest therein. This contention of the defendant has been found against and this finding is not disputed in appeal. It was therefore the case of both parties that the properties actually vested in the defendant. Consequently no evidence was let in as to the manner in which such vesting was effected, and consequently it hardly lies with the defendant now to plead that the

plaintiff has not proved an effective transfer of the properties.

Apart from this the whole of the appellant's argument has been confined to the period dating from Ponnambala Chetty's death ; but it is in evidence and is not disputed now that the property entrusted to Sadayappa Chetty was entrusted to him many years before Ponnambala Chetty died, the alleged trust being at the time one for the benefit of Ponnambala Chetty himself. The bulk of the property originally entrusted was presumably money and possibly promissory notes and bonds ; there is no evidence at all that at that time any mortgages existed. The transfer of the money and bonds, therefore, could be effected by delivery ; and if it was the intention of the parties that Sadayappa Chetty should hold the property as a separate fund to be accounted for by him to Ponnambala Chetty undoubtedly an express trust would be created. There being no immovable property, so far as it appears from the record, no registered instrument of transfer would be necessary ; and the property would vest in Sadayappa Chetty by the mere transfer of possession coupled with the intention of the parties that such delivery of possession should vest the property in Sadayappa Chetty. The subsequent direction by Ponnambala Chetty that the property should be held for the benefit of his wife and daughter was merely an alteration for the purpose of the trust ; in both cases the property would have been held for a specific purpose. In this view of the case, undoubtedly an express trust within the meaning of S. 10 of the Limitation Act was created and consequently, the plaintiff's present suit cannot be barred by limitation.

I do not, therefore, think itis necessary to ascertain in this suit whether the mortgage deeds had become vested in Sadayappa Chetty inasmuch as there is nothing to show that, when the entrustment was made, any immovable properties, such as mortgages, were transferred. Their existence now can be explained by the fact that Sadayappa Chetty, dealing with the moneys of Ponnambalam Chetty, converted some of those moneys into mortgages ; and, if the money vested in him the proceeds thereof would similarly vest. Even if it were necessary to prove vesting, it is possible that the view taken by the late Chief Justice in *Kistappa Chetty* v. *Lakshmi Ammal* (1) that the word 'vesting' means merely 'properly having control of the property would be sufficient to dispose of the case, but, as I am of the opinion that the parties did not go to trial on this question of vesting, the defendant having admitted that the property vested in him, it is unnecessary, to further discuss this question ; and I need not refer to the various authorities, English and Indian, which have been referred to in the course of the argument, an argument which was largely beside the point with reference to the pleadings in the case.

The appeal, therefore, fails and is dismissed with costs.

Krishnan, J.—The defendant, the appellant in this appeal, is the husband of the plaintiff. The plaintiff sues him for an account and for payment over of the moneys which she alleges her father Ponnambala Chetty entrusted to his brother-in law Sadayappa Chetty, defendant's father, which on his death passed into the hands of the defendant. Defendant denied the entrustment and pleaded that pro-notes and mortgage bonds, in his name, were his own property and raised several legal pleas, and further contended that the suit was barred by limitation. In answer to the last plea plaintiff contended that her case fell within S. 10 of the Limitation Act and no limitation applied to it. The Subordinate Judge, overruling the defendant's pleas, passed a decree in plaintiff's favour and the defendant has appealed to us. The only point raised in the appeal is the one of limitation, the learned vakil for the appellant expressly stating that he gave up all other points. The question we have to decide is thus confined to whether S. 10 applies on the facts of this case. It is clear from the evidence that Ponnambala Chetty and his brother, who were carrying on money lending business in Thiruvannamalai, but living in a small village near by, being apprehensive of the safety of their property, purchased a house in Thiruvannamalai, and gave it to their brother-in law Sadayappa Chetty to live in, free of rent, and transferred their funds to him and got him to transact their business on their behalf in his own

(1) A.I.R. 1923 Mad. 578.

name keeping separate accounts for the same. He was to render accounts and hand over the moneys and profits when demanded. Ponnambala's brother subsequently divided off from him and, obtained from Sadayappa his half share in those moneys and in the house. But Sadayappa continued to act for Ponnambala till the latter's death in 1912. There is a body of evidence, which there is no reason to discredit, that just before his death, early in 1912, Ponnambala instructed Sadayappa to continue the business as before and hold the moneys for the benefit of his wife and daughter the plaintiff ; Sadayappa agreed to it and acted accordingly. Sadayappa also died at the end of the year 1912 and it is in evidence that just before his death he told his son, the defendant to continue the arrangement and pay the ladies the moneys of plaintiff's father when wanted. Plaintiff's mother brought a suit against her son in-law, the defendant, and got a decree for the transfer to her of a number of pro notes and bonds standing in the defendant's name, but found to have been taken with her husband's moneys. Plaintiff has brought this suit after her mother's death for an account of all the moneys belonging to her father which the defendant collected and had not hitherto accounted for, and for payment over.

On these facts the plaintiff contends that Sadayappa was an express trustee in whom moneys were vested by her father for the specific purpose of carrying on his money lending business, improving the estate and handing over the capital and profits to him on demand, a purpose which was afterwards changed by her father into a similar one in favour of herself and her mother ; she, therefore, pleads S. 10 applies. The defendant pleads that there is no proof that any funds of the plaintiff's father vested in his father and even if so vested he says they were not vested for any specific purpose and S. 10 could not apply. According to him his father was only an agent of the plaintiff's father and as such an agency came to an end with his death in 1912 and the suit is barred by limitation.

Although the evidence on the point is somewhat meagre as to what actually took place when Sadyappa was installed in the newly purchased house in Thiruvannamalai there is evidence to show that the funds of the plaintiff's father's money-lending business were thereafter kept by Sadayappa and were lent out by him on bonds and mortgages taken either in his own name or in the name of his son, the defendant. Ex. KKK the account produced. and the other documents referred to by the Subordinate Judge in his judgment prove this. It is true that some bonds were taken in Ponnambala's name and Ponnambala at times sent chits to Sadayappa for loans to be given to borrowers. But these circumstances do not interfere with the inference that Sadayappa was made a trustee and was not a mere agent. If he was only an agent he would not have taken bonds in his own and in his son's name for moneys got from Ponnambala. The near relationship of the parties, the fact that Sadayappa dealt with Ponnambala's moneys as if they were his own and took bonds in his and his son's name for such moneys when lent, the fact that he kept a separate account for these funds, the evidence as to what took place at Ponnambala's and Sadayappa's deaths, all point to the fact that Sadayappa was not a mere agent but was in reality a trustee. There is no force in the argument that the properties were never properly vested in the defendant's father by Ponnambala. In fact, the defendant's case in the lower Court was not merely that the properties were vested in his father and after his death in him but that they were actually his own properties. The plea now taken that the properties were not vested in the father is not consistent with that position. The funds were all apparently in the shape of moneys which had only to be handed over to the defendant's father with the intention of passing the property to him to vest them in him. If there were any pro-notes or bonds in Ponnamabala's name at the time which required endorsement or assignment in writing to transfer, they were evidently subsequently realised and converted into moneys and taken by Sadayappa as no such notes or bonds exist now. Such taking with Ponnambala's consent would vest these funds in Sadayappa. The contention that a registered instrument was required to create a trust with reference to immovable property like a mortgage interest is of no avail here as it is not shown that at the time the funds were vested in Sadayappa any portion of

them consisted of mortgage securities. The mortgage bonds that now exist were taken in defendant's name by his father for moneys lent out by him which were already vested in him though they were originally part of Ponnambala's estate. I have no doubt that Ponnambala's money, were legally vested in Sadayappa in trust. The evidence also shows that the specific purpose of the trust was to carry on money-lending with those moneys and to increase the estate by addition of profits by way of interest and hand over when called on to Ponnambala. It was clearly open to Ponnambala, the funds being already vested in Sadayappa, to alter the purpose of the trust by merely directing him to hold them for the benefit of his wife and child as he did just before his death. It seems to me that all the conditions necessary for the application of S. 10 of the Limitation Act exist in this case and the Subordinate Judge was right in overruling the plea of limitation, as under S 10 the defendant, as the legal representative of the trustee, is equally barred from pleading the statute.

As this case turns on the facts proved here which clearly bring it within the section it is not necessary to refer to any authorities on the exact meaning of the section. The case cited in *Krishna Pattar* v. *Lakshmi* (2) to which I was a party is clearly distinguishable as that was a case of a constructive trust. The case in *Bhurabhai* v. *Bai Ruxmani* (3) is more in point.

I agree that the appeal fails and should be dismissed with costs.

Appeal dismissed.

(2) A. I. R. 1922 Mad. 57
(3) [1908] 32 Bom. 394=10 Bom. L. R. 540.

★ A. I. R. 1926 Madras 112

JACKSON, J.

Narayanasami Pillai—Plaintiff—Petitioner.

v.

Gapalakrishna Naidu — Defendant—Respondent.

Civil Revision Petition No. 715 of 1923 Decided on 13th August 1925, against the decree of the Dist. Munsif, Negapatam, D/- 19th March 1923, in Small Cause Suit No. 107 of 1922.

★ *Trust—Trustee is also liable for uncharged debts for trust even after he leaves office.*

When a trustee incurs debt for the trust but without charging the trust property, it should be assumed that the creditor lent money on the personal credit of the trustee. The proper decree in cases of this sort is a decree for payment by the trustee personally and out of the temple funds although the trustee may have ceased to hold office: 43 *Mad.* 795 and *A. I. R.* 1922 *Mad.* 402, *Ref.* [P. 112. C. 2]

M. S. Venkatarama Aiyar—for Petitioner.

Judgment.—Plaintiff sued defendant for Rs. 95 for fireworks supplied to defendant as trustee of a temple. The District Munsif found the claim to be true, but nonsuited plaintiff on the ground that the defendant was no longer trustee and the temple was liable. Plaintiff seeks to have the decree reversed. Defendant may have his remedy against the trust but it cannot be said that he is absolved from all liability to plaintiff by the mere fact that he has ceased to be trustee.

"Such a trustee has got his personal credit to pledge and the presumption should be that, when he incurred a debt without charging the trust properties, the creditor lent the money on such personal credit.

The principle would apply to an ordinary trustee who is not a sanyasi. *Lakshmindrathirtha Swamiar* v. *Raghavendra Rao* (1). In *Sundaresan Chettiar* v. *Viswanada Pandara* (2), it is shown that the proper decree in cases of this sort is a decree for payment by the defendant personally and out of the temple funds.

The defendant does not appear to oppose this petition.

I reverse the decree of the lower Court and order that a decree issue as prayed for against the defendant with costs.

Decree reversed.

(1) [1920] 43 Mad. 795=39 M. L. J. 174=(1920) M. W. N. 568=28 M. L. T. 269=12 L. W. 139.
(2) A. I. R. 1922 Mad. 402.

A.I.R. 1926 Madras 113.

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Bava C. Vaithilinga Mudaliar—1st Defendant-Appellant

v.

Chidambaram Pillai—Plaintiff-Respondent.

Appeal No. 71 of 1925, decided on 10th March, 1925, against the order of the Sub-Judge, Tiruvalur, in E.A. No. 52 of 1925.

(a) *Execution — Decree binding — Judgment-debtor cannot insist on attachment of particular item of assets.*

Where the decree contained clear words that the plaintiff was to recover the amount from the income and assets of the *Ulturai kattalai.*

Held, that the defendant cannot urge in the executing Court that a particular item of income or assets should be excluded. (43 Mad. 675, F.B., *Ref.*) [P. 113, Col. 2.]

(b) *Religious endowment*—Mohini *allawance is an income of* kattalai.

Mohini allowance is a part of the income of the *kattalai.* (17 Mad. 199, *Ref.*) [P. 104, Col. 1.]

K. Bhashyam Aiyangar and *S. Panchapagesa Sastri*—for Appellant.

C. A. Seshagiri Sastri for *K. S. Jayarama Aiyar*—for Respondent.

Judgment:—The first defendant-appellant objects to execution on two grounds: *first*, that the *Mohini* allowance which is sought to be attached is an endowment for a special purpose, and therefore it cannot be made available to a creditor who has obtained a decree against the *Ulturai kattalai* in general terms; *secondly* that the allowance does not constitute either the assets or the income of the *Ulturai kattalai.*

The first objection assumes that the *mohini* allowance is a part of the assets of the *Ulturai kattalai*; but the argument is that the *kattalai* provides for various objects, and that the *mohini* allowance is earmarked for a certain specific purpose. Granting but not deciding that this is so, it has not been shown that the debt in respect of which the decree was passed was not incurred for a purpose which would be a legitimate charge on the *mohini* allowance. On the other hand, from the judgment it would appear that the debt was incurred for carrying out the objects of the *kattalai* and performing all kinds of duties in connection with them, and there is no trace anywhere that the amount borrowed was expended in connection with any particular object. Next the debt was incurred by the Receiver who fully represented the *kattalai* and the 1st and 2nd defendants being the trustees of the *kattalai* equally represented it in the suit in which the decree in question was passed. The decree contained clear words that the plaintiff was to recover the amount from the *income* and *assets* of the *Ulturai kattalai.* The executing Court cannot go behind the decree and it will not be open to the defendant to say that a particular item of income or assets should be excluded. [See *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*(1)], Sir John Wallis who delivered the judgment of the Full Bench thus observes:—

"This is the view taken in *Hari Govind* v. *Narasingrao Konherrao* (2) and *Kalipada Sarkar* v. *Hari Mohan* (3) is also a recent authority for the proposition that the Court executing the decree cannot go behind it."

This was followed in *Sami Mudaliar* v. *Muthiah Chetty* (4). In *Kalipada Sarkar* v. *Hari Mohan Dalal* (3) the learned Judges said:—

"It is indisputable that the Court executing a decree must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree."

It is noteworthy that no such defence was put forward in the suit although a similar plea was taken in connection with a particular sum which seems to form a part of the *kattalai.* The learned Vakil for the appellant tells us that apart from the *Mohini* allowance of Rs. 7,200 per year, there are two other sums which constitute the endowment — Rs. 1,000 the sum in respect of which exception was taken in the suit itself, and a sum of about Rs. 700 which represents the realisation from the sale of *Prosadams.* If the contention is correct, the only amount that is available to the decree-holder is the latter sum of Rs. 700.

We shall next deal with the second objection. We cannot follow the argu-

(1) (1920) 43 Mad. 675=39 M.L.J. 203=28 M.L.T. 75=(1920) M.W.N. 400=58 I.C. 871=12 L.W. 217 (F.B.).

(2) (1913) 38 Bom. 194=23 I.C. 123=16 Bom. L.R. 26.

(3) (1916) 44 Cal. 627=24 C.L.J. 375=35 I.C. 856=21 C.W.N. 1104.

(4) A.I.R. 1923 Mad. 212=43 M.L.J. 293=16 M.L.W. 314=(1922) M.W.N. 597.

ment that the *Mohini* allowance is neither the income nor the assets of the *kattalai*. The very documents on which appellant relies show that this contention is utterly devoid of force. Ex. B refers to the *Mohini* allowance as cash income. Ex. C includes *Mohini* allowance among the items belonging to the *kattalai* in question. Again the case which the learned Vakil for the appellant has relied on, *Vaiythilinga Pandara Sannadhi* v. *Somasundara Mudaliar* (5) refers to the *Mohini* allowance as constituting the largest portion of the income of the *Ulturai kattalai*. This argument therefore cannot be accepted.

The appellant lastly contends that we should in our discretion restrain the plaintiff from attaching this allowance and direct him to proceed against the other properties of the *kattalai*. It is unnecessary to decide whether we have this power; granting we have it, no reason has been given why we should exercise it in favour of the appellant. The only other items available according to him are the two paltry sums of Rs. 1,000 and Rs. 700. We also must note that this contention was not put forward before the lower Court. There is no equity on his side, as the judgment, which at present we must assume is right, makes it clear that the debt is a long-standing one and the plaintiff has been kept out of his money for several years; on the other hand, the defendant appellant has not shown that the interests of the trust will be advanced by allowing execution against the other properties.

Finally, the appellant's learned Vakil has contended that if the whole *Mohini* allowance is attached, the daily *puja* in the temple cannot be performed and may have to be discontinued. Mr. Seshagiri Sastri, the learned Vakil for the respondent, without admitting the truth of this statement, agrees to leave out Rs. 1,200 and attach the balance only, *viz.*, Rs. 6,000. Any sums already drawn by this appellant out of the *Mohini* allowance must go towards the said sum of Rs. 1,200.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) (1893) 17 Mad. 199.

A.I.R. 1926 Madras 114.

SPENCER AND ODGERS, JJ.

B. S. Mahadeva Iyer and others—Appellants

v.

Ramakrishna Reddiar and others—Respondents.

Appeal No. 90 of 1922, decided on 27th February, 1925, against the decree of the Sub-Judge, Ramnad, in Original Suit No. 38 of 1920.

(a) *Contract Act, S. 263—One ex-partner cannot bind another ex-partner.*

After dissolution no ex-partner has power to do any act to bind another ex-partner. (*Watson* v. *Woodman*, 22. Eq. 721, *Ref.*) [P. 115, Col. 1.]

(b) *Contract Act, S. 264—Partnership dissolved—Notice not given—Strangers are not affected.*

According to S. 264 in the absence of notice of dissolution, persons dealing with a firm are entitled to assume that the partnership still continues though it has actually been dissolved. (17 Bom. L. R. 762, *Ref.*) [P. 115, Col. 1.]

(c) *Contract Act, S. 253—Mercantile Firms—One partner can acknowledge by part-payment.*

In the case of a mercantile firm each partner is entrusted by his co-partners with a general authority to do any act necessary for or usually done in carrying on the business of each partnership; a partner's authority extends to making an acknowledgment by part-payment so as to bind his partners. [P. 115, Col. 2.]

(d) *Limitation Act, S. 21 (2)—Acknowledgment of co-partner is not alone sufficient to fix other partner with liability.*

Section 21 (2) does not say that a person shall not be liable on an acknowledgment signed by the partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if there is no more than a written acknowledgment signed by one defendant, the fact that the other defendant is his partner cannot affect the latter's liability. (41 Mad. 427 (F.B.); *Expl.*) [P. 115, Col. 2.]

A. Krishnaswamy Aiyar and *K. Krishnaswamy Aiyangar*—for Appellants.

T. R. Venkatarama Sastri, A. Venkatarayaliah, L. Venkatanarasiah and *A. N. Krishna Aiyangar*—for Respondents.

Odgers, J.:—In this case, the plaintiffs are the sons of one S. V. Manavala Reddiar who died about 1915, and they sue the defendants who are, as to the defendants 2 to 4, the undivided sons of defendant 1 and as to defendants 6, 7 the undivided sons of defendant 5. Defendant 1 and defendant 5 carried on business in

partnership in cotton and money lending under the style of "P.K N." firm. Defendant 1 borrowed from Manavala Reddy Rs. 10,000 from his family funds, in his (defendant's) capacity as managing partner on 26-8-1914. The suit is brought on the Promissory Note executed thereupon Ex. A. Defendant 1 is also alleged to have made and endorsed a payment of Rs. 1,000 for interest on 16-8-17 thus saving limitation. The defence is that the partnership between defendant 1 and defendant 5 had ceased to the knowledge of plaintiffs long before 16-8-1917 and had been dissolved by a decree in a suit for dissolution (O. S. No. 7 of 1918) brought by defendant 5, the capitalist partner, against defendant 1. The decree decided that the partnership was dissolved as from 11-3-1915. Consequently defendant 1 had no authority to bind his former partner in 1917 by any endorsement of part payment in order to save limitation. It is no doubt clear law that after dissolution no ex-partner has power to do any act to bind another ex-partner. *Cf. Watson* v. *Woodman* (1) where the Vice-Chancellor held that it was not there proved that the two parties concerned had so intended that they should for the purposes of that suit be deemed to have continued partners. In *RajagopalaPillai* v. *KrishnaswamiChetti*(2) it was held that the fact that a partnership is being wound up is by itself insufficient to authorise a surviving partner to bind the representatives of a deceased partner. But in the present case it is clear that as regards third parties (in the position of the plaintiffs) there was no notice, express or constructive, given of dissolution and section 264 of the Contract Act is clear that in the absence of such notice, persons dealing with a firm are entitled to assume that the partnership still continues (*Chandu Churn Dutt* v. *Eduljee Cowsaji Bijnee* (3) and *B. G. Gorio and Co.* v. *Vallabhdas* (4). Therefore plaintiffs were still entitled even after 1915 to regard the partnership between defendant 1 and defendant 5 with whom they have dealt for 15 years as subsisting. The question then arises, had defendant 1 authority to bind his firm by making this payment. My own opinion is that as in the case of a mercantile firm, as here, each partner is entrusted by his co-partners with a general authority to do any act necessary for, or usually done, in carrying on the business of such partnership; a partner's authority extends to making an acknowledgment by part-payment so as to bind his partners. I am fortified in this opinion by that of Kumaraswami Sastriar, J., in his referring judgment in *Veeranna* v. *Veerabhadraswami* (5). However a question has been raised on limitation with regard to the provisions of section 21 (2) of the Limitation Act which runs as follows:

"Nothing in the said sections renders one of several joint contractors, partners, executors or mortgagees chargeable by reason only of a written acknowledgment signed or of a payment made by or by the agents of any other or others of them."

Those words have been construed in *Veeranna* v. *Veerabhadraswami* (5), by a Full Bench of this Court. There the learned Judges say "It is important to notice the exact wording of section 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on an acknowledgment signed by the partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant, the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section, proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice" (p. 434.) Here there is no question that the part-payment was in respect of a partnership debt Ex. A. There is also ample evidence from the surrounding circumstances which we are entitled to look at, *Veeranna* v. *Veerabhadraswami* (5), for the conclusion that there was express authority for defendant 1 to make the acknowledgment to rebut the possible validity of the contention that from the wording of section 21 (2), Limitation Act, there is no presumption in India that

(1) (1870) 20 E.Q. 721=45 L.J. Ch. 57=24 W.R. 47.
(2) (1898) 8 M.L.J. 261.
(3) (1882) 8 Cal. 678=11 C.L.R. 225.
(4) 1915) 17 Bom. L.R. 762.
(5) (1918) 41 Mad.427=34 M.L.J. 373=23 M.L.T. 261=(1918) M.W.N. 285=7 L.W. 552 (F.B.).

a partner has power to acknowledge, though the validity of this contention is at least doubtful after the exposition of the sub-section by the Full Bench. P. W. 3 a clerk of appellant's (defendants') firm swears that the entry in Ex. E. (1) showing the payment of Rs. 1,000 on 16-8-1917 was made under the orders of defendants 1 and 5 : he also states that the partnership has not been wound up or the accounts settled. Defendant 5 himself applied for a loan to the South Indian Bank in 1915 Ex. G. in which he sets out the present loan. Ex. H is the defendant 5's plaint in the dissolution suit against defendant 1. He says that since his (defendant 5's) father's death in 1907, defendant 1 and another assistant partner, conducted the entire business. Defendant 5 was obliged to rely on defendant 1 for the conduct by him of all matters connected with the partnership and all such things as the collection of outstandings, etc. In Ex. F dated 6-2-1918 the present appellant admits that defendant 1 has to pay a share of the debt due to Manavala Reddy. There is also a correspondence between the receiver in the dissolution suit and the vakil of Manavala Reddy's sons which shows that at first at any rate the appellants were willing to discharge their half of the suit debt and did not question their liability to do so. There is no doubt on the evidence, which there is no reason to discredit, that never until this suit was brought did appellants dispute their liability nor suggest that defendant 1 was not authorised to make the acknowledgment. The proviso of section 21 (2) of the Limitation Act as construed by the Full Bench can therefore have no application to the present case. I am therefore of opinion that the Subordinate Judge was correct in the conclusion he came to and I would dismiss this appeal with costs of plaintiffs (Respondents 1—3). Costs not to come out of partnership assets.

Spencer, J. :—I agree that the Appeal must be dismissed with costs and I will give my reasons in my own language. Defendants 6 and 7 are sons of the 5th defendant, who died during the suit under appeal and 10th defendant is the Receiver in O. S. 7 of 18.

From the terms of the reference in *Veeranna* v. *Veerabhadraswami* (5) it appears that the Full Bench had not to consider the effect of section 21 (2) of the Limitation Act upon acknowledgments of debts and payments saving limitation by partners with express reference to the circumstance of the partnership being a continuing one or one that had been dissolved at the time of acknowledgment or payment. The learned Judges observed that they saw nothing in the sub-section to make it necessary to suppose that it was intended to apply to transactions conducted in the ordinary course of partnership. They overruled *Valla Subramania Pillai* v. *Ramanatham Chettiar* (6). So long as a partnership continues, it is a part of the ordinary course of partnership business to pay partnership debts, and therefore it would ordinarily be sufficient to prove that the debt in question was a partnership debt and that the person who paid the interest on it or part of the principal was a partner, in order to give an extended period of limitation calculated from the date of payment as against all the other partners. Even after dissolution, section 263 of the Contract Act provides that the rights and obligations of the partners continue in all things necessary for winding up the business, and from section 265 it appears that payment of the firm's debts is part of the business of winding up. But after a partnership has become dissolved, it may not be the particular duty of every person who has been a partner to pay and acknowledge debts of the firm, as by arrangement that may be done by the Court, or by a Receiver, or by one of the ex-partners acting as agent for the others. So far as strangers are concerned, a partnership dissolved is a partnership in being, unless and until they receive notice of dissolution. In the case of old customers, like the plaintiffs in this case, express notice is necessary (*Vide Chundee Charn Dutt* v. *Eduljee Cowasjee Bijnee* (3) and Pollock and Mulla's commentary on section 264). It has not been proved by the evidence in this case that the plaintiffs received any notice of the partnership of defendants 1 and 5 having become dissolved on 11-3-1915 or indeed on any date before 16-8-17 when the payment of Rs. 1,000 was made by 1st defendant to 2nd plaintiff according to his evidence as P. W. 4 and the ledger Ex. E. (1). For some unaccountable reason no issue as to limitation was directly raised in the lower Court. P. W. 3, who was clerk of the firm, says that the

(6) (1909) 32 Mad. 421=5 M.L.T. 102.

firm's business was closed on 14th Thai, Rakshasa, corresponding to January 27th, 1916, but 7th defendant who, as authorised agent of his father, 5th defendant, brought O. S. No. 7 of 1918 on the file of the Sub-Court of Ramnad against 1st defendant to obtain a declaration that the partnership terminated on 11-3-15, did not present the plaint in that suit to the Court before 1-2-18 (see Ex. H.) In paragraph 11 of the plaint the 5th defendant states that he was dependant on the 1st defendant for all matters connected with the business of the firm such as the collection of outstandings even after 13-3-15 pending the settlement of the accounts.

Fifth defendant in Ex. G, a loan application made to the South Indian Bank and 7th defendant in his affidavit Ex. F. and in his letter (Ex. D-2) to the Receiver admitted that the debt due to the plaintiffs was a partnership debt of the P.K.N. firm, and P. Ws. 3 and 4 deposed, without being contradicted or shaken in cross-examination, that the payment of Rs. 1,000 was a joint payment by both 1st and 5th defendants and that the entry in the accounts was made under the authority of both of them. This is quite enough to fix all the appellants with liability and to save limitation. I agree in the proposed order for costs.

Appeal dismissed.

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*A.I.R. 1926 Madras 117.

PHILLIPS, J.

Pasumarti Seethanna—2nd Defendant-Appellant

v.

Thammandra Yasikalappa — Plaintiff-Respondent.

Second Appeal No. 649 of 1924, decided on 5th August, 1925, from the decree of the Sub-Judge, Kistna at Ellore, in A. S. No. 176 of 1923.

** Contract Act, S. 73—Earnest money should be forfeited only when given as security for performance.*

An advance is liable to be forfeited only when it is given as security for performance of the contract but not otherwise. (23 C.W.N 40, *Rel.*) [P. 118, Col. 1.]

P. Venkataramana Row—for Appellant.

B. Sommayya—for Respondent.

Judgment:—The lower appellate Court has found that the plaintiff committed default in respect of a contract to purchase 1501 bags of rice from the first defendant. The plaintiff paid a sum of Rs. 6,000 in advance and the lower appellate Court has held that the plaintiff is entitled to return of this money after deducting certain sums which the defendant is entitled to retain. The 2nd defendant (widow of first defendant) now appeals and contends that she is entitled to retain the whole Rs. 6,000 on the ground that it was paid as deposit. This question of whether it was paid as a deposit has not been raised in either of the lower Courts; but the appellant relies on certain cases for the proposition that whenever money is paid in advance on account of a contract, the vendor is entitled on breach of contract to retain the whole sum. That is the effect of the rulings cited where the money has been paid as deposit. In *Roshan Lal* v. *Delhi Cloth and General Mills Co.* (1), where earnest money was paid and in *Bishan Chand* v. *Radha Kishan Das* (2), where a deposit was paid, it was held that the vendor was entitled to retain the money deposited on breach of the contract. The Full Bench decision in *Natesa Aiyar* v. *Appavu Padayachi* (3) relates to a contract in which there was a specific clause of forfeiture and does not appear to be applicable here. In *Nawab Khaju Habibulla* v. *Arman Dewan* (4) the law on the point has been reviewed with great care and the conclusion arrived at is that:—

> "The deposit, if nothing more is said about it, is according to the ordinary interpretation of businessmen, a security for the completion of the purchase so that in the event of the contract being performed, it must be brought into account and if the contract is not performed by the payer, it is forfeited to the payee: but every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. It is incumbent on the Court in each case to ascertain the real intention of the parties from all the terms of the contract."

This with all respect, appears to me to be the correct interpretation of the law on the subject—whether an advance is given as security for performance of the intention of the parties. It may well be that in a certain contract, the purchaser may, to oblige the vendor, pay some of the purchase-money in advance. Can it be said in that case that he paid that money as a

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(1) (1911) 33 All. 166=7 A.L.J. 1019.
(2) (1897) 19 All. 489=(1897) A.W.N. 123.
(3) (1915) 38 Mad. 178=(1913) M.W.N. 341=24 M.L.J. 488=13 M.L.T. 391.
(4) (1919) 23 C.W.N. 40=30 C.L.J. 113.

security for performance of the contract? If he did not pay it as security, there is no reason why the vendor should retain such money, unless he has himself suffered damage to an equivalent or greater sum owing to the purchaser's breach. The question has not been raised at all in the present proceedings. There is no definite written contract from which the intention of the parties can be ascertained, but so far as appears from the lower appellate Court's judgment, it was not the intention of the parties to treat this money as a deposit. It is found that the defendant wanted ready money to pay to his vendors and also that the defendant actually returned a portion of the deposit when the contract came to an end. Without a finding or some evidence from which it may be inferred that this advance was in the nature of a security deposit, I cannot allow the objection to be taken now.

A further objection is taken by the appellant as to the damage sustained, but this appears to be purely a question of fact which the lower appellate Court was entitled to decide finally and this objection must be disallowed.

The respondent has filed a memorandum of objections in which he first of all objects to the lower appellate Court's finding that he was guilty of breach of contract. This is a question of fact and it appears to me that on the facts found by the lower appellate Court, namely, that certain rice was available for delivery to the plaintiff and the plaintiff refused to accept it on some excuse or other, not having the cash ready to pay for delivery, it has rightly found that the plaintiff committed default. The argument that there is no finding that the defendant had rice ready for delivery does not appear to me to be correct, in view of the statement that the plaintiff made some excuse or other to avoid taking delivery.

A further point is raised by the respondent and that is that interest should have been allowed to him from the date of the plaint to the date of the first Court's decree. On reading the judgment of the lower appellate Court, I think this contention is correct and that the omission to provide for this interest in the decree is a mistake. This mistake apparently could not be corrected in the lower appellate Court because this appeal was filed before an opportunity could be obtained.

The objection is allowed and the decree will be modified to the extent of allowing interest at 6 per cent. from the date of plaint 20th September, 1920, till payment. In the result, the second appeal is dismissed with costs and the memorandum of objections, subject to the modification above, is dismissed, respondent paying and receiving proportionate costs.

Appeal dismissed.

A.I.R. 1926 Madras 118.

JACKSON, J.

Narasimha Mudali and another—Plaintiffs-Appellants

v.

Petti Narayanasami Chetty and another—Defendants-Respondents.

Second Appeal No. 18 of 1923, decided on 31st July, 1925, from the decree of the Sub-Judge, Chittoor, in A. S. No. 282 of 1921.

Contract Act, S. 73—One party repudiating contract—Other party may accept or sue in damages.

If one party to a contract repudiates it, the other party may either treat the repudiation as inoperative, or he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, but he cannot both sue upon the breach and also keep the contract open. (*Frost* v. *Knight*, 7 *Ex*. 111, *Rel*.). [P. 119, Col. 1.]

C. V. Ananthakrishna Aiyar—for Appellants.

S. Jagadisa Aiyar—for Respondents.

Judgment :—This is a second Appeal from the decree in A. S. No. 282 of 1921, on the file of the Subordinate Judge of Chittoor preferred against the decree in O. S. No. 55 of 1920 on the file of the Court of the District Munsif of Sholinghur. Both the lower Courts have dismissed the suit and plaintiffs appeal.

A Chetty firm contracted with a Mudaly firm to supply the Mudaly firm with 25 bales of yarn, Ex. A and A-1. On 24th October, 1918, the Mudaly firm wrote Ex. II cancelling the contract because the supply had been irregular. The Chetty firm not accepting this cancellation gave notice of Suit and in due course filed Original suit No. 27 of 1919 in the Court of the District Munsif of Chittoor. The matter was referred to arbitration and apparently settled by award but the award is not in evidence. On the

9th December, 1919, the Mudaly firm wrote Ex. D to the Chettys that under the previous contract they were still bound to supply them with 11½ bales, and if these were not supplied within two days they would file a suit. Hence the present suit brought by the Mudaly firm, the plaintiffs and appellants.

The point taken in this appeal is that the contract was never cancelled and the appellants rely for this position upon *Frost* v. *Knight* (1), where it is laid down at page 122, that if one party to a contract repudiate it, the promisee may treat the repudiation as inoperative, and at the end of the period of the contract, treat the other party as responsible for all the consequences of non-performance, thereby, keeping the contract alive, or on the other hand, he may treat the repudiation as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it. The Chetty firm evidently adopted the latter alternative when it brought Original Suit No. 27 of 1919. But relying upon a passage in the plaint of that suit, the appellants would have it that the Chettys availed themselves of both alternatives. They sued upon the breach of the contract; and in the same breath kept it open, because, in paragraph 11 of their plaint, there is a statement that they were still entitled to deliver the rest of the bales. The short answer to this is that they had no right to make any such reservation. *Frost* v. *Knight* (1) is recognised authority prescribing the remedies open to a promisee and he cannot both sue upon the breach and also keep the contract open.

The appellants then proceed to argue that if so much must be conceded the Chetty firm closed the first portion of the contract, but re-opened a new contract by their 11th paragraph. This plea can have no force unless the Mudaly firm can show its acceptance of this fresh tender, and so far from accepting it, that firm in its written statement utterly repudiated the 11th paragraph as false (Ex. III, paragraph 11). Therefore, there was no fresh contract between the parties.

Apart from contesting this plea of the plaintiffs, the respondents have a good case as set forth in paragraph 8 of their written statement by way of waiver and estoppel. A party cannot repudiate a contract, wait a year and then suddenly insist upon its performance. The question turns upon whether his conduct gives rise to an implication of abandonment. Cf. *Pearl Mill Co.* v. *Ivery Tannery Co.* (2). Delay coupled with repudiation does give rise to such an implication.

"Where one party by acts and conduct evidences an intention no longer to be bound by the contract, the other party will be justified in regarding himself to be emancipated." [Halsbury Laws of England, Vol. VII, Para 865.]

For the above reasons the appeal is dismissed with costs.

Appeal dismissed.

(1) L.R. 7 Ex. 111=41 L.J. Ex. 78=26 L.T. 77 =20 W.R. 471.

(2) (1919) 1 K.B. 78=88 L.J. K.B. 134=120 L.T. 28=24 Com. Cas. 169.

A.I.R. 1926 Madras 119.

JACKSON, J.

Kanaparthi Srinivasa Rao and others —Petitioners

v.

Kanaparthi Venkatanarasamma — Respondent.

Civil Revision Petition No. 692 of 1923, decided on 17th July, 1925, against the order of the Sub-Judge, Masulipatam, dated 29th January, 1923, in C.M.P. No. 1249 of 1922.

(a) *Civ. Pro. Code, O. 32, r. 7—Next friend giving up claim against one of the defendants—Minor can re-open proceedings.*

If the next friend of a minor plaintiff withdraws the suit against one of the defendants, the minor has got a right to have the matter re-opened. [P. 120, Col. 1.]

(b) *Civ. Pro. Code, S. 151—Inherent powers should be exercised to correct errors—Express provision in Civ. Pro. Code is not necessary.*

It is an inherent power of every Court to correct its own proceedings where it has been misled, although there may be no express provision in the Civ. Pro. Code, for such correction. [P. 120, Col. 1.]

V. Ramadoss—for Petitioners.

Judgment:—This is an appeal against the order of the Subordinate Judge of Masulipatam on C.M.P. No. 1249 of 1922.

2. In O.S. No. 45 of 1920, the plaintiffs-minors appeared by their next friend and he exonerated the 1st defendant. The minors now apply to have the matter re-opened. No one appears for first defendant.

3. The point for determination is whether the learned Judge's concluding remark is justified :

"Even if it be held that my predecessor ought to have made some enquiry before allowing the next friend to give up 1st defendant, I think as a successor I cannot re-open the suit."

It must be held that his predecessor should have acted under Order 32, rule 7 of the Civil Procedure Code and should have recorded the leave of the Court. Then can the present Judge re-open the suit which is thus found to have been improperly decided ?

4. The Court has a special responsibility to safeguard the interests of the minor plaintiffs. See *Doraisami Pillai* v. *Thungasami Pillai* (1) and the case quoted therein *Karmali Rahimbhoy* v. *Rahimbhoy Habibbhoy* (2); and where those interests have been overlooked it ought, if possible to remedy the defect. The question then is reduced to one of procedure, whether the Court has the power to review the proceedings. In *Peary Choudhury* v. *Sonoory Dass* (3) it is observed, quoting *Basangowda* v. *Churchigirgowda* (4) that once the Court is asked to go back upon its own procedure, it is not a question whether there is any section in the Civil Procedure Code to warrant the action of the Court amending its proceedings. It is an inherent power of every Court to correct its own proceedings where it has been misled. One should be careful not to read too broad a sense into this dictum, but I think it is applicable to the peculiar circumstances of the present case.

Nothing seems to turn on the fact that the *personnel* of the Court has changed. A minor cannot be expected to exercise diligence, and as soon as he discovers the important matter that the Court failed in its duty in safeguarding his interest, he is entitled to move for a review. If he were moving under Order 47 the rule applicable would be rule 1 and not rule 2, but it is laid down in the case cited above. *Peary Choudhury* v. *Sonoory Dass* (3), that section 151 is more appropriate.

The petition is allowed and the suit should be reopened and heard so far as it related to 1st defendant.

Petition allowed.

(1) (1904) 27 Mad. 377.
(2) (1889) 13 Bom. 137.
(3) (1915) 19 C.W.N. 419.
(4) (1910) 34 Bom. 408=12 Bom. L.R. 223.

A.I.R. 1926 Madras 120.

KRISHNAN, J.

C. Govindaswami Pillai—Appellant

v.

Doraiswami Mudali and others—Respondents.

Second Appeal No. 825 of 1921, decided on 10th November, 1924, against the decree of the Sub-Judge, Chittoor, in Appeal Suit No. 59 of 1920.

Specific Relief Act, S. 27 (b)—Mere offer to give first opportunity to purchase, not perfected by acceptance cannot bind a transferee—Contract Act, S. 2 (a) and (b).

A mere offer to give a sort of right of pre-emption to another by giving the latter the first opportunity to purchase the property when necessity to sell it arises, in which there is nothing to compel the offeree to buy the property is not a contract to sell the property and until the offer is perfected by acceptance it is not binding. (A.I.R. 1922 Mad. 16, *Foll.*) Such an offer cannot be enforced against a transferee. [P. 121, Col. 1.]

S. Duraiswamy Iyer and *T. D. Ramayya*—for Appellant.

A. C. Sampath Aiyangar—for Respondent.

Judgment:—In this case, the plaintiff sued to recover two items of property described in Schedules A and B. He got a decree in the first Court for both these properties. In appeal the Subordinate Judge has disallowed his claim for A Schedule property. He purchased this property under Ex. A, dated 26th April, 1914. The 3rd defendant who is the contesting defendant before me also purchased the very same property on 9th May, 1914. The 3rd defendant claims priority for his purchase over that of earlier purchase by the plaintiff on the ground that he had a contract, under which the owner of the property, the 1st defendant, had agreed to sell it to him, of an earlier date than the 26th April, 1914. That agreement was produced and it is Ex. III. The agreement was found to be genuine. The question that I have to decide turns upon section 27 of the Specific Relief Act. If it is an agreement which could be specifically enforced under section 27 against the plaintiff as purchaser subsequent to the date of that agreement then the 3rd defendant's claim, would be good. If there was an agreement established of an earlier date, it would be for the plaintiff of who subsequently purchased the property

to show that he is a transferee for value who has paid his money in good faith and without notice of the original contract. But before the 3rd defendant can take advantage of section 27, clause (*b*), of the Specific Relief Act he has to show that he has a contract in his favour to sell. The document he produced, Ex. III, it is argued by the appellant's vakil, does not amount to a contract at all but amounts only to an offer by the owner of the property to give a sort of right of pre-emption to the 3rd defendant. It says "If it so happens that I have to sell it (the property) out of necessity, I will sell it to you for Rs. 60 and I bind myself to take the money from you and convey the land to you. I will give you ten days' time from the date of my proposing to sell it within which time you should pay me the money and take the sale-deed from me. But if you fail to pay the money within the 10 days I will overlook your right and claim and I will be at liberty to sell it as I like." It is argued by the learned Vakil for the appellant that this does not amount to a contract at all but it is only a binding offer on the part of the 1st defendant to the 3rd defendant that he would sell the property to him first, if necessity arises for him to sell it, at the price of Rs. 60. The document cannot be treated as a contract, for there is nothing in it to compel the 3rd defendant to buy the property on the terms set out in it. As was held in a recent decision of this High Court in *Papa Naidu* v. *Munisami Naidu* (1) such a document as this would only amount to an offer and until that offer is perfected there is no binding contract resulting. No doubt when once the offer is accepted, there will be a binding contract. Exhibit III, therefore, by itself, is not sufficient to justify the finding of the Subordinate Judge that the 3rd defendant's purchase should prevail as against the plaintiff's earlier purchase. But the question that has been now raised was not properly put forward in the lower appellate Court and I think, therefore, that an opportunity should be given to the 3rd defendant to show, if he can, that this offer in Ex. III became a completed contract by his acceptance before the date of the sale to the plaintiff. If he is able to prove that, then the plaintiff will have to show that he paid the purchase money in good faith and without notice of that contract, to save his purchase being postponed to the purchase by the 3rd defendant; but till the 3rd defendant proves the existence of a binding contract prior to 26th April, 1914, the date of Ex. A, no question under the Specific Relief Act will arise.

The Subordinate Judge will be requested to submit findings on the issues whether Ex. III was converted into a binding contract between the parties by its acceptance by the 3rd defendant before the 26th April and, if so, whether the plaintiff is a transferee for value who paid his money in good faith without notice of that contract. Both parties will be allowed to adduce fresh evidence. The findings will be returned in two months from this date and ten days will be allowed for objections.

As regards the memorandum of objections filed in this case, it seems to me that there is no ground to support it. The finding of the lower appellate Court that the property in Sch. B belonged to the 2nd defendant, as whose property the plaintiff purchased it, and was not the property of the 1st defendant, is conclusive against the 3rd defendant. That finding is supported by the evidence of the plaintiff's witnesses and I must accept it in second appeal. The memorandum of objections will therefore be dismissed with costs.

It is now pointed out that the Subordinate Judge has not given a finding on issue 1 in this case and if the findings on the issues remitted to the lower court are against the 3rd defendant, a finding on that issue will be necessary for the disposal of his second appeal. The Subordinate Judge will be requested to return a finding on that issue as well on the evidence on record already.

[In accordance with the order contained in the above judgment, the Subordinate Judge of Chittoor submitted the following findings :—]

The High Court having remanded the case for findings on the following issues, *viz* :—

(i) Whether Ex. III was converted into a binding contract between the parties by its acceptance by the 3rd defendant before the 26th April, 1914 ?

(1) A.I.R. 1922 Mad. 16=46 Mad. 30=42 M.L.J. 432=15 M.L.W. 409=(1922) M.W.N. 201=30 M.L.T. 175.

(ii) If so, whether the plaintiff is a transferee for value who paid his money in good faith without notice of that contract?

(iii) And whether the sale of Sch. A property by the 1st defendant is inoperative for the reasons stated in para. 4 of his written statement?

I submit the following findings:

* * *

I therefore hold that there was no completed contract between the defendants 1 and 3 before the date of the plaint sale, *i. e.*, before 26th April, 1914.

Second point.—Assuming that there was a completed contract between defendants 1 and 3 before 26th April, 1914, the next question for consideration is whether plaintiff is a *bona fide* purchaser for value without notice of that contract.

In my opinion defendants have failed to prove plaintiff's knowledge of the prior agreement at the time of Ex. A and his want of *bona fides*.

4. My finding on this second question, therefore, is in the affirmative.

5. Next as regards the last question *viz.*, whether plaintiff misrepresented to 1st defendant that 3rd defendant did not want to purchase the suit site, I agree with the District Munsif also on this point.

In my opinion it was this desire to obtain more money and not any alleged misrepresentation by plaintiff which induced the 1st defendant to sell the property to the latter.

Judgment:—I accept the finding and as a result the second appeal is allowed and the decree of the lower appellate Court is set aside and that of the District Munsif is restored. There will be no costs to either side in the appeal or the second appeal. This does not affect the order on the memorandum of objections.

Appeal allowed.

A.I.R. 1926 Madras 122.

ODGERS, J.

Prathipati Suryanarayana — Plaintiff-Petitioner

v.

Prathipati Seshayya and others — Defendants-Respondents.

Civil Revision Petition No. 604 of 1923, decided on 28th March, 1924, from an order of the Additional District Judge, Guntur, dated 23rd July, 1923.

Court Fees Act, 2nd Schedule, Art. 17 (b)—Suit for partition—Hindu joint family already divided—Art. 17 (b) applies.

The correct method of regarding the relief claimed in suits for partition of a joint Hindu family which has already been divided is that it is merely a prayer to change the form of enjoyment and can only be valued by deducting from the value of plaintiff's share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. In such a case therefore it is impossible to estimate the money value of the suit, to which Art. 17 (*b*) alone should be held applicable. [21 M.L.J. 21 (F.B.), *Foll.*] [P. 123, Col. 1.]

B. Somayya—for Petitioner.

Order:—This is a revision petition presented against the decision of the Additional District Munsif of Guntur in which he held that the plaintiff's suit had not been properly valued. He held that *ad valorem* Court-fee on the value of the property claimed must be paid.

Now the value of the suit is to be ascertained from the plaint and the plaint sets out that the suit is one for partition. It is brought by the plaintiff, the younger brother of the 1st defendant. The 3rd defendant is the undivided son of the 1st, and the 4th and 5th defendants, the sons of the 2nd defendant. According to the plaint, in the year 1912 it was arranged that a division should take place and certain vessels and working utensils were divided out into three equal shares. The 1st defendant had been the manager of the joint family and he was apparently unwilling to divide the rest of the property, moveables and immoveables. The plaintiff has admittedly collected and applied to his own use certain rents from the family land, and it is alleged that the 1st defendant has done the same thing with regard to granting *cowles* of other portions of the family land which the plaintiff says the 1st defendant is liable to account for. The said lands are in the management of the first defendant and in the constructive possession of this plaintiff. The learned Additional District Munsif says that

"Having regard to the claim for rendition of accounts and for the recovery of past profits, it cannot be said that the plaintiff is in joint possession and enjoyment of the suit properties."

This I am unable to follow. The allegation is clearly that the lands and some of the moveables have remained undivided and that the plaintiff, with regard to the land that has been leased by the 1st

defendant, is in constructive possession thereof, which can only mean to my mind that he is in possession as a tenant-in-common the division in *status* of the joint family having, as stated, taken place in 1912.

Under the state of things the question is, under which provision of the Court Fees Act the matter falls? In the Full Bench case reported as *Rangiah Chetty* v. *Subramania Chetty* (1), a suit for partition by a member of a joint Hindu family, it was held by White, C.J., and Krishnaswamy Aiyar, J., the majority of the Court, that the suit was governed by section 7, clause 4 (*b*). Now partition having taken place, the question is whether the matter is not governed by the present Art. 17 (6) in Sch. II which would entail a Court-fee of Rs. 15. As stated by Krishnaswami Aiyar, J. the question "is really the value of the convenience of changing the form of the enjoyment of the plaintiff's share.....It is not possible to estimate this difference in value or this convenience in the form of the enjoyment at a money value." True he was there speaking of joint possession, but I do not think that that affects the applicability of those remarks to the present case. Ayling, J., who dissented from the majority of the Full Bench in that he held that the matter fell under Art. 17 (6) as amended also concurred in the opinion expressed in *Kirty Churn Mitter* v. *Aunath Nath Deb* (2) that the correct method of regarding the relief claimed in suits for partition was that it was merely a prayer to change the form of enjoyment and could only be valued by deducting from the value of his share as ascertained in the partition the value of his beneficial enjoyment as co-parcener before partition. That learned Judge also was of opinion that in such a case it was impossible to estimate the money value of the suit. I have not had the advantage of an argument on the other side but Mr. Somayya has put before me the facts fully and clearly so far as I am able to understand and I am of opinion that the decision of the learned Additional District Munsif is wrong. I think on the authority of the Full Bench case above quoted, the proper valuation will be that which seems to have occurred to the learned District Munsif in one place in the course of his judgment, namely, Rs. 15.

The civil revision petition will be accordingly allowed. The Court-fee will be paid within ten days after the records are received in the lower Court.

Petition allowed.

(1) (1910) 21 M.L.J. 21=9 M.L.T. 3=(1910) M. W.N. 755 (F.B.)

(2) (1882) 8 Cal. 757=11 C.L.R. 95.

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* A.I.R. 1926 Madras 123.

RAMESAM, J.

Kallukutt Parambath Perachan—Petitioner.

Puten Peetikakkal Kuttiali--Respondent.

Civil Revision Petition No. 1027 of 1923, decided on 22nd April, 1925, against the order of the District Judge, South Malabar, dated 25th October, 1923, in Civil Mis. Appeal No. 62 of 1923.

* (a) *Provincial Insolvency Act (1920), S. 27—Petition for insolvency filed under old Act—Order passed under new Act—Order is valid and legal.*

An insolvency petition was put in on the 8th January, 1920, and the petitioner was adjudicated an insolvent on the 4th June, 1920. Meanwhile, Act V of 1920, had come into force on the 25th of February, 1920. At the time of adjudication the Court fixed one year as the period within which he should apply for discharge. It was contended in appeal that as the petition was filed under the old Act the petitioner obtained a vested right to an unconditional order of discharge and the Court had no jurisdiction to impose a condition that discharge must be applied for within one year under S. 27 of the new Act.

Held that by the mere filing of a petition under the old Act the petitioner did not acquire a vested right to a particular kind of order which cannot be affected by the new Act. The nature of order to be passed is a matter of mere procedure. (A.I.R. 1924 Mad. 368, *Foll.*) [P. 124. Col. 1.]

(b) *Provincial Insolvency Act (1920), S. 27—Order under S. 27—Second appeal lies.*

An appeal lies to the High Court from an appellate order of a District Judge upholding the order of trial Court passed under section 27 of the Provincial Insolvency Act (1920). [P. 125, Col. 1.]

N. A. Krishna Aiyar—for Petitioner.

T. S. Viswanatha Aiyar—for Respondent.

Judgment:—In this case the insolvency petition was put in on the 8th January, 1920, and the petitioner was adjudicated an insolvent on the 4th of June, 1920. Meanwhile, Act V of 1920 had come into force on the 25th of February, 1920. At the time of adjudication the Court fixed one year as the period within

which he should apply for discharge. This order was based obviously under section 27 of Act V of 1920 as the old Act, III of 1907 contained no such provision. He, not having applied within one year, the District Munsif of Calicut annulled the order of adjudication and the District Judge of South Malabar affirmed the order on appeal. The present revision petition before me is against the order of the District Judge.

It has been contended before me that as the petition was filed under the old Act the petitioner obtained a vested right to an unconditional order of discharge and the District Munsif's Court had no jurisdiction to impose a condition that discharge must be applied for within one year under section 27 of the new Act. It is true that in *Chhatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (1), the Privy Council held that where an application under the Insolvency Act complies with all the conditions specified by the Act the petitioner is entitled to an order of adjudication and the dismissal of his petition amounted to an abuse of the process of Court. But I do not see how this decision helps the petitioner. For some reason or other the petition did not come on for final disposal before the 25th of February and by the time it did so come on, the new Act had come into force. What order should be passed on the insolvency petition seems to me to be a matter of procedure and it cannot be said that by the mere filing of a petition under the old Act the petitioner acquired a vested right to a particular kind of order which cannot be affected by the new Act. The order actually passed was a perfectly proper order under the new Act. It may be that if a condition was improperly annexed it may be ignored as a nullity [vide *Ram Chandra* v. *Syama Charan* (2)] but I do not see my way to hold in this case that the condition was improperly annexed or was passed without jurisdiction. I do not see how the remarks of Macleod, C. J. in *Laxmi Bank, Ltd.* v. *Ram Chandra* (3) help the petitioner. All that was said in that case was that there was no material difference between Act III of 1907 and the Act of 1920 in the matter of what was required to be proved before it is decided that the petitioner had a right to present his petition. Nor does the decision in *Aiyapparaju* v. *Venkatakrishnayya* (4) help the petitioner. It is not decided in that case that when a petition was filed under the old Act and when the new Act had come into force by the time the petition comes on for disposal, the old Act is applicable and not the new Act. What was held there was that a creditor's right to apply for adjudicating his debtor an insolvent, based on an alleged fraudulent transfer by the debtor, had become barred under the old Act and therefore that the new Act could not revive the barred right and the District Court had no power under section 78 of Act V of 1920 to excuse the delay so as to revive the barred right. This proceeds on a well-known and perfectly intelligible principle that a new Act cannot revive a right barred under an old Act. This decision does not therefore help the petitioner. See also *Hanmayya* v. *Ramayya* (5). My conclusion is in accordance with the decision in *S. Rangiah Chetti* v. *Annasami Alwar Aiyangar* (6) where it is observed that any orders passed under the old Act or rights obtained thereunder will be unaffected by the new Act. In the present case we have neither.

A second point raised by the petitioner is that the adjudication should not be annulled without notice to all the creditors and he relied on a decision in *In the matter of Rajnarayan Pal* (7). In that case the petition for annulment was filed on the ground that the insolvents had come to a settlement with all their creditors and objection was properly taken for the Official Assignee that notice should be given to all the creditors having regard to the nature of the ground, but I do not see how that decision applies here. Even if it does, it is for the creditors to complain. They have not chosen to appear and oppose the annulment in all the three Courts. I take it they are apparently satisfied with the annulment. Anyhow I do not see how this objection can be taken by the petitioner. I may add that a

(1) (1916) 44 Cal. 535=44 I.A. 11=21 M.L.T. 36=15 A.L.J. 87=(1917) M.W.N. 100=32 M.L.J. 1=19 Bom. L.R. 174=25 C.L.J. 215=21 C.W.N. 497=10 Bur. L.T. 25 (P.C.)

(2) (1913) 19 C.L.J. 83=18 C.W.N. 1052.

(3) A.I.R. 1922 Bom. 80.

(4) A.I.R. 1923 Mad. 462.

(5) (1921) 41 M.L.J. 126=(1921) M.W.N. 381.

(6) A.I.R. 1924 Mad. 368.

(7) (1874) 13 B.L.R. App. 25.

preliminary objection was taken that the revision petition does not lie as an appeal lies under section 75 (1) proviso. As I have come to a conclusion against the petitioner on the merits it may not be necessary to deal with this objection, but I think the objection is well founded. The words "of any nature whatsoever" in section 4 of the new Act show that all questions which arise in the course of insolvency may be dealt with by the Court for the purpose of doing complete justice and in such a case a Second Appeal lies to the High Court on a question of law. It, therefore, seems to me that the revision petition is not competent.

The result is the petition is dismissed with costs.

Petition dismissed.

A.I.R. 1926 Madras 125.

PHILLIPS AND ODGERS, JJ.

Secretary of State—Appellant.

v.

Sreeramamurthi and others — Respondents.

Second Appeal No. 6 of 1922, decided on 2nd March 1925, from the decree of the District Judge, Salem, in A.S. No. 80 of 1914,

Limitation Act, Art. 149—Suit by Jagirdar *against Government for possession of forests—Possession for 60 years must be proved.*

A *Jagirdar* claimed to recover possession of certain forests from the Government on the ground that they formed part of his *Jagir*. In support of his title he proved his possession from 1872 down to date (1914).

Held that as the original title must be deemed to have been in the Crown, plaintiff's possession for 60 years under Art. 149 must be proved to extinguish the title of Government. (39 Mad. 617 (P.C.), *Rel on*) [P. 126, Col. 2.]

Advocate General—for Appellant.

C. V. Ananthakrishna Aiyar and *E. R. Krishna Aiyar*—for Respondents.

Phillips, J.:—The only question for decision in this case is whether the plaint forests which were constituted as Government Reserve in 1910, belong to Government or form part of the plaintiff's Chinnakkalrayan *Jagir*. The learned District Judge has considered the evidence and has come to the conclusion that the plaintiff is the owner of these forests; and has given a decree accordingly. This Second Appeal is filed by the Secretary of State for India in Council and it is contended that this finding of the District Judge is not warranted by law and that upon the facts found by him the suit must be dismissed.

There is no grant produced in this case, nor any other evidence of the manner in which the plaintiff obtained his *Jagir*. It would appear probable, that the *Jagir* was originally obtained by the plaintiff's predecessors-in-title squatting upon the land many years ago. However that may be, the real question for decision now is, whether the District Judge has found as a fact that these forests were originally included in the *Jagir* or whether he means to find that, inasmuch as the plaintiff has proved possession and enjoyment since 1872, the presumption must be raised that the land belongs to him.

The latter, is I think, the correct interpretation of the judgment, as will appear from paragraphs 18 and 19, in the first of which he sets out all his findings of fact and in the second, the legal inference to be drawn from these facts. The most important finding of fact is the *first*, namely, that neither party has produced satisfactory evidence of title apart from the evidence of possession and enjoyment. The *second* finding is, that, there is no evidence from which it can be stated definitely in whose possession and enjoyment the slopes (*i.e.*, the suit forests) were down to the year 1872. From these two findings I think it is clear that the Judge did not mean to find that the title of the plaintiff was proved; but inasmuch as possession for 38 years had been proved it was incumbent on Government to prove a subsisting title, failing which possession for 60 years might be inferred. The learned Judge refers to the decision of the Privy Council in *Secretary of State* v. *Chellikani Rama Rao* (1) but he distinguishes that case on the ground that there the legal problems started with the position that the title was in the Crown, whereas in the present case the Government has shown no subsisting title. There seems to be a certain amount of confusion in the learned Judge's mind as to the difference between "title" and "subsisting

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(1) (1916) 39 Mad. 617=43 I.A. 492=31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224=14 A.L.J. 1114=20 M.L.T. 435=4 L.W. 486=18 Bom. L.R. 1007=25 C.L.J. 69 (P.C.)

title." Undoubtedly the title must originally have been in the Government, for otherwise no grant could have been made of the land and when the Judge talks of "subsisting title" he appears to think that inasmuch as there has been adverse possession for a number of years that original title has vanished, unless Government can show that it is still subsisting. This question of "subsisting title" has been very clearly dealt with in the judgment of the Privy Council in *Secy. of State* v. *Chellikani Rama Rao* (1) where they deal with the prior judgments of this Court namely *Secy. of State* v. *Vira Rayan* (2), *Secy. of State* v. *Kota Bapanamma Garu* (3) and *Chelikani Rama Rau* v. *Secy. of State* (4), the last of which was then under appeal. In these prior cases, it had been consistently held that if a person had been in possession of land for a long period it was incumbent on the Crown to show possession of the proprietary right within 60 years, namely, that it was incumbent on Government to establish not merely original title but a "subsisting title." The view has been directly negatived by the Privy Council. After referring to the view of this High Court expressed as follows :—

"Though no title was originally in the Crown, still as the possession of the claimants for twenty years prior to the notification is found, it rests upon the Crown to prove that it has a subsisting title by showing that the possession of the claimants commenced or became adverse within the period of limitation, that is, within sixty years before the notification."

their Lordships remark,

"In so far as this negatives the duty resting upon the claimants to establish affirmatively their and their predecessors' possession for sixty years, their Lordships opinion is, as stated, that this is erroneous. But with reference to the "subsisting title" it appears to their Lordships that nothing further is needed than the acknowledgment of the undisputed fact, that these islands formed in the sea belong to the Crown. That fact is fundamental; until adverse possession against the crown is complete, that is to say, is for the period of sixty years, that fundamental fact remains, and that fact forms 'subsisting title.'"

It is, I think clear, from this dictum that it is misleading to talk about "subsisting title" when there is a finding of original title in the Government, which title has not been displaced by proof of adverse possession. Consequently the District Judge, having found that there is no evidence on which a finding as to possession and enjoyment prior to 1872 can be based, held that the plaintiff has failed to prove adverse possession for the full period of 60 years and consequently his title against Government has not been perfected. His finding that possession for over 60 years must be presumed is therefore wrong. It is argued for the plaintiff that there are certain observations in the judgment which go to show that the learned Judge really found that the plaintiff had title from the time of his grant and reference is made to the following observations :—

Paragraph 11 :

"I think the inference is legitimate that from 1872 to 1884 P. W. 1's uncle was in possession as lessee of these blocks and that they were really part of the Jagir itself."

Again in paragraph 18 :

"The legitimate conclusion is from 1873 onwards down to the date of the notification, these slopes have formed part of the Chinnakal Rayan Jagir."

As I have pointed out above, I am satisfied that from the conclusions of fact specified in paragraph 18 and the legal inferences drawn therefrom in paragraph 19 that this statement, "that the slopes formed part of the Chinnakal Rayan Jagir" only means that this conclusion is arrived at from the presumption that arises from possession since 1872 and is not a finding of fact apart from the question of adverse possession.

In this view the plaintiff must be deemed not to have established his title and consequently the appeal must be allowed and plaintiff's claim dismissed with costs throughout.

Odgers, J. :—I agree.

Appeal allowed.

A.I.R. 1926 Madras 126.

COUTTS TROTTER, C.J. AND RAMESAM, J.

N. M. Khajamyan Rowther—Appellant

v.

Appavu Pillai (dead) and others—Respondents.

Appeal No. 342 of 1920, decided on 30th January, 1925, from the decree of the Addl. Sub-Judge, Trichinopoly, dated 30th September, 1920, in Original Suit No. 2 of 1920.

(2) (1886) 9 Mad. 175.
(3) (1896) 19 Mad. 165.
(4) (1910) 33 Mad. 1=20 M.L.J, 66=7 M.L.T. 128.

Civ. Pro Code. O. 23, r. 1—Suit for possession of share in Melvaram *and* Kudivaram — *Trial almost closed—Plaintiff wishing to withdraw part of the claim without specific reasons cannot be allowed to withdraw.*

Plaintiff claimed partition and possession and a permanent injunction restraining the defendant from entering on the plaintiff's share in both the *Malvaram* and *Kudivaram* of the suit land. After defendant filed his written statement and the issues were framed, he asked for permission to withdraw the suit in respect of the *Malvaram* and to confine himself to the claim of the *Kudivaram*. No specific reasons were given for such withdrawal. The lower Court permitted the withdrawal and granted leave.

***Held* that the lower Court used its discretion wrongly and that the defendant should have such order vacated without waiting for the final judgment.** [P. 127, Cls. 1 and 2.]

A. Krishnaswamy Iyer, B. R. Vijiayaraghavachariar and *K Balasubramania Iyer*—for Appellant.

L. A. Govindaraghava Iyer and *Watrap Subramania Iyer*—for Respondent.

Order:—We deal first with the preliminary point raised in the ground of Appeal No. 21, that the action of the lower Court in allowing the plaintiff at a late stage in argument to withdraw his claim for *melvaram*, and in having permitted him to bring a fresh suit thereon was altogether illegal and unjust.

The facts, as we have ascertained them, are that after a prolonged trial, in the course of the plaintiff's arguments after the defendant had been heard, the plaintiff on 25th September, 1920, presented a petition asking for permission to withdraw this claim in respect of the *melvaram* right in the suit lands with liberty to file a fresh suit in respect of the same, and that the petition was granted. In the plaint the claim had been stated in very general language and the relief asked for was a decree for partition and possession and a permanent injunction restraining the defendant from entering on the plaintiff's share. In the body of the plaint, however, the plaintiff's right is described very generally. In paragraphs 3 and 4, for instance, there are references to his ownership or acquisition of shares in both the *melvaram* and *kudivaram* of the suit lands. The defendant in his written statement met him in respect of both. The issues again are very general, there being but a general reference in them to the nature and extent of the interest acquired by the plaintiff. In the judgment, paragraph 5, however, we have the lower Court's own statement as to what it understood was the real scope of the suit. It stated clearly that the plaintiff was claiming *melvaram* as well as *kudivaram*. In the plaintiff's petition and affidavit already referred to there was no suggestion that the suit was not for *melvaram* or that it had not been tried in respect of the claim to *melvaram* as well as to *kudivaram*.

Turning to the ground on which the plaintiff asked for permission to withdraw the suit and to sue again we find nothing alleged at all except that he preferred for the time being to confine himself to the claim to kudivaram and that a decision as to melvaram in the present suit was unnecessary. There is no further explanation of any sort for this change in his attitude and something was necessary to justify it, beyond his mere preference. It has to be observed that this was announced after the defendant had been put to the trouble and expense of the trial, which was almost completed. In these circumstances there can be no doubt that the lower Court used its discretion wrongly in permitting the withdrawal and granting leave. The only remaining question is whether the defendant is at liberty to make that a ground of appeal. It is possible that speaking strictly we ought not to allow him to do so. There is, however, no doubt that it is his duty to have an order such as this vacated without delay and that it is not for him to wait until the suit in respect of *melvaram* is actually filed and then to plead that this permission was given wrongly—*Thuljaram Row* v. *Gopala Ayyan* (1). The question is then only whether he is at liberty to advance this objection in an appeal against this decree or should have made it in a revision petition. In view of the fact that no question of delay or limitation arises and of the obvious advisability of an early disposal of this matter, we think ourselves justified in treating this portion of the appeal as a revision petition. In doing so we hold that the lower Court had no jurisdiction to permit the withdrawal and grant leave on the sole ground that the party did not prefer to proceed with his litigation. We, therefore, set aside the order of the lower Court, dated 30th September, 1920.

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(1) (1917) 32 M.L.J. 434=21 M.L.T. 229=(1917) M.W.N. 234.

The result is that this portion of the plaintiff's suit has not been disposed of. We, therefore, call on the lower Court for findings on the issues already framed so far as they relate to the plaintiff's claim to *melvaram*. The findings will be recorded on the evidence on record. They are due in this Court within six (6) weeks and seven (7) days will be allowed for objections.

Findings ordered.

A.I.R. 1926 Madras 128 (1).

SPENCER, J.

K. R. Radhakrishna Aiyar—Judgment-Debtor-Petitioner

v.

Vinayakaswamiar, minor by guardian T. A. Ramachandra Rao—Decree-holder Respondent.

Civil Revision Petition No. 944 of 1924, decided on 27th April, 1925, against the order of the Sub-Collector, Kumbakonam, in Execution Petition No. 75 of 1924.

Civ. Pro. Code, S. 47—Objection as to jurisdiction to try suit cannot be raised in execution.

An objection to the jurisdiction of the Court that tried the suit is not one of the questions allowed by S. 47 to be dealt with in execution. (43 Mad. 675 (F.B.) *Ref.*) [P. 128, Col. 1.]

N. S. Rangaswami Aiyangar and *S. Rangaswami*—for Petitioner.

K. S. Sankara Aiyar—for Respondent.

Judgment :—An objection was raised to the execution of a decree in a suit for rent under Madras Act I of 1908, in which the petitioner did not appear and defend himself against the plaintiff's claim, the ground of the objection being that the Court had no jurisdiction to try the suit. The defence of want of jurisdiction is one that should have been raised at the trial of the suit itself. After the passing of the decree, the defendant's only course was to apply under Order 9, rule 13, Civil Procedure Code to have the *ex parte* decree against him vacated and the suit reheard. An objection to the jurisdiction of the Court that tried the suit is not one of the questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree, which are allowed by section 47, Civil Procedure Code 'to be dealt with in execution', [vide *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (1) and *Kalipada Sarkar* v. *Hari Mohan Dalal* (2).] As the petitioner was in fact a party to the suit, though not represented at the trial, he cannot invoke the authority of the Privy Council decision in *Khiarajmal* v. *Daim* (3). The Revision Petition against the order of the Sub-Collector passed upon the decree-holder's execution petition is dismissed with costs.

Petition dismissed.

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(1) (1920) 43 Mad. 675=39 M. L. J. 203=12 L. W. 217=28 M. L. T. 75=(1920) M. W. N. 400 (F.B.)

(2) (1917) 44 Cal. 627=24 C.L.J. 375=21 C.W.N. 1104.

(3) (1905) 32 Cal. 296=32 I.A. 23=9 C.W.N. 201=2 A.L.J. 71=7 Bom. L.R. 1=1 C.L.J. 584=8 Sar. 734 (P.C.)

A.I.R. 1926 Madras 128 (2).

VISWANATHA SASTRI, J.

Alapati Ramaswami—Plaintiff-Appellant.

v.

Dasari Venkatanarayana—Defendant-Respondent.

Second Appeal No. 408 of 1923, decided on 16th September, 1925, against the decree of the District Judge, Guntur, in Appeal Suit No. 332 of 1921.

Civ. Pro. Code, O. 6, r. 17—Amendment asking for change in the date of cause of action should be allowed.

Amendment should be allowed when there is no change in the cause of action but only a change in the date when the cause of action arose. (36 Mad. 378 *Rel. upon*; 36 All. 370 *Expl.*) [P. 129, Col. 2.]

B. Somayya—for Appellant.

N. Rama Rao—for Respondent.

Judgment:—Second Appeal by plaintiff against the decree of the District Judge of Guntur in Appeal Suit No. 332 of 1921.

The question to be considered in this appeal is one of limitation, and the facts are as follow:—The defendant executed a hypothecation bond Ex. A, on 10-10-1917. Under this bond a sum of Rs. 2,000 was due to the plaintiff and the defendant undertook to deliver 7½ candies of paddy every year for a period of eight years. The paddy was deliverable on Pushya Bahula 30th of every year, and in case default was made in the delivery of the paddy the defendant made himself

liable to pay the market value of the paddy in Ponnur market on the 30th Phalguna Bahula of the same year. There is also a provision in the bond to the effect that in case the first instalment was not fully paid the last instalment also became due; and that in case the second instalment was not paid, the 7th instalment also became due; and so on. For the first instalment a small quantity of paddy had been delivered, and on 20-11-1918 the plaintiff instituted a suit for the recovery of the amount due with respect to the first and eighth instalments. The plaint in this suit was returned for presentation to the proper Court on 24-9-19 and it was presented in the District Munsif's Court of Bapatla on 26-9-1919. The present suit out of which this second appeal arises was in respect of the second and seventh instalments. One of the contentions urged was that the suit was barred under Order II, rule 2 of the Code of Civil Procedure. Both the Courts below upheld this contention and dismissed the suit.

It is contended before me that the cause of action in the present suit which was instituted on 31-8-1920 did not arise on the date when the plaint for the first and eighth instalments was filed and that, even if it did arise the date of the cause of action was not 30th January 1919 as stated in the plaint, but 30th of Phalguna Bahula which would be about March 1919. For considering when the cause of action really arose, reference has to be made to Exhibit A. This document recites that the paddy was deliverable on Pushya Bahula 30th of every year, and that in case there was failure to deliver the paddy, defendant was to pay the value of 14½ candies at the price prevailing in the Ponnur maket on Phalguna Bahula 30th. Before the parties went to trial the plaintiff put in a petition to amend the plaint by stating that the cause of action arose on Phalguna Bahula 30th and this application was refused by both the Courts below on the ground that "a change in the cause of action would prevent the suit being barred and thus deprive the defendant of his right to have the suit dismissed." Both the lower courts were of opinion that the amendment would make a change in the cause of action, but this does not appear to me to be so. The change would be only in the date when the cause of action arose and not in the cause of action itself which would remain the same. The document distinctily provides that the value of the paddy as and on Phalguna Bahula 30th was to become payable in case the paddy was not delivered. For the purpose of instituting the suit the plaintiff would therefore have to wait till Phalguna Bahula 30th for the purpose of ascertaining the price on that date. It is only after ascertaining the price that he could have valued his suit and come in with his plaint. The cause of action remains as it was, namely the failure to deliver paddy, but the only variation which the plaintiff wanted to make was as to when the cause of action arose. Therefore such an amendment could be allowed as laid down by this court in *Sevugan Chetti* v. *Krishna Iyengar*,(1). The Vakil for the respondent relies upon a case in *Balharan Upadhya* v. *Gaya Din Kalevar* (2) but all that this case lays down is that no amendment should be allowed when there is a change in the cause of action and not when there is a change in the date when the cause of action arose. The grounds on which the lower courts declined to allow the amendment seem to me to be untenable; and the amendment in my opinion ought to have been allowed. In this view the suit would not be barred by limitation.

Other pleas were also raised which form the subject matter of issues 2 and 3. No evidence was let in and no finding given on these issues by the trial court.

The appeal is therefore allowed and the suit is remanded to the trial court for disposal after receiving evidence on the remaining issues.

Costs in this court will be paid by the respondents. Costs in the lower courts will abide and follow the result.

The appellant will get a refund of the Court fee paid on the memorandum of second appeal; and in the memorandum of appeal to the lower appellate Court.

Case remanded.

(1) (1913) 36 Mad. 378=10 M.L.T. 557=13 I.C. 268=22 M.L.J. 139.
(2) (1914) 36 All. 370=24 I.C. 255=12 A.L.J. 635.

*A.I.R. 1926 Madras 130.

SPENCER AND MADHAVAN NAIR, JJ.

Sivan Pillai and another—Petitioners-Appellants

v.

T. S. Venkateswara Ayyar—Respondent.

Appeal No. 70 of 1925, and Civil Rev. No. 106 of 1925, decided on 9th September, 1925, from the order of the District Judge, Tinnevelly, in I.A. No. 992 of 1923.

*(a) *Trusts—Scheme of Management not providing for removal of trustee—Trustee can be removed by separate suit only.*

A petition is not competent for the removal of a trustee in the absence of any provision, in the scheme, for his removal. It would be necessary to bring a separate suit. [P. 130, Col. 2.]

*(b) *Civ. Pro. Code, S. 47—Scheme of Management of trust—Order of a Court acting under scheme is not order in execution—No appeal lies.*

An appeal will not lie against an order made by a Court exercising a power given to it by a provision in the scheme of Management of a trust such an order is not an order made in execution. [P. 130, Col. 2.]

T. M. Krishnaswami Aiyar and *K. S. Varadachari*—for Appellants.

K. V. Sesha Aiyangar—for Respondent.

Spencer, J.:—The revised decree in this scheme suit as passed on March 16th, 1906, by the learned District Judge of Tinnevelly (now Mr. Justice Phillips) provided that the trustee should hold office for a term of 7 years renewable at the will of the villagers and the Court. New trustees were to hold office upon nomination by the villagers of Thiruvannathapuram and Thimmarajapuram, subject to the approval of the District Court. More than twice 7 years had passed, when the matter came up again before the District Judge of Tinnevelly in November 1924. At that time, there was a mahazar dated 16th December, 1922, signed by several villagers asking the Court to approve of the nomination of Venkatarama Aiyar. There was another mahazar dated 15th February, 1923, asking the Court to appoint Venkateswara Aiyar, the trustee hitherto in office. While that was pending, the present petitioner and appellant, Sivan Pillai who claimed to have an interest in the trust, filed a petition supporting the candidature of Venkateswara Aiyar. The District Judge dismissed the petition and from his order this is an appeal or a revision. So far as the records show, the District Judge was in error in stating that the 4th respondent was to be treated as holding office for the third term. He seems to have failed to appreciate that under the scheme, it was necessary to have a nomination by the villagers and an approval by the Court before any trustee could be appointed or his term renewed. The District Judge might have called upon the villagers to make a nomination of the person considered by the villagers to be the most fit to be appointed as a trustee upon the expiry of the term of Venkateswara Aiyar, and if the nomination so made by them had his approval, he might have appointed the nominee. It does not appear whether there was any such nomination and confirmation. But the District Judge made an order disposing of the petitions of Venkatarama Aiyar and of Sivan Pillai. The petition of the former was that the present trustee should be removed. That request could not be granted by the District Judge upon a petition of this nature. For the removal of a trustee, it would be necessary to bring a separate suit, in the absence of any provision in the scheme for his removal. Upon Sivan Pillai's [*i.e.*, petitioner's] petition, it is not clear what order the District Judge could have made other than to dismiss it, as it was not competent. The scheme does not provide for independent petitions being put in to support the candidature of various claimants for the office of trustee. As the District Judge has not acted without jurisdiction or committed any material irregularity in his order dismissing the petition, we cannot interfere in revision.

As regards the appeal, there is a preliminary objection that no appeal will lie. In the light of the recent Privy Council decision in *Bhogilal* v. *The Dakore Temple Committee* (1), and the decisions of this Court in *Lokasikhamani Mudaliar* v. *Thiagaroya Chettiar* (2) and *Ranganadha* v. *Krishnaswamy* (3), I am of opinion that an appeal will not lie against the order made by a Court, as in this case exercising a power given to it by a provision in the scheme and that such an order is not an order made in execution. In *Prayaga Doss*

(1) A.I.R. 1925 P.C. 155 (P.C.)
(2) (1917) 5 L.W. 596=(1917) M.W.N. 420.
(3) A.I.R. 1924 Mad. 369.

Jee Varu v. *Tirumala Purisa Srirangacharyulu* (4), there is an observation that the order to be made by a District Court, in that case appointing a treasurer in a scheme of management of a Devasthanam, should be considered as an order made in execution. But, in view of the decision of the Privy Council to which I have referred, I do not think we are bound by that observation which was made with reference to the circumstances of the particular scheme concerned in that case. The appeal and the revision petition are dismissed As the District Judge's order was somewhat ambiguous, there will be no order as to costs.

Madhavan Nair, J.—I entirely agree with the order proposed by my learned brother. I will just say a few words only about the preliminary objection. In view of the decision of the Privy Council in *Bhogilal* v. *The Dakore Temple Committee* (1), I think it must be held that the order is not subject to appeal under section 47, Civil Procedure Code. In that case, it was held by the Privy Council, that an order passed by the District Judge affirming or disaffirming the rules made by a committee of management in pursuance of directions in a scheme settled by it, cannot be made the subject-matter of an appeal under section 47, Civil Procedure Code. The order that is now complained against comes within the scope of that ruling. In this order, the learned District Judge refused to accept the nomination by the villagers of one Venkatarama Aiyar in pursuance of a "scheme" settled under section 92, Civil Procedure Code and treated the present trustee as continuing in the office. Mr. T. M. Krishnaswami Aiyar who appears for the appellant has sought to distinguish the Privy Council case, on the ground, that what their Lordships stated in that case amounted to this only, namely, that applications with regard to the scheme decree settled in that case should have been made to the Privy Council, as the scheme decree was one finally passed by the Privy Council.

I cannot accept this argument. There is no justification for such a contention in the judgment itself. The argument involves the assumption that the Privy Council decree is still not a final and complete decree, that the Privy Council should be considered to have given directions to the District Court to frame rules and to submit the District Court's recommendations and that it is for the Privy Council to pass orders after receiving such recommendations from the District Court. Such an argument was put forward in *Prayaga Doss Jee Varu* v. *Tirumala Purisa Srirangacharyulu* (4) and it is thus met by the learned Judges who overruled that argument. "It is true that their Lordships have statutory authority to make references under Section 17 of the Privy Council Act, 3 and 4 Will. IV, Chap. 41 in which case the referee, would have to report to their Lordships, and the case, would be adjourned pending the receipt of the report as in *Hutchinson* v. *Gillespie* (5), but in the present case, it is, we think, clear from the judgment and the order that their Lordships did not intend to make any such reference but disposed of the appeal finally, leaving the directions contained in their judgment to be executed in the usual manner." I think similar observations may be made in this case also with reference to the suggestion made by Mr. T. M. Krishnaswami Aiyar.

This Court has already held in a decision in *Logasikhamani Mudaliar* v. *Thiagaroya Chettiar* (2) which was followed in *Ranganadha* v. *Krishnaswamy* (3) that directions given effect to under the provisions of the scheme cannot be made the subject-matter of an appeal under Section 47, Civil Procedure Code. See also the unreported decision in *Vythilinga Mudaliar* v. *Mahadeva Aiyar* (6). Two decisions, *viz.*:—*Ponnambala Tambiran* v. *Sivagnana Desika* (7) and *Prayagadoss Jee Varu* v. *Tirumala Purisa Srirangacharyulu* (4) have been relied upon by the learned Vakil for the appellant in support of his argument. It may be pointed out that the proceedings referred to in the decision in *Ponnambala Tambiran* v. *Sivagnana Desika Gnana Sambandha Pandara Sannadhi* (7) did not relate to any scheme which was settled by the Court under Section 92, Civil Procedure Code and therefore that decision is not obviously applicable. As regards *Prayaga Doss Jee Varu* v. *Tirumala Pursia Srirangacharyulu* (4) I agree

(4) (1908) 31 Mad. 406=4 M.L.T. 92.

(5) (1856) 11 Ex. 798=25 L.J. Ex. 103=2 Jur. (N.S.) 403=4 W.R. 302.

(6) Civil Rev. Petition No. 645 of 1924.

(7) (1894) 17 Mad. 343=21 I.A. 71=6 Sar. 234 (P.C.)

with my learned brother in thinking that, after the Privy Council decision in *Bhogilal* v. *The Dakore Temple Committee* (1), it cannot be relied upon as an authority to show that the order in this case is appealable under section 47, Civil Procedure Code.

Appeal dismissed.

A.I.R. 1926 Madras 132.

JACKSON, J.

E. M. Gopalakrishna Konar—Petitioner

v.

A. Vilanga Konar and another—Respondents.

Civil Mis. Petition No. 961 of 1924, decided on 13th March, 1924, from an order of the Sub-Judge, Madura, in Original Petition No. 59 of 1923.

Election—Injunction—None can be granted preventing an elected member from taking his seat in Council—Specific Relief Act, S. 54.

It is impossible to lay down an exhaustive rule but generally speaking injunctions should be confined to preserving the status *quo ante*, to preventing irremediable damage or loss to the property in the suit, or to averting substantial injury. No such conditions arise where the Court is moved not to re-instate the unseated Councillor, but to unseat the Councillor declared elected in his stead, and thus create a vacancy in the Municipal Council pending a civil litigation in respect of that matter; in such case there is no ground for interference. [P. 132, Col. 2.]

E. L. Thornton for *C. Krishnaswami Rao*, *A. V. Visvanatha Sastri* and *A. Raghunatha Rao*—for Petitioner.

K. Rajah Aiyar—for Respondents.

Order:—This is a petition for issue of an injunction restraining second respondent from taking his seat as Councillor in the Municipal Council of Madura pending disposal of C. R. P. No. 182 of 1924.

Petitioner and respondents were rival candidates in a Municipal election; petitioner was declared elected, and has since been, unseated after the inquiry in O. P. No. 51 of 1923 in the Court of the Subordinate Judge of Madura, and C. R. P. No. 182 of 1924 is preferred against that decision.

I am doubtful whether this Court has jurisdiction to grant an injunction in such a matter. No such power lies with the Judge who holds an inquiry under the election rules, and it is not clear that the High Court acting in revision has any extended power. If a suit is transferred to the High Court, its powers are confined to powers which but for the transfer might have been exercised by the original Court: *Annie Besant* v. *Narayaniah* (1). However the Calcutta High Court has held that it has general power of granting injunctions: *Rash Behary Dey* v. *Bhowani Churn Bhose* (2) and *Mungle Chand* v. *Gopal Ram* (3) and I will proceed on the assumption that the Court has jurisdiction.

Obviously an injunction of the sort prayed for, which can only be based upon a *prima facie* consideration of the case, must be granted with circumspection. It is impossible to lay down an exhaustive rule but generally speaking such injunctions should be confined to preserving the status *quo ante*, to preventing irremediable damage or loss to the property in the suit, or to averting substantial injury. None of these conditions arise in the present case. This Court is not moved to reinstate the unseated Councillor, but to unseat the Councillor declared elected in his stead, and thus create a vacancy in the Municipal Council and an entirely new situation. It may be noted here that in *Aslatt* v. *Corporation of Southampton* (4), the leading English case which warrants the interference of the Courts in these matters, the Courts' order of injunction preserved the *status quo ante*. Compare also Wallace, J., in *Sarvothama Rao* v. *Municipal Council, Saidapet* (5), "the ordinary Civil Court has the right to grant a proper temporary injunction relating to matters in *status quo ante* until the suit is tried". Nor is there any question of irremediable damage, or indeed of any damage at all. The injury which is contemplated can at most only be such injury as an inhabitant of Madura town may suffer owing to a Councillor who will ultimately be proved not to have been duly elected temporarily taking his seat in the Council. It is difficult to conceive the circumstances which would give any substance to an injury of this sort; and there is no special allegation to this effect.

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(1) (1914) 38 Mad. 807=41 I.A. 314=27 M.L.J. 30=18 C.W.N. 1089=1 L. W. 520=(1914) M.W.N. 585=16 M.L.T. 165=20 C.L J. 253=16 Bom. L.R. 625=12 A.L J. 1155 (P.C.)

(2) (1907) 34 Cal. 97.

(3) (1907) 34 Cal. 101.

(4) (1881) 16 Ch. D. 143=50 L.J. Ch. 31=43 L.J. 464=29 W.R. 117.

(5) A.I.R. 1923 Mad. 475.

Accordingly I see no reason to grant an injunction, and dismiss this petition with costs.

Memorandum of objections will follow.

Petition dismissed.

***A.I.R. 1923 Madras 133 (1).**

DEVADOSS AND WALLER, JJ.

M. A. R. R. M. P. Muthu Veerappa Chettiar—Appellant

v.

U. K. Sivagurunatha Pillai—Respondent.

Appeal No. 369 of 1924, decided on 3rd September, 1925, against the order of the District Judge, Coimbatore, dated 28th August, 1924, in Insolvency Petition No. 43 of 1924.

**Provincial Insolvency Act (1920), S. 25—Son's liability.*

A Hindu son can be adjudicated insolvent in respect of his father's debt. [P. 133, Col. 1.]

M. Patanjali Sastriar—for Appellant.

T. R. Ramachandra Aiyar, P. Balakrishna Menon and *S. Srinivasa Aiyar*—for Respondent.

Judgment :—This is an appeal against the order of the District Judge of Coimbatore dismissing the appellant's application to adjudicate the respondent an insolvent. The learned Judge dismissed the application on the ground that the respondent should not be adjudicated in respect of his father's debt, as there was no personal liability on the part of the respondent in respect of such debt. The petitioner in his petition alleged that the respondent was pressed to pay the debt due to him and he requested the petitioner to give him time to collect the outstandings and pay him. Taking advantage of the time given to him, he made certain alienations in favour of certain creditors which the petitioner alleges to be fraudulent preferences. There is nothing in the Insolvency Act which prevents the undivided members of a joint Hindu family from being adjudicated insolvents in respect of debts due by the family. Each case would depend upon its circumstances. If the petitioner makes the necessary allegations and proves them, then the Court would be justified in adjudging the members of a joint family insolvents. In the case of a joint Hindu family, if the father incurs debts and dies, the other members of the family do not stand in the relation of heirs ; they only succeed to him and the debts are binding upon them. It was laid down by a Bench of this Court in *V. S. Rm. Chokalingam Chettiar* v. *Tiruvenkatasami* (1) that the relation of creditor and debtor existed between the lender and the members of a joint family in respect of debts incurred by the family. That being so, there was no reason why the lower Court should not have enquired into the matter and disposed of the petition on the merits. We therefore set aside the order and direct the District Judge to restore the petition to file and dispose of it according to the provisions of section 24 of the Provincial Insolvency Act. Costs will abide the result.

Case remanded.

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(1) C.M.A. No. 47 of 1916.

***A.I.R. 1926 Madras 133 (2).**

ODGERS, J.

Kommareddi Ramachandrayya and others—Petitioners

v.

Vodury Venkataratnam—Respondent.

Civil Revision Petition Nos. 500 and 501 of 1924, decided on 9th April, 1925, against the orders of the Court of the Principal District Munsif, Ellore, dated 2nd and 26th April, 1924, in I. A. No. 857 of 1924.

**(a) Civil Procedure Code, S. 148—Extension of time for paying additional Court-fee after return of plaint is ordered, is without jurisdiction.*

After the Court has ordered a return of plaint for presentation to proper Court on payment of additional Court fee, it cannot review its order and extend time previously fixed for payment of Court fee. [P. 134, Col. 1.]

**(b) Civil Procedure Code, O. 7, r. 10—Return of plaint ordered—Plaintiff willing to drop part of his claim to bring the case within Court's jurisdiction—Court can allow plaintiff to do so.*

Where after a return of plaint for presentation to proper Court was ordered, the plaintiff applied showing his willingness to drop a part of his claim to bring his case within the Court's pecuniary jurisdiction.

Held, that there was nothing wrong in the court's admitting the plaint so amended. (33 Mad. 262, *Foll.*; 41 Mad. 701, *not foll.*). [P. 134, Col. 1.]

P. Venkataramana Rao and *A. Lakshmayya*—for Petitioners.

V. Suryanarayana—for Respondent.

Judgment:—In this case, a certain suit O. S. No. 704 of 1923 was filed in the Court of the Principal District Munsif of Ellore for the recovery of certain properties. It was alleged that the suit had been undervalued and the District Munsif held a preliminary enquiry into the valuation of the items of property involved and came to the conclusion that the market value was over Rs. 5,000. The plaint was ordered to be returned to the plaintiff who was given 7 days' time for presentation to the proper Court. This order was made on the 31st March, 1924. On the 1st April, 1924, the plaintiff presented a petition asking for 15 days' time for filing the additional stamp for the plaint. No notice of this application was given to the defendants and on the 2nd April, the Principal District Munsif purported to review his decision of the 31st March and granted the prayer in the petition of the 1st April, giving the petitioner 7 days' time in which to pay the additional Court-fee. I am of opinion that, as regards C.R.P. No. 500 of 1924, the learned District Munsif was clearly not entitled to review his order at least without notice to the other side. Therefore, C.R.P. No. 500 must be allowed with costs.

A more important question arises in C.R.P. No. 501 of 1924. On the 3rd April one day after the petition for review above referred to, the plaintiff asked to be allowed to withdraw his claim to 4 items of properties mentioned in the plaint schedules and to amend the plaint in such a manner that it would conform to the monetary jurisdiction of the District Munsif's Court, and the District Munsif by his order of the 26th April 1924, held that no final order had been passed on the plaint and that by his order of the 2nd April, the District Munsif intended to set aside the original order for the immediate return of the plaint. The petition was allowed and the plaintiff was permitted to withdraw his claims and amend his plaint accordingly. The question is, "Had the learned District Munsif jurisdiction to pass the order he did?" In passing, I may state that I am very doubtful whether the District Munsif was right in his view as to the effect of the order of the 2nd April and I am more than doubtful as to the correctness of his view that no final order had yet been passed on the plaint. In this connection, I am pressed with two decisions of this Court. The first is the one reported in *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan* (1), which is a decision by Mr. Justice Abdur Rahim in a case, which I am bound to say, strikes me as very similar to the present. In that case, there was an enquiry as to the value. It was found that the suit was undervalued and the plaint was returned for presentation to the proper Court. The plaintiff amended his plaint by correcting the valuation and striking off some of the properties, so as to leave the claim within the jurisdiction of the District Munsif. The District Munsif thereupon readmitted the plaint and the question for decision was "had he power to do so?" The learned Judge decided that he had and his decision was confirmed in Letters Patent Appeal by a Bench of this Court. On the other hand, there are observations of Sadasiva Aiyar, J., in *Kannuswami Pillai* v. *Jagathambal* (2), in the course of which he says:

> "It also stands to reason and principle that a Court which has no jurisdiction over a suit cannot pass any valid orders in such a suit except orders which the statute expressly empowers it to pass, such as the order returning the plaint to be presented to the proper Court which it is specifically empowered to pass by O. 7, r. 10 and orders as to costs incurred before it, as to which also there is a special provision in Sec. 35."

And again:

> "the Court of first instance had no jurisdiction to pass any other judicial order in the suit after it had once arrived at the conclusion that the suit as brought was beyond its jurisdiction except to return it for presentation to the proper Court."

The other learned Judge (Oldfield, J.), does not base his judgment on these grounds. Therefore although, if I may say so, I am in entire agreement with the extracts that I have quoted from the judgment of Sadasiva Aiyar, J., and if the matter were *res integra* to me, I should certainly decide it in the same manner, I feel that I cannot distinguish the facts of the present case from *Karumbayira Ponnapundan* v. *Authimoola Ponnapundan* (1)

(1) (1910) 33 Mad. 262=6 M.L.T. 261.
(2) (1918) 41 Mad. 701, 8 L. W. 145=(1918) M.W.N. 497=24 M.L.T. 46=35 M.L.J. 27.

The addition of a party under Order I, rule 10 is ordinarily a matter within the discretion of the Court trying the suit, and an erroneous exercise of discretion in a matter of procedure should not be regarded as something done illegally in the exercise of the Court's jurisdiction. *Sitaramaya* v. *Ramappaya* (1) is an authority of a Single Judge of this Court for the view that even in such cases the High Court can interfere in revision, but I respectfully doubt its correctness, and I think that the law will soon make its clear that that view was wrong, if the recommendations of the Civil Justice Committee are accepted.

But in the present case the liability of the petitioner under his sale-deed and the liability of defendants Nos. 1 to 3 under the promissory note are quite distinct and *prima facie* there would appear to be here not only a misjoinder of parties, but a misjoinder of causes of action in which case a Bench of this Court has held in *Arunachalam Chettyar* v. *Arunachalam Chettyar* (2) that a Court of Revision should interfere unless and until the law is amended. I think I am bound by that decision.

But I find that besides adding the petitioner as a party to the suit, the lower Court allowed the plaintiff to amend the plaint by adding a paragraph in which this petitioner's liability as a transferee of the contractual liability of defendants Nos. 1 to 3 is put in issue. The petitioner has not asked this Court to interfere with the order of the lower Court permitting this alteration of the character of the suit, and I do not think it necessary to declare that the trial should not be allowed to proceed in the manner permitted by the Trying Court. In *Deb Narain Dutt* v. *Ram Sadhan Mandal*, (3) and *Ajudhia Nath* v. *Anant Das* (4), the liability of a transferee of a debtor's liability was held to be a question on which the Court could adjudicate without referring the plaintiff to a separate suit. In para 7 of the defendant's written statement he has raised a question of estoppel which will have to be disposed of in the suit. It cannot be decided in these proceedings.

The civil revision petition is, therefore, dismissed with costs.

Petition dismissed.

(1) (1917) (5 L. W. 207).
(2) A.I.R. 1922 Mad. 486.
(3) (1914) 41 Cal. 137 = 17 C.W.N. 1143 = 18 C.L. J. 603.
(4) 3 All. 799.

A.I.R. 1926 Madras 136.

PHILLIPS, J.

Periakaruppa Thevan and others—Defendants-Appellants

v.

Aiyanarsand Kaniyalaswamigal Kovil Devasthanam of Koshadai and others—Plaintiffs-Respondents.

Second Appeal Nos. 1454, 1455, 1456, 1457 and 1476 of 1922, decided on 16—4—1925, against the decrees of the 2nd Additional Sub-Judge, Madura, in Civil Appeals Nos. 21, 22, 23, 25, and 154 of 1921.

Grant—Inam—No presumption can be raised in favour of either party—Tenants holding as occupancy tenants since 1843—Grant of Melvaram *only in favour of grantee can be presumed.*

In considering the nature of an inam grant, namely, whether it was a grant of *melvaram* only or a grant of both *melvaram* and *kudivaram*, no presumption can be made in favour either of the grantee or of the cultivator, and therefore where an *inamdar* sues to evict the tenants, the ordinary principle that a person suing in ejectment must prove his right to eject will apply. (A.I.R. 1922 P.C. 292, *Foll.*; A.I.R. 1924 P.C. 65, *Expl.* and *Dist.*) [P. 137, Col. 1.]

Where it was found that the defendants-tenants and their predecessors-in-interest had been in possession of the suit lands from 1843 onwards and that they had been disposing of their rights in those lands and dealing with them as if they had this right of occupancy and there was no evidence to show that the original grantee was himself in occupation of the suit lands before the grant and the only available evidence as to the tenants in possession showed that so far back as there was any record, the defendants and their predecessors had been cultivating the lands and dealing with them as if they had this right of occupancy.

Held, that the evidence does not support a grant to any greater extent than a grant of *melvaram* only. [P. 138, Col. 1.]

C. S. Venkatachariar—for Appellants.

A. V. Viswanatha Sastri and *K. Rajah Aiyar*—for Respondents.

Judgment:—In these appeals the question at issue is whether the plaintiffs, minor inamdars, are entitled to evict the defendants who are cultivating their inam lands.

The lower appellate Court has found that the tenants have not proved their occupancy right, and that they have not subsequently acquired the right of occupancy; and has accordingly decreed the suits in favour of the plaintiffs.

In these appeals it is contended that the lower appellate Court has not considered

decision of the Privy Council in *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1). In that case it was finally laid down that in considering the nature of an inam grant, namely, whether it was a grant of the *melvaram* only or a grant of both *melvaram* and *kudivaram*, no presumption can be made in favour either of the grantee or of the cultivator. For a long period this Court had held that there was a presumption, especially in the case of Brahmins, that the grant was only of the *melvaram*. This presumption was held to be wrong by the Privy Council in *Venkata Sastrulu* v. *Seetharamudu* (2), which says that each case must be considered on its own facts. Subsequent to that decision, a Full Bench of this Court in *Muthu Goundan* v. *Perumal Aiyan* (3) held that there was an initial presumption in favour of the grant of both varams. In *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) this judgment has been referred to. It is pointed out by the learned Judges that the Full Bench decision is clearly in error and that there is no presumption one way or the other. In the present case therefore it would appear that in the absence of any presumption that plaintiffs own the *kudivaram* it is incumbent on them to prove such right, which must be invoked to support their claim to eject defendants. The ordinary principle that a person suing in ejectment must prove his right to eject will apply. The learned Subordinate Judge has started his judgment with an assumption "that the burden is on the cultivating tenants to show that they and their predecessors-in-title have been in occupation of the identical lands from the date anterior to the grant." Admittedly the grants to the plaintiffs' predecessors were prior to the British rule and it would be extremely difficult for the defendants to prove that at the time of the grants their predecessors were actually in possession of the lands. It seems to me therefore that on the authority of *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) the burden in the present suits is on the plaintiffs to prove their right to eject.

It is, however, contended for the respondents that this principle laid down by the Privy Council in 1922 has been modified in 1923 by the judgment in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) in which it is stated :—

> "It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

It is contended that by reason of this dictum the burden is upon the defendants to prove their occupancy rights. The decision in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) is based upon two prior cases *Secretary of State* v. *Luchmeswar Singh* (5) and *Sethuratnam Aiyar* v. *Venkatachala Goundan* (6). In both these cases it was either admitted, or found as a fact, that the tenants had been let into possession by the landlord and that consequently when the tenant claimed to possess occupancy right, it was incumbent upon him to prove it. I think that the same principle has been repeated in *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4). That case does not in any way modify the judgment of their Lordships delivered in the preceding year. In *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) it is stated that the 'lands' in respect of which a decree of ejectment has been made are part of the endowed property of the temple and that it is not disputed that the defendants were 'tenants' of the temple lands to which the suits relate. It had been definitely found by the Subordinate Judge that the plaintiffs had both varams in the lands and consequently it was incumbent on the defendants to prove their occupancy right. If one were to interpret the judgment otherwise, it would appear that *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1) and *Nainapillai Marakayar* v. *Ramanadhan Chettiar* (4) are in conflict, and, inasmuch as the judgment in the former is not referred to in the latter, I do not think that any such inference can be drawn if the cases can be explained in any other manner. As I have said above, the latter case follows two prior cases in which

(1) A.I.R. 1922 P.C. 292 (P.C.)
(2) (1919) 43 Mad. 166=46 I.A. 123=17 A.L.J. 725=37 M.L.J. 42=21 Bom. L.R. 925=26 M.L.T. 175=30 C.L.J. 441=10 L.W. 633=24 C.W.N. 129 (P.C.).
(3) (1921) 44 Mad. 588=40 M.L.J. 429=13 L.W. 483=(1921) M.W.N. 263=29 M.L.T. 398 (F.B.)
(4) A.I.R. 1924 P.C. 65 (P.C.)
(5) (1888) 16 Cal. 223=16 I.A. 6=5 Sar. 275 (P.C.).
(6) (1919) 43 Mad. 567=47 I.A. 76=18 A.L.J. 707=22 Bom. L.R. 578=(1920) M.W.N. 61=27 M.L.T. 102=11 L.W. 399=38 M.L.J. 476 (P.C.).

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the land itself belonged to the plaintiff, and consequently I think that in this last case also it must be deemed that the judgment is based on such an assumption. If I am correct in this, the present suits have to be determined in accordance with the principle laid down in *Sivaprakasa Pandara Sannadhi* v. *Veeramma Reddi* (1), and that is, that there is no presumption that the grantee of an inam is holder of both varams. In this view it might be advisable to set aside the finding of the Subordinate Judge and ask for another finding; but inasmuch as the facts are all before me, I do not think it is necessary. The District Munsif has dealt with the defendants' evidence at considerable length and has found that the defendants and their predecessors-in-interest have been in possession of the suit lands, at any rate from 1843 onwards and that they have been disposing of their rights in those lands and dealing with them as if they had this right of occupancy. There is not a particle of evidence to show that the original grantee was himself in occupation of the suit lands before the grant and the only available evidence as to the tenants in possession shows that so far back as there is any record, the defendants and their predecessors have been cultivating the lands and dealing with them as if they had this right of occupancy. The learned Subordinate Judge has not referred to any particular facts in favour of the plaintiffs beyond reciting the history of land tenures in this Presidency and, although that history is not inconsistent with the grant of the actual land to plaintiffs, it does not support such a grant to any greater extent than a grant of *melvaram* only. Each case has to be determined on the evidence given therein. In the present case the District Munsif is right in holding that the plaintiffs have not proved their right to eject.

The lower appellate Court's decrees are therefore set aside and the decree of the District Munsif restored with costs both here and in the lower appellate Court.

Appeal allowed.

* A.I.R. 1926 Madras 138.

PHILLIPS, J.

Karipineni Rajayya — Defendant-Appellant

v.

Kalapatpu Annapurnamma — Plaintiff-Respondent.

Second Appeal No. 292 of 1923, decided on 19th August, 1925, from the decree of the Sub-Judge, Masulipatam, dated 11th September 1922.

* *Civ. Pro. Code, O. 21, r. 22—Execution sale held after judgment debtor's death—Legal representative not brought on record—Sale is a nullity—Civ. Pro. Code, S. 50.*

Execution sale held after the death of the judgment-debtor without bringing the legal representatives on record is a nullity. 42 Cal. 72 [P.C.] *Foll.* 1922 Mad. 307 *Appr.* 1924 Mad. 130 *Diss.* [P. 139 Col. 1.]

V. Ramadoss and *P. Satyanarayana Row*—for Appellant.

A. Venkatachalam—for Respondent.

Judgment:—The main question for consideration in this appeal is whether the sale in execution of the property of the deceased judgment-debtor is a mere irregularity or a nullity. It appears that in this case, an order for the sale of the judgment-debtor's property was made and that before the sale took place, the judgment-debtor died. His legal representatives were not impleaded. There are two cases of this Court which are exactly applicable, one reported in *Ragunathasami Aiyangar* v. *Gopaul Row* (1) and the other in *Doraswami* v. *Chidambaram Pillai* (2), the decisions being directly opposed to one another. It is suggested for the appellant that in view of this difference of opinion, this second appeal should be referred to a Bench but, as I will explain, I do not think that is necessary.

In *Ragunathasami Aiyangar* v. *Gopaul Rao* (1), Oldfield and Ramesam, JJ., held that the sale in execution which took place after the death of the judgment-debtor without bringing the legal representatives on record was a nullity; Spencer and Krishnan, JJ., in *Doraswami* v. *Chidambaram Pillai* (2), held exactly the contrary. The Full Bench decision in *Rajagopala Aiyar* v. *Ramanujachariar* (3) does not in terms decide the point at issue but it did

(1) A.I.R. 1922 Mad. 307.
(2) A.I.R. 1924 Mad. 130.
(3) A.I.R. 1924 Mad. 431. (F.B.)

hold, overruling *Doraswami* v. *Chidambaram Pillai*, (2) that an omission to give notice under Order 21, rule 22, renders a sale held in execution, a nullity. It does, in effect, deal with the present question at issue, although in that case the judgment-debtor was not dead but no notice was issued in accordance with Order 21, rule 22. The question is, however, definitely decided by the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (4). That was a case, where after the sale had been proclaimed and had even been adjourned to a future date, the judgment-debtor became an insolvent. Notice was given to the Official Assignee, but the notice apparently was merely a notice asking him whether he would come on record and it was not notice that execution would proceed against him. It was there held that in asmuch as the property passed by operation of law from the judgment-debtor to the Official Assignee, execution could not proceed until the Official Assignee had been brought before the Court and an order binding on him had been obtained. Their Lordships further remark that.

"A notice under S. 248 of the Code (corresponding to O. 21, r. 22) is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal representative of a deceased judgment-debtor."

No distinction can be drawn between the civil death of a judgment-debtor as the result of insolvency and the actual death of the judgment-debtor and the effect would appear to be exactly the same. When the sale in this suit was held, the judgment-debtor in whom the property had vested was dead and consequently, the property could no longer vest in him and there could be no sale of his property, but only of property which had been his before his death. The property that was sought to be sold is property which at the date of the sale had become vested in the legal representative of the debtor and inasmuch as the legal representative was not on record, there could be no valid sale as against him. Provision for executing decrees after the death of the judgment-debtor is contained in section 50 of the Code of Civil Procedure, which provides that the decree-holder may apply to execute them against the legal representatives. I do not think that I need discuss the question whether execution can be taken against a deceased man, for that is not possible. He cannot be arrested and has no longer any property to be proceeded against. Therefore, the only remedy for a decree-holder is to proceed against the legal representatives as possessing the assets of the deceased and then the provisions of Order 21, rule 22 must be applied. If they are not complied with, we have the authority of Privy Council and a Full Bench of this Court to the effect that the sale is a nullity. The question is thus concluded by authority and the difference of opinion between two benches of this Court does not render it necessary for me to refer this case to a Bench. I must follow the decision of the Privy Council in *Raghunath Das* v. *Sunder Das Khetri* (4) and accordingly, I confirm the finding of the lower Court that the sale was a nullity.

Further, an argument is put forward by the appellant that the finding of the lower appellate Court that the brothers were divided is wrong in law. The Subordinate Judge relies on oral evidence and the circumstances of the case for arriving at this finding, and that evidence is not before me and I am not, therefore, in a position to say that there was no evidence on which his finding could be based. Being a finding of fact, I must accept it. The second appeal is accordingly dismissed with costs.

Appeal dismissed.

(4) (1914) 42 Cal. 72=41 I.A. 251=18 C.W.N. 1058=1 L.W. 567=27 M.L.J. 150=16 M.L.T. 353=(1914) M.W.N. 747=16 Bom. L.R. 814=20 C.L.J. 555=18 A.L.J. 154 (P.C.)

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* A.I.R. 1926 Madras 139.

DEVADOSS AND WALLACE, JJ.

Marudayya Thevar—Petitioner

v.

Shanmugasundara Thevar and another—Respondents.

Criminal Mis. Petition No. 164 of 1925, decided on 30th April, 1925, against the order of the Joint First Class Magistrate of Tinnevelly, dated 18th February, 1925.

*(a) *Crim. Pro. Code, S. 145—Revision petition filed before High Court—High Court cannot appoint Receiver pending disposal.*

The High Court has no power to appoint a Receiver pending disposal of a petition to revise an order passed under S. 145. [P. 140, Col. 2.]

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*(b) *Crim. Pro. Code, S. 561-A—Inherent powers do not extend statutory powers.*

The Court cannot by invoking its inherent powers, extend the powers given to it by Statute [A.I.R. 1925 Mad. 438 (F.B.), *Ref.*] [P. 140, Col. 1.]

Criminal Courts are not primarily for the purpose of preventing private parties from sustaining pecuniary loss. [P. 140, Col. 2.]

Marthandam and *A. Srirangachari*—for Petitioner.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar*—for Respondents.

Order :—This is a petition asking this Court to appoint a Receiver pending disposal of Cr. R. C. No. 239 of 1925, which is a petition, asking this Court to revise an order of the lower Court passed under section 145, Criminal Procedure Code.

Mr. Jayarama Aiyar for respondents raises a preliminary objection that this Court has no jurisdiction to entertain such a petition. We think the preliminary objection is well founded. If this Court has jurisdiction, it must be found within the Criminal Procedure Code [*see* the remarks of the learned Chief Justice in *Sankaralinga Mudaliar* v. *Narayana Mudaliar* (1)]. Section 561-A confers no new powers on this Court, since "the Court cannot, by invoking its inherent powers, extend the powers given to it by Statute," [Full Bench ruling in *Veerappa Naidu* v. *Avudayammal* (2)]. Petitioner relies on section 423 (1) (*d*) read with section 439, but an interlocutory order of the kind now sought by petitioner to be passed before the criminal revision case is heard is obviously not an order either incidental to, or consequential on, an order which has not yet been passed in the criminal revision case and which may eventually not be in petitioner's favour at all. It cannot be an order which necessarily follows from the order eventually passed in revision. The cases quoted by petitioner, *Reid* v. *Richardson* (3) and *Katras-Jherriah Coal Co.* v. *Sibkrishta Dew and Co.* (4) have no bearing on this point.

It is next urged that the High Court must be deemed to possess all the powers which the Magistrate has in an enquiry under Chapter XII, Criminal Procedure Code. Such a general claim was considered in another connection by a Full Bench of this Court in *Veerappa Naidu* v. *Avudayammal* (2) and negatived. Even assuming for the sake of argument that the High Court has that power, it would not in the least avail petitioner. For, in the first place the Magistrate and therefore, *exhypothesi*, the High Court, can only appoint a Receiver while the enquiry is pending, and the enquiry is now over, and in the second place, the Magistrate, and therefore again the High Court, can appoint a Receiver only where it is satisfied that a dispute likely to cause a breach of the peace exists, whereas now the Magistrate's order has put respondent in possession of the property, and there is no danger of a breach of the peace, unless petitioner intends to defy the order of the Magistrate, and the High Court would certainly not encourage a party who announces his intention of doing so.

It is urged finally that, unless petitioner's prayer is granted, he will suffer much loss if he eventually succeeds in the criminal revision case. Obviously such a consideration does not confer on the High Court powers which it does not possess. In any case Criminal Courts are not primarily for the purpose of preventing private parties from sustaining pecuniary loss. Petitioner has his remedy in a civil claim for damages. We dismiss the petition.

Petition dismissed.

(1) A.I.R. 1922 Mad. 502 (F.B.)
(2) A.I.R. 1925 Mad. 438 (F.B.)
(3) (1887) 14 Cal. 361.
(4) (1894) 22 Cal. 297.

A.I.R. 1926 Madras 140.

PHILLIPS, J.

Trustee of the Vizianagaram Estate—Plaintiff-Appellant

v.

Paila Achanah and others—Defendants-Respondents.

Second Appeal No. 1717 of 1922, decided on 23rd July, 1925, against the decree of the District Judge, Vizagapatam, in A. S. No. 336 of 1919.

(a) *Madras Estates Land Act (1908), S. 3 (11)—Rent includes whatever is payable on any land.*

The definition of 'rent' in S.3 (11) includes whatever is payable not merely on ryoti land or old waste or *Kambattam* but on any land whatever. [P. 141, Col. 1.]

(b) *Madras Estates Land Act (1908), S. 19 and Schedule Part A., Art. 8—Suit to recover rent except of* Kambattam *land is triable by Revenue Court.*

Under S. 19, a revenue Court is debarred from trying a suit for rent on *Kambattam* land, but all other suits by a landholder for recovery of rent seem to be covered by Art. 8 of the Schedule, Part A. [P. 141. Col. 1.]

(c) *Civ. Pro. Code, O. 7, r. 10—Suit presented —Court having no jurisdiction should not dismiss it but return it for proper presentation.*

When a suit is not maintainable in the Court to which it is presented, it should not dismiss it but should return it for presentation to proper Court. [P. 141, Col. 1.]

S. Srinivasa Aiyangar, S. Venkatesa Aiyangar and *A. C. Sampath Aiyangar*—for Appellant.

Y. Suryanarayana—for Respondents.

Judgment :—This is a suit for rent in respect of certain lands called Badava lands situated in a river bed. The District Judge has found that these lands were neither Kambattam nor old waste nor ryoti nor of any of the other descriptions mentioned in section 3 (16) (*a*), (*b*) and (*c*) of the Estates Land Act. He has in consequence held that the revenue Courts have no jurisdiction to try a suit for rent in respect of these lands. He has, however, omitted to notice that the definition of 'rent' in section 3 (11), runs as follows :—

"'Rent,' means whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture."

That is to say it includes whatever is payable not merely on ryoti land or old waste or Kambattam but on any land whatever. Under section 19, a revenue Court is debarred from trying a suit for rent on Kambattam land, but all other suits by a landholder for recovery of rent seem to be covered by Art. 8 of the Schedule, Part A. The District Judge was therefore wrong in declining jurisdiction in this case and his order must be set aside. I would further point out that he should not have dismissed the suit but should have returned the plaint for presentation to the proper Court. That is not of much importance now, as I direct him to restore the appeal to file and dispose of it in accordance with law. The costs here will abide the result.

The Memorandum of Objections does not lie because it merely relates to an argument which the respondents are entitled to put forward but is not in any way an objection to the decree. It must, therefore, be rejected.

The Court-fee on the appeal Memorandum will be refunded.

Order set aside.

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* A.I.R. 1926 Madras 141.

PHILLIPS, J.

Nagala Kotayya—Plaintiff-Appellant

v.

Koganti Kotappa and others—Defendants-Respondents.

Second Appeals Nos. 1609 and 1610 of 1922, decided on the 2nd February, 1925, against the decree of the District Court of Kistna, in A. S. Nos. 126 and 127 of 1921.

* (a) *Co-sharer—One sharer paying government revenue has a right to contribution and he has a charge on the revenue of others even in cases governed by Madras Estates Land Act,--Limitation Act, Art. 132—Madras Estates Land Act, S. 5.*

Where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and therefore a suit by him brought more than three years after the payment is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act, even where the case is governed by the Madras Estates Land Act. 26 Mad. 686 (F.B.) *Foll* [P. 142, Col. 1.]

* (b) *Transfer of Property Act, S. 100—Charge though not coming under S. 100 may still be a charge within Limitation Act, Art. 132.*

The mere fact that the charge does not come within the meaning of S. 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132. (42 Mad. 114 and 43 Mad. 786 *Expl.*) [P. 142, Col. 2.]

(c) *Madras Estates Land Act, S. 132—Section does not affect substantive rights of parties.*

S. 132 relates only to a question of procedure and does not affect the substantive rights of the parties. 26 Mad. 686 (F.B). *Appl.* [P. 142, Col. 2.]

V. Ramadas—for Appellant.

P. Somasundaram—for Respondents.

Judgment :—The plaintiff held the patta for the suit land and took in with him four *lopayakari* tenants, but, in 1908, a dispute arose between them as to who was entitled to the occupancy right in the lands, and it was finally decided that they all had occupancy right in the land. Subsequently, the plaintiff paid the whole of

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the rent and now seeks to recover a portion of the amount from the other co-sharers. In the present case we are only concerned with one of these sharers. The plaintiff relies on the ruling of the Full Bench in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhara Raz* (1), in which it was held that, where one of two or more co-sharers owning an estate subject to the payment of revenue to Government pays the whole revenue in order to save the estate, he is by the operation of law entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue and contends that, in consequence of this, his suit which is brought more than three years after the payment, is not barred by limitation as it is a suit to enforce a charge and comes within the scope of Art. 132 of the Limitation Act. The District Judge has differentiated the present case from that, in that the present claim is one for rent under the Estates Land Act, holding that under the Estates Land Act rent is not a charge on the land. Section 5 of the Act however, clearly makes rent a charge upon the land and it is difficult to see how the present case can be differentiated from the Full Bench decision which is concerned with the payment of revenue. There seems to be no distinction between the charge given under section 5 of the Estates Land Act and the charge given by section 2 of the Revenue Recovery Act. In both cases the charge is actually given in favour of the landlord, in the latter case, the Government, but there is none the less the charge upon the land in both cases. It would therefore appear that the Full Bench decision is applicable here and that the District Judge is wrong.

The respondent, however, relies on a case *Suramma* v. *Suryanarayana Jagapati Razu* (2), in which it was held that the charge under section 5 of the Estates Land Act is not a charge within the meaning of section 100 of the Transfer of Property Act. The correctness of the decision, to which I was a party, has been questioned in a subsequent case reported in *Sri Rajah Bollapragada Venkata Lakshmamma Garu* v. *Menda Seetayya* (3), but whether it is correct or not, the mere fact that the charge does not come within the meaning of section 100 of the Transfer of Property Act does not necessarily imply that it is not a charge within the meaning of Art. 132, which is very general in its terms. I do not think that the decision in *Suramma* v. *Suryanarayana Jagapati Razu* (2) is any authority to the contrary.

Another argument is based on some of the remarks in *Sri Rajah Bollapragada Venkata Lakshmamma Garu* v. *Menda Seetayya* (3), namely, that because it is section 132 of the Estates Land Act which gives the Revenue Court power to apply the provisions of Chapter VI (of that Act) to the execution of a decree for arrears of rent, the same provisions are not applicable in the case of a Civil Court which must act under the Civil Procedure Code. No doubt these remarks in a way support the respondent's case, that the charge under section 5 is limited in its application but they were made *obiter* and, if it was meant to lay down that a Civil Court cannot in any circumstances enforce the charge for rent given by section 5 (of the Estates Land Act) with all respect, the remarks appear to me to go too far, for section 132 relates only to a question of procedure and does not affect the substantive rights of the parties. The procedure to be adopted by the Revenue Court is that contained in Chap. VI of the Estates Land Act, whereas the procedure in execution by the Civil Court is that laid down by the Code of Civil Procedure, but whichever form of procedure is adopted, it cannot remove a charge which is given by law. In this view I think that the ruling in *Rajah of Vizianagaram* v. *Rajah Setrucherla Somasekhara Razu* (1) must be held applicable to the present case and that, consequently, the plaintiff has a charge upon the land for the rent paid by him.

A further contention is put forward by the respondent that he is not liable for contribution under section. 69 of the Contract Act because the plaintiff alone was the person bound to pay the rent. It was held in *Jagapati Raju* v. *Sadrusannama Arad* (4) that the only person who is personally bound to pay revenue to the Government is registered holder and that as the plaintiff was the pattadar, the other

(1) (1903) 26 Mad. 686=13 M.L.J. 83 (F. B.)
(2) (1918) 42 Mad. 114=35 M.L.J. 443=(1919) M.W.N. 25=48 I.C. 794=25 M.L.T. 365.
(3) (1920) 43 Mad. 786=39 M.L.J. 30=28 M.L.T. 44=(1920) M.W.N. 294=57 I.C. 764=11. L.W. 466.
(4) (1915) 39 Mad. 795=29 M.L.J. 639=2 L.W. 1046=31 I.C. 255=14 M.L.T. 464.

sharers were not personally bound to pay rent. This is a new argument put forward apparently for the first time in this Court and it would appear to be opposed to the facts, for it appears that the other co-sharers did actually obtain pattas in their own names for the landlord and, consequently, they would thus be liable to pay the rent under these pattas. Another case relied on is *Naraina Pai* v. *Appu* (5), but that, again, was a case of contribution in which the person sought to be made liable was not the pattadar. In the present case, as all the parties had pattas, they were all personally liable to pay the rent. Consequently, the plaintiff has a right under section 69 of the Contract Act to ask for contribution.

The appeals must accordingly be allowed, and there will be a decree for the recovery of the respondent's proportionate share of the rent with proportionate costs throughout, with the direction that, on failure to pay the amount, his share in the estate will be liable to be sold.

Time three months.

Appeals allowed.

(5) (1914) 28 I.C. 456.

A.I.R 1926 Madras 143.

PHILLIPS, J.

Marath Veetil Kalliani Amma and others —Defendants 1 to 8—Appellants

v.

Cochin Sircar and others—Plaintiffs-and Defendant No. 9—Respondents.

Second Appeal No. 1500 of 1922, decided on 23rd April, 1925, against the decree of the Sub-Judge, South Malabar, at Palghat, in A. S. No. 140 of 1920.

(a) *Deed—Construction* — Anubhavam *deed—Definite quantity of grain mentioned—Only that much is of permanent nature.*

Where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted. Where therefore the *anubhavam* is recited as relating solely to the amount of 60 *paras* of the produce there is a strong presumption that only 60 *paras* is of the permanent nature. 29 Mad. 501; and 30 Mad. 203, *Ref.* [P. 143, Col. 2.]

(b) *Deed—Construction—Subsequent assertions by one party cannot affect meaning.*

Although the circumstances attending the execution of a document may be looked at to construe the contents of the document in order to ascertain the intention of the parties, at the time subsequent assertions by one of the parties with reference to that document cannot affect its meaning. [P. 144, Col. 1.]

(c) *Landlord and tenant—Notice to quit found insufficient — Tenant denying landlord's title — Fresh notice is not necessary.*

Where the tenant denied his landlord's title, when he was asked to take a renewal, no further notice would be necessary though the original notice to quit be insufficient. [P. 144, Col. 1.]

K. Krishna Menon—for Appellants.

C. V. Anantakrishna Aiyar and *C. V. Mahadeva Aiyar*—for Respondents.

Judgment:—The question at issue in this appeal is whether the demise evidenced by Ex. VII creates a perpetual or irredeemable tenure of the land. Both the lower Courts have found that it does not do so, but it is contended that although the lower appellate Court has applied the principles laid down in decisions of this Court, it has failed to have regard to any other circumstances in the case. The relevant portion of the document is as follows :—

"The pattam being one hundred and twenty *paras* of paddy, out of the pattam of 120 *paras* of paddy, deducting 60 *paras* allotted for your *anubhavam*, and deducting 30 *paras* for assessment out of the remaining 60 *paras*, the balance payable yearly is 30 *paras* of paddy".

The document is not described as an *anubhavam* deed, nor is there any mention of *anubhavam* tenure. In construing these documents the law has been laid down in *Vythilingam Pillai* v. *Kuthiravattah Nair* (1), as follows :.

"The point to be borne in mind with regard to '*Anubhavam*' is that it may be used with reference to tenure of land, and it will then *prima facie* import an irredeemable tenure, or it may be used with reference to a specific money or grain rent charged on the land, and in that case it will not imply any tenure in favour of the grantee".

That case has been followed in *Mana Vikrama* v. *Karnavan Gopalan Nair* (2), and *Puthur Tarwad Karnavan* v. *Muthiyallur Kumaran Rarichan* (3). In this last case, it was held that where the remuneration mentioned in the deed is a definite quantity of grain out of the produce of the lands, a strong presumption arises that only a rent charge was granted. In this case therefore, where the *anubhavam* is recited as relating solely to the amount of

(1) (1906) 29 Mad. 501=16 M.L.J. 358=1 M.L.T. 290.
(2) (1907) 30 Mad. 203.
(3) (1918) 43 I.C. 379.

60 *paras* of the produce there is a strong presumption that only 60 *paras* is of the permanent nature. It is suggested that the last recital in the document "you should pay also one fanam per year as *adimakazhicha*" shows that it is permanent tenure of land. The rent fixed for the land is 30 *paras* of paddy and this one fanam per year as *adimakazhicha* must be something else, and I think that it could only refer to the nominal payment fixed in respect of the *anubhavam* of 60 *paras*, otherwise, there would really be no meaning in this last clause. The final question that remains is, whether this very strong presumption has been rebutted by the appellant. It is contended that the subsequent conduct of the parties forms very strong evidence as to the meaning of the document. I am unable to go so far as this. Although the circumstances attending the execution of a document may be looked at to construe the contents of the document in order to ascertain the intention of the parties, at the time, subsequent assertions by one of the parties with reference to that document cannot affect its meaning. Had there been agreement between the parties during a long series of acts which could only be explained by regarding the document as an irredeemable tenure, there might be some force in the contention, but here it appears that the landlord always maintained that the lease was to be renewed. The fact that the tenants set up a permanent right cannot affect the meaning of the document. I may add that the Subordinate Judge has dealt with this evidence and it is a question of fact whether such evidence is sufficient to rebut the original prersumption, and therefore, the finding should not be interfered with unnecessarily in Second Appeal. The lower appellate Court has adopted the right principles of law in construing the document, and I think its decision is correct.

A further point is taken that the notice to quit was insufficiet. Both the lower Courts have found that it was sufficient, and apart from that, it is found that the tenant denied his landlord's title, when he was asked to take a renewal. In the face of that, no further notice would be necessary.

The second appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

* A.I.R. 1926 Madras 144.

PHILLIPS, J.

Metta Rama Bhatlu—3rd Defendant-Appellant

v.

Metta Annayya Bhatlu and others—Plaintiff and Defendants 1 and 2—Respondents.

Second Appeal No. 750 of 1922, Civil Revision Petition No. 442 of 1923 and Civil Mis. Petition No. 258 of 1923, decided on 4th February, 1925, against the decree of the Additional Sub-Judge of Vizagapatam, in A. S. No. 380 of 1921.

(a) *Specific Relief Act (I of 1877) Ss. 12 and 21—Contract for transfer of immoveable property—Damages provided for default were only for security for performance—Money would not be adequate compensation for breach.*

In a contract for the transfer of immoveable property there was a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee. There was nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose than to provide a security for performance.

Held, in a suit for specific performance, that the contract was not one for the breach of which money would be adequate compensaction. [P. 14, Col. 2..]

*(b) *Specific performance—Court ordering specific performance can extend time for payment by plaintiff—Delay in such cases should be more leniently treated than in case of limitation.*

As an order for specific performance of a contract for transfer of immoveable property is in the nature of a preliminary decree and as the Court does retain power to make any stipulation it thinks fit with reference to the performance that power to extend time vests in the Court which actually passes the order for specific performance although it is an appellate Court.

In considering whether time should be granted it has to be remembered that the delay need not be explained so minutely in a case of this sort as in a case, for instance, under the Limitation Act, where it is sought to excuse a bar of limitation. Delay in such a case should be looked at more leniently than in a case of limitation.

B. Satyanarayana—for Appellant.

Y. Suryanarayana—for Respondents.

Phillips, J.:—[S. A. No. 750 of 1922]—This is an appeal by the 3rd defendant against the decree for specific performance of a contract of sale entered into by defendants 1 and 2 in favour of the plaintiffs. It has been found that the contract was a valid contract and that the 3rd defendant (appellant) purchased property from defendants 1 and 2 with notice of the contract

The only question argued in the appeal is that the contract is not one of which performance can be enforced by virtue of Section 21 of the Specific Relief Act (I of 1877), because it is a contract for the non-performance of which compensation in money is an adequate relief. Under Section 12 of the Act, "unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immoveable property cannot be adequately relieved by compensation in money." This rule would *prima facie* apply here; but it is argued that, as there is a condition in the contract for the payment of damages in default of performance, whether by the vendor or by the vendee, it must be held that the parties considered that the enforcement of these damages would be adequate in case the contract is not performed. So far as the default on the purchaser's side is concerned, it is not suggested that the provision for default can be treated otherwise than as furnishing security for performance. There is really nothing to show that the clause with reference to the default on the part of the vendor was for any other purpose. It is suggested that as the amount fixed as damages was high, such damages must be deemed to be adequate relief, but as the amount is only Rs. 37-8-0 it does not seem to me a tenable contention.

There are no other circumstances to prove that in this case money compensation is adequate. Consequently this plea must be rejected.

The Second Appeal is dismissed with costs.

C. R. P. No. 442 *of* 1923 and *C. M. P. No.* 258 *of* 1923:—Before the appeal was filed the plaintiff failed to deposit money in accordance with the decree of the Lower Appellate Court, and it has been held by that Court that it had no power to alter its order giving three months' time for the payment and it dismissed the petition put in by the plaintiff for extension of time and also the petition put in for amendment of the decree. The plaintiff has filed a Civil Revision Petition against this order and has also put in a petition in this Court asking for extension of time to be granted in case the second appeal is dismissed. So far as the revision petition is concerned, it appears to me that in accordance with the principles laid down in *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (1), the Lower Court had power to extend the time. It is argued that that decision relates only to the order of an Original Court, but as it is based on the fact that an order for a specific performance of this nature is in the nature of a preliminary decree and that the Court does retain power to make any stipulation it thinks fit with reference to the performance I think that power must vest in the Court which actually passes the order for specific performance and the language of the judgment in the case support this view—both the judgments of the late learned Chief Justice and of Wallace, J. From the fact that the Subordinate Judge dismissed the plaintiff's petition without making any order as to costs it would appear that it thought that there was ground for extending the time but that because it was not competent to review its own order the request could not be granted. In considering whether time should be granted it has to be remembered that the delay need not be explained so minutely in a case of this sort as in a case, for instance, under the Limitation Act, where it is sought to excuse a bar of limitation. In the latter the applicant is seeking to revise a right which he has lost and it is necessary for him to show that he has not lost it by his negligence. Here it is a question of destroying a right which plaintiff had to enforce a contract and it does not necessarily follow that because he has been guilty of some delay in enforcing the contract, that that fact alone should deprive him of a right which undoubtedly is his. Consequently I think that the delay in such a case should be looked at more leniently than a case of limitation. In the present case the plaintiff states that he was not aware of the provisions in the decree until the time for payment had passed, and, if that is so, there were very good reasons for his not making the payment in time. The main cause for the delay appears to be the inordinate time taken by the Lower Appellate Court in granting a copy of its decree. The copy was applied for on the 14th of October, 1921, and the copy was not ready until the 5th January, 1922; for other reasons the plaintiff did not receive the copy till the 17th January. It is this delay by the officers of the Court

(1) A.I.R. 1923 Mad. 284=46 Mad. 148=44 M.L.J. 107=17 L.W. 216=(1923) M.W.N. 1.

that has been mainly responsible for the delay. I think that it should be executed; and consequently I order that the time for payment be extended till the date on which the plaintiff deposited money, or if the deposit has been withdrawn till one month from this date.

I pass no order as to costs of the Revision Petition.

Second Appeal dismissed.

A.I.R. 1926 Madras 146 (1).

MADHAVAN NAIR, J.

Naiwale Sulaiman Ali Khan and others —Appellants

v.

Munra Venkatanarayana Garu and others—Respondents.

Second Appeal No. 316 of 1922, decided on 18th February, 1925, from the decree of the Sub-Judge, Cocanada, in A. S. No. 4 of 1921.

Contribution—Joint decree.

In a suit for contribution against two persons who are judgment-debtors along with some others, a *joint* decree against the two defendants should not be passed. [P. 146, Col. 1.]

N. Rama Rao—for Appellants.

P. Somasundaram—for Respondents.

Judgment:—The 1st defendant is the appellant. He is now dead and his legal representatives have been brought on record. Plaintiff's suit was one for contribution against two persons who were, along with others, judgment-debtors in O.S. No. 358 of 1904 on the file of the Court of the Principal District Munsif of Masulipatam. A joint decree was passed against the two defendants by the Court of first instance. On appeal the Subordinate Judge departed from the usual rule of passing general decrees against the two defendants because he was under the impression that there was only one judgment-debtor in the said O. S. No. 358 of 1904 and the others were all his legal representatives. The report submitted by the Subordinate Judge shows that in this assumption he was wrong. It follows therefore that the joint decree against the two defendants should not have been passed by the lower Court. So far as the 1st defendant is concerned the lower Court's decree is modified and the plaintiff will get a decree for half the amount against the assets of the 1st defendant in the hands of his legal representatives. In other respects, the decree of the lower Court will stand. The parties will pay and receive proportionate costs. The 1st respondent's Vakil's fee in this case is fixed at Rs. 35.

Decree varied.

A.I.R. 1926 Madras 146 (2).

DEVADOSS, J.

Munuswami Nayakar—1st Defendant-Appellant.

v.

Abdul Azeez Sahib and another—Plaintiffs-Defendants—Respondents.

Second Appeal No. 1595 of 1922, decided on 21st April, 1925, against the decree of the Sub-Judge, Chingleput, in A.S. No. 113 of 1921.

Trust—Sale of trust property by unauthorised person—Purchaser should be given a refund of the purchase money if sale is set aside—Contract Act, S. 65.

Where a sale of trust property is set aside merely on the ground that the vendor who acted on behalf of the trust could not bind the trust by his act, but where with the proceeds of the sale some other property is purchased it is but proper that when the sale is set aside the vendee should be allowed to proceed for the money paid by him to the trust against the property which was purchased with the consideration given by him for the sale in his favour. 26 C.L.J. 263, *Foll.* [P. 147, Col. 2.]

C. V. Anantakrishna Aiyar and *C. Pattabhirama Aiyangar*—for Appellant.

V. Vishwanatha Ssstri, C. Sankararama Sastri and *T. S. Rajagopala Aiyar*—for Respondents.

Judgment:—This appeal is by the 1st defendant. He purchased some property belonging to a mosque in St. Thomas Mount from the Mutwali, the 3rd defendant in the suit, for Rs. 1,000. After the purchase some persons interested in the mosque brought the present suit for setting aside the sale on the ground that the sale was not binding on the trust. The District Munsif dismissed the suit but on appeal the Subordinate Judge of Chingleput decreed the suit in plaintiff's favour. Mr. Anantakrishna Aiyar, who appears for the 1st defendant, does not object to the judgment of the Appellate Court so far as it sets aside the sale in favour of the plaintiffs. But his contention is that

inasmuch as the trust was benefited by the sale to him, the trust is bound to pay back to him the amount which it received from him by sale of the property. The property was sold to the 1st defendant, and out of the sale proceeds another property was purchased in St. Thomas Mount. The Mutwali and the persons who attended the meeting of the committee which advised him to sell the property evidently thought that the property was not yielding any appreciable income whereas a shop in St. Thomas Mount would be yielding a very fair income. The sale was on 5th October, 1917, under Ex. V, and the purchase of the shop in St. Thomas Mount was under Ex. I on 12th February, 1918. From both the documents it is quite clear that the sale to the 1st defendant was for the purpose of buying property in St. Thomas Mount and the whole of the consideration for the sale to the 1st defendant was utilised for the purpose of buying the shop. That being so, the question is whether the trust, that is, the mosque, should be allowed to get back the property on the ground that the sale did not bind the trust and should also keep the property which it purchased by utilising the sale proceeds obtained from the defendant. I think in a case like this where it is quite clear that the trust has had the benefit of the sale which is set aside the Court should make the trust pay back what it gained by the sale which is afterwards held not to be binding on the trust. In the case of minors it was held that if the guardian sells property belonging to the minor or borrows money for the purpose of buying property and if afterwards the minor seeks to set aside the transaction the Court would be justified in making the minor pay back what was got by the sale or by borrowing on his account. Vide *Burrayya* v. *Ramayya* (1), *Rabia Bi* v. *Angappan* (2) and *Djendra* v. *Manoarama Dasi* (3). I think the same principle should be made applicable to a trust. It is a well-known principle of equity that if a person seeks equity he ought to do equity. The sale is set aside merely on the ground that the vendor who acted on behalf of the trust could not bind the trust by his act, but where with the proceeds of the sale some other property is purchased it is but proper that when the saleis set aside the vendee should be allowed to proceed for the money paid by him to the trust against the property which was purchased with the consideration given by him for the sale in his favour. This principle was applied by the Calcutta High Court in a case reported in *Badal* v. *Tinkari* (4). In that case a Mutwali granted a lease and received Rs. 400 by way of *selami*. His successor sued to set aside the lease. The Court held that he could do so on his paying back Rs. 400 which was received as *selami* for the lease. In this case the sale was for a definite purpose, namely, for the purchase of a shop and the proceeds were utilised in purchasing the shop. It is but proper that when the sale to the 1st defendant is set aside he should be allowed to proceed not against the general assets of the trust but against the shop which was purchased with the sale proceeds. I, therefore, modify the decree of the Lower Appellate Court by directing the Mutwali of the mosque to pay to the 1st defendant Rs. 1,000 before he recovers possession of the property sold to the 1st defendant, and this amount will be a charge on the shop which was purchased in St. Thomas Mount. If the Mutwali does not pay the amount the 1st defendant will be entitled to proceed in execution of the decree against the shop purchased under Ex. I in St. Thomas Mount. The transaction so far as the defendant is concerned was a fair and *bona fide* one. I think in the circumstances the 1st defendant is entitled to his costs incurred in the three Courts. The direction as regards mesne profits will stand. But the 1st defendant is entitled to get interest at 6 per cent. on the amount from the date of Ex. I to the day on which the money is paid to him. The 1st defendant will have a charge for the total amount of Rs. 1,000, interest and costs on the shop in St. Thomas Mount. The decree of the Lower Appellate Court will be further varied by directing possession to be given, not to the 1st plaintiff in the suit, but to the 3rd defendant, the Mutwali of the mosque. The plaintiff's costs in the three Courts will come out of the trust funds belonging to the mosque.

Decree modified.

(1) A.I.R. 1924 Mad. 472=47 Mad. 449=46 M.L.J. 49=19 M.L.W. 67=33 M.L.T. 254=(1924) M.W.N. 42.

(2) (1915) 2 L.W. 369=28 I. C. 714.

(3) A.I.R. 1922 Cal. 150=49 Cal. 911=36 C.L.J. 326.

(4) (1917) 26 C.L.J. 263=41 I.C. 736.

A.I.R. 1926 Madras 148.

SRINIVASA AIYANGAR, J.

Tulasidass Govindjee—Plaintiff.

v.

Madhavadass Laljee and others—Respondents.

Liladhar Sait—Petitioner.

Original Petition No. 170 of 1919, decided on 22nd July 1925.

Guardians and Wards Act, S. 41—Act applies during minor's lifetime—Succession to minor's property after his death is not within jurisdiction of the Court acting under the Act.

Though section 41 might apply to cases of the death of a minor, still it is applicable only to simple cases where there can be no doubt whatever about the succession to the minor and about the items of property which belong to the minor or the accounts relating to the management of the estate. When, however, there is a dispute relating to succession, or the likelihood even of a dispute as to succession, the Court has no powers under the Guardians and Wards Act to seek to determine the succession to a deceased minor and thereupon make any orders for granting delivery of possession of property. [P. 148, Col. 2.]

A Court acting under the Guardians and Wards Act is really *functus officio*, when the minor dies. Any disputes or rights with regard to the property of the minor should be litigated in the ordinary tribunals of the country. (1918 M. W. N. 440, *Doubted.*) [P. 149, Col. 1.]

K. S. Jayarama Aiyar—for Petitioner.

Judgment:—I am clearly of the opinion that this application is incompetent. The minor for whose person and property, the guardian had been appointed in this matter is now admitted to be dead and the petitioner now before me claims under an assignment from the son of the deceased 2nd respondent and I am told that the 2nd respondent's son had a right so to assign a share in the property, because it is alleged that on the death of the minor, the son of the 2nd respondent became one of the reversionary heirs to the estate. When the application came on for hearing before me last week, I intimated to the learned vakil for the petitioner Mr. Jayarama Iyer, that I had my doubts whether such an application could be maintained under the Guardians and Wards Act after the death of the minor. I have now been referred to the case of *Nataraja Pillai* v. *Subbaraya Pillai* (1). In that case, Oldfield and Sadasiva Aiyar JJ., held that the words "for any cause" in clause 3 of section 41 of the Guardians and Wards Act were wide enough to cover the case of the death of a minor, though such a contingency is not contemplated or provided for in the previous portion of that section. With all respect, I am constrained to state that I very much doubt the correctness of that decision but being a decision of a bench of this Court I cannot regard it as anything but binding on me. But, for the purpose of this application, it is unnecessary for me finally to hold whether or not the view of the law as set out in that decision is correct. In that case, what the learned Judges said was that the section applied and it was within the discretion of the lower Court to make, or to refuse to make, an order of the kind referred to therein. Even though the section might apply to cases of the death of a minor, still, I am clear in my mind that the section is applicable only to simple cases where there can be no doubt whatever about the succession to the minor and about the items of property which belong to the minor or the accounts relating to the management of the estate. When, however, there is a dispute relating to succession or the likelihood even of a dispute as to succession, in my judgment, the Court has no powers under the Guardians and Wards Act to seek to determine the succession to a deceased minor and thereupon make any orders for granting delivery of possession of property. Further the prayers in this application are far from being identical with the reliefs asked for apparently in the application with the order on which the learned Judges were dealing in the case in the Madras Weekly Notes. The section clearly speaks merely of orders being passed for the delivery of any property in the possession of the guardian or under his control and also for the delivery of any accounts in his possession or control. The prayers in this present application are for rendering of the accounts. The phrase "rendering of the accounts" means an order against the guardian for an account as in a suit for an account and cannot possibly mean the delivery of account books alone. It is also admitted that O. S. No. 2 of 1924 on the file of the Additional Subordinate Judge of Coimbatore is now pending to determine the succession to the minor's estate. In the face of the admitted fact that the succession to the minor's

(1) (1918) M.W.N. 440.

property is under litigation, or in other words, when the question is pending before another Court of competent jurisdiction for the purpose of determining the person who would be entitled to the property it is impossible to accept the contention that the Court that appointed the guardian of the person and property of the minor would have jurisdiction to make such an order as is asked for.

I am also surprised at prayer No. 2 for the removal of the guardian from the office when, *ex concessu*, his powers as guardian have ceased under section 41 of the Guardians and Wards Act and that is the very basis of the contention before me.

The third prayer is still more strange, that the Court should appoint a fit and proper person to be in charge of the estate. I certainly think that a Court acting under this enactment is really *functus officio* when the minor dies. Any disputes or rights with regard to the property of the minor should be litigated in the ordinary tribunals of the country. It may be that in simple cases where no contest arises or can arise, the Court having regard to the fact that it appointed a particular person as guardian and entrusted him with the management of the property may make simple orders for the purpose of the delivery of the property. But I do not think even such a provision can be extended to include the determination of doubtful or disputed rights to the property of a deceased minor.

It is not for me to suggest what course the petitioner should adopt. I should have thought that the remedy would have been obvious to any one who looked at the facts and circumstances of the case that the petitioner would have been well advised to have gone to the Coimbatore Court and applied for the appointment of a receiver who would have been able either to get such reliefs as might be needed or else to enforce such rights by proper proceedings. I must therefore dismiss the present application.

Application dismissed.

A.I.R. 1926 Madras 149.

RAMESAM J.

Maharajah of Jeypore—Petitioner

v.

Sobha Sundar Dalai and another—Respondents.

Civil Revision Petition No. 529 of 1925, decided on 23rd July, 1925, against the order of the Agency Divisional Officer, Oriya Agency, Koraput, dated 23rd October, 1922, in E. L. A. No. 1 of 1922.

Madras Estates Land Act, S. 111—Order on application for sale of holding is revisable by the High Court—Board of Revenue declining to interfere—Delay in applying for revision is ground for refusal—Only persons interested can stop sale—Acceptance of arrears by landholder will create estoppel.

An order passed by a Revenue Divisional Officer on an application put in by a landholder under S. 111 for a sale of the ryot's holding is revisable by the High Court since the Officer is a Court subordinate to the High Court. (42 Mad. 76 and 42 Mad. 310, *Foll.*) [P. 149, Col. 2.]

But where the Revision Petition in the High Court is filed more than two years after the order of the Board of Revenue refusing to interfere, the High Court will not interfere unless there has been a gross miscarriage of justice. (A.I.R. 1924 Mad 119, *Foll.*) Sale cannot be stopped by a total stranger by depositing the amount of rent due by the defaulting ryot. He must possess an interest which will be affected by the sale. Where, however, the landholder has accepted the arrears from a person, as if it was paid for rent due by the ryot, he cannot afterwards change his mind and question the interest of the person paying it. [P. 150, Col. 1.]

P. Somasundaram—for Petitioner.

K. N. Rajagopala Sastri for *B. Satyanarayana*—for Respondents.

Judgment:—A preliminary objection has been taken that the revision petition does not lie but following *Paramaswami Aiyangar* v. *Alamelu Natchier Ammal* (1) and *Ramaswami Goundan* v. *Kali Goundan* (2) I hold it lies. The learned Vakil for the respondents says that there is not even a suit which might go to the District Court and therefore the reasoning of Ayling, J. in *Paramaswami Aiyangar* v. *Alamelu Natchiar Ammal* (1) does not apply. But we have got an application under section 111 of the Act. A suit to question it might have been filed by the defaulter under

(1) (1918) 42 Mad. 76=35 M.L.J. 632=9 L.W. 26 =(1918) M.W.N. 107.
(2) (1918) 42 Mad. 310=36 M.L.J. 571.

section 112. I think this is enough to make the Revenue Divisional Officer a Court subordinate to the High Court. How far I should interfere is a difficult matter. Coming to the merits, I remember (1) that this Civil Revision Petition has been filed in April 1925, against an order of October 1922; (2) that the Board of Revenue has declined to interfere and, if possible, I should not create a conflict between an order of this Court and an order of the Board of Revenue unless there will be such a gross miscarriage of justice by my non-interference as to require my passing an order differing from the Board of Revenue. [*Vide* Devadoss, J., in *Appanna* v. *Latchayya* (3)].

It is true that a total stranger may not, by depositing the amount of rent, obtain a stoppage of the sale. He ought to possess an interest which will be affected by the sale. It is doubtful if that is the case here. The respondent alleged that he was a Mokhasadar of the suit land and all the proceedings taken by the petitioner against the tenants were bogus proceedings. If so, his interest cannot be affected by the sale. The only other way in which a sale may be stopped is by the payment of the amount in default by the respondent or by some other person on his behalf. In this case, the petitioner at first accepted the amount. We must take it that he accepted it, as if it was paid for rent due by the ryot. If so, he cannot change his mind about it and question the interest of the person paying it.

It is obvious on the facts of this litigation that the two parties must soon face each other in a regular suit and it is clear that it is more desirable that the matter in dispute between them should be tried in such a suit rather than be enquired in a proceeding of this kind. Having regard to this consideration and to the conditions I have already set forth at the earlier part of the judgment I decline to interfere.

The petition is dismissed with costs.

Petition dismissed.

(3) A.I.R. 1924 Mad. 119.

* A.I.R. 1926 Madras 150 (1).

COUTTS-TROTTER, C.J. AND MADHAVAN NAIR, J.

Official Assignee of Madras—Applicant-Appellant

v.

Zamindar of Udayarpalayam—Respondent.

Original Side Appeal No. 77 of 1924, decided on 11th December, 1924, from the order of Waller, J., in Insolvency Petition No. 299 of 1924, dated 3rd November, 1924.

* *Presidency Towns Insolvency Act (III of 1909), S. 18—High Court Judge exercising Insolvency jurisdiction can transfer suit against the insolvent pending in a mofussil Subordinate Court.*

A Judge of the High Court sitting on the Insolvency side can under S. 18 transfer to the High Court a suit pending against the insolvent and his properties in a mofussil Court subordinate to the High Court.

V. Varadaraja Mudaliar—for Appellant.

Coutts-Trotter, C. J.:—This is a matter clearly within the jurisdiction of the Court under section 18, corresponding to the familiar section of the English Bankruptcy Act whereby cases of this kind are transferred as a matter of course every day and every one who had ever had an experience of these matters will be quite familiar with it.

The appeal must be allowed and the learned Judge must exercise the jurisdiction which he has held that he did not possess. Costs on the Original Side scale.

Madhavan Nair, J.:—I agree.

Appeal allowed.

A.I.R. 1926 Madras 150 (2).

PHILLIPS, J.

Vayyaprath Kunnath Packi—Plaintiff No. 1-Appellant.

v.

Vayyaprath Kunnath Muhammad and others—Defendants-Respondents.

Second Appeal No. 1167 of 1922, decided on 2nd April, 1925, against the decree of the Sub-Judge, Tellichery, in Appeal No. 216 of 1921.

Malabar Law—Anandravan *has no right to sue on* tarwad's *behalf in presence of* karnavan.

Unless the *karnavan* himself is disabled from suing to obtain other relief regarding the *tarwad* property an *anandravan* cannot be allowed to sue on behalf of the *tarwad* for the relief claimable by the *tarwad* in respect of the *tarwad* property. (20 Mad. 129; 43 Mad. 393; 32 M.L.J. 323 and 29 M.L.J. 632, *Foll.* and 14 Mad. 101 *Expl. and Dist.*) [P. 151, Col. 1.]

K. P. M. Menon and *K. P. Abdulla Kutty*—for Appellant.

P. Govinda Menon—for Respondents.

Judgment:—The main question for determination in this appeal is whether a junior member of a Malabar tarwad can sue on behalf of the tarwad even when there is a karnavan in existence, who can bring the suit. The powers of a karnavan have been considered on many occasions and it has always been held that he is the controlling authority of the tarwad and that all the powers of management are vested in him. In fact, over sixty years ago, it was held by Mr. Holloway, with regard to a karnavan: "A Malabar family speaks through its head, the karnavan, and in Courts of Justice, except in antagonism to that head, can speak in no other way." That principle has been upheld in *Vasudevan* v. *Sankaran* (1) and what is practically the same principle has been laid down later in *Soopi* v. *Mariyoma* (2) adopting a decision in S. A. No. 959 of 1917 in which it was held that "only under very special circumstances could the anandravan of the tarwad maintain a suit for redemption of a *kanom* granted by their karnavan, as such a suit would amount to an act of interference in the karnavan's management of tarwad affairs." In *Cheria Pangi Achan* v. *Unnal Achan* (3) it was held by Sadasiva Aiyar, J., that "unless the karnavan himself is disabled from suing to recover possession of, or obtain other relief regarding, the tarwad property an anandravan cannot be allowed to sue on behalf of the tarwad for the relief claimable by the tarwad in respect of the tarwad property." We find the same principle in *Rajah of Arakal* v. *Churia Kunhi Kannan* (4). Acting on this principle the Lower Courts have held that the appellant has no right of suit and accordingly dismissed it. There is one authority which would appear to support the appellant and that is *Anantan* v. *Sankaran* (5). It is a very brief judgment and does not discuss the principle at all. The material portion of the judgment runs as follows:—

"The karnavan is included as a defendant in the suit and as he has failed to sue till the period of 12 years has almost expired, we are of opinion that the suit by the junior members cannot be validly objected to."

If this be taken as a broad proposition of law that in all circumstances the junior member will be entitled to sue when the karnavan has failed to do so, it seems to be opposed to all the prior and subsequent decisions which deny such a right of suit to anandravan unless there are special circumstances which justify his bringing such a suit. But if we look to the facts of that case we find that the two members of the tarwad whose actions were impeached were defendants and all the other members of the tarwad were plaintiffs. Applying the facts to the judgment, the case does come within the principle mentioned above that an anandravan may be permitted to sue when the karnavan had disabled himself from bringing such a suit. In this case the karnavan had, through his agent, another member of the tarwad, made an alienation which was sought to be set aside. It would have been difficult for him to have brought the suit to set aside his own transactions and in that view this case is perfectly consistent with the other cases that I have mentioned above and I think that the decision must be read in the light of these facts. There appears to be no other authority opposed to the cases I have cited.

On the facts of the present case the appellant has nothing particular in his favour. The karnavan who made the alienation is dead. He was succeeded by another and he is also dead, and very recently the 1st defendant has become the karnavan. In the plaint it is not alleged that plaintiff consulted the 1st defendant or that the 1st defendant was neglecting the interests of the tarwad. In fact, no allegation of misconduct is made against h.m. It is only here in second appeal that it is said for the first time that the 1st defendant was acting in collusion with the alienee.

(1) (1897) 20 Mad. 129=7 M.L.J. 102 (F.B.)
(2) (1919) 43 Mad. 393=38 M.L.J. 207=11 L.W. 200=27 M.L.T. 169=55 I.C. 760=(1920) M.W.N. 279.
(3) (1916) 32 M.L.J. 323=21 M.L.T. 329=5 L.W. 392=38 I.C. 513=(1917) M.W.N. 185.
(4) (1915) 29 M.L.J. 632=31 I.C. 482.
(5) (1890) 14 Mad. 101.

The suit was brought by the plaintiff nine months before the claim would have become barred and inasmuch as the 1st defendant had only recently assumed office, there is nothing to show that the plaintiff believed that he would not take action if approached in the matter. I think it would be very undesirable to extend the right of an anandravan to bring a suit on behalf of the tarwad for it would lead to multiplicity of litigation and there would be no finality whatever. The cases cited have laid down the restrictions which should be imposed on such suits and I entirely agree. In that view the plaintiff has not disclosed any cause of action, that is to say, he is not entitled to bring such a suit and the decree of the lower Court is right.

It is unnecessary to consider the other point on which the plaintiff's suit has been dismissed, namely, that of limitation. The second appeal must be dismissed with costs.

Appeal dismissed.

A.I.R. 1926 Madras 152 (1).

MADHAVAN NAIR, J.

Payida Ramakrishnayya and others—Plaintiffs-Petitioners.

v.

Barrey Nagarazu and another—Defendants-Respondents.

Civil Revision Petition No. 733 of 1923, decided on 17th August, 1925, from the decree of the Dist. Munsif, Peddapur, dated 28th November 1922.

Contract Act, S. 69—Defendants must be bound in law to pay—Trespassers are not bound to pay dues to zemindar, hence no action lies against them under S. 69.

For the application of S. 69, it is necessary to show that the defendants are the persons bound in law to pay. Trespassers are not persons bound in law to pay dues to the zamindar. Therefore, no cause of action arises against the trespassers for reimbursement under S. 69 for dues paid to zamindar on their behalf. [P. 152, Col. 2.]

C. Rama Rao—for Petitioners.

S. Natesa Sastriar—for Respondents.

Judgment:—The plaintiffs are the petitioners. The plaintiffs and defendants were co sharers of certain property on which certain dues had to be paid to the zemindar. The plaintiffs purchased the defendants' portion and paid the dues to the zamindar for the whole property. They now claim to recover from the defendants that portion of the dues payable for the share of the defendants.

The defendants, after the purchase by the plaintiffs of their share, remained in possession of the property. Clearly, therefore, the defendants were in the position of trespassers. The plaintiffs, in order to entitle them to reimbursement, rely upon section 69 of the Indian Contract Act and state that since they paid the dues payable by the defendants as well, they are entitled to get back that amount. For the application of section 69, it is necessary to show that the defendants are the persons bound in law to pay. From what I have already said, it would appear that the defendants are trespassers pure and simple and are not persons bound in law to pay dues to the zamindar. The plaintiffs, therefore, have no cause of action against the defendants for reimbursement under section 69 of the Indian Contract Act. The plaintiffs' remedy clearly will be to sue the defendants for mesne profits. I find the District Munsif says in the beginning of his judgment that the plaintiffs had already filed a suit O.S. No. 140 of 1916, in which a decree was given to them for mesne profits. If so, the plaintiffs have, neither in equity nor in law, any claim against the defendants.

The decree of the lower Court is right and the revision petition is dismissed with costs.

Petition dismissed.

A.I.R. 1926 Madras 152 (2).

JACKSON, J.

The Krishna Jute and Cotton Mills Co., Ltd., Ellore, represented *by Mothey Gangaraju Garu, Secretary and Treasurer*—Plaintiff-Petitioner.

v.

The Municipal Council, Vizianagram—Defendant-Respondent.

Civil Revision Petition No. 872 of 1923, decided on 27th July 1925, from the decree of the District Munsif, Vizianagram, in Small Cause Suit No. 966 of 1922.

Madras District Municipalities Act (V of 1920), S. 354—Municipal Council cannot impose unauthorised charges—Local bodies must strictly fulfil statutory obligations imposed.

A Municipal Council cannot impose charges not under the authority of the Act, and then, when a

suit is filed for their recovery, allot the money thus unlawfully obtained to some demand alleged to be under the authority of the Act and plead that no suit lies. Large powers are conferred upon these local bodies upon the strict understanding that they observe the conditions of the statute to which they owe their origin, and to allow them levy taxes upon private persons without such strict compliance would be a grave scandal. At any rate the Courts have no power to relieve local bodies from the statutory obligations imposed upon them. [P. 155, Col. 2.]

A Municipality levied a certain sum of money as profession tax which was paid under protest and an appeal was preferred to the Council on the ground that the Company had been exempted from payment of profession tax by a decree of Court. Failing to get any reply, the Company after giving the usual notice of suit under the District Municipalities Act filed a suit for refund of the amount paid.

***Held* that the suit was maintainable.**

T. Ramachandra Rao—for Petitioner.

V. Suryanarayana—for Respondent.

Judgment:—The petitioner seeks to revise the decree of the Court of the District Munsif of Vizianagram in S.C.S. No. 966 of 1922.

The petitioner is the Krishna Jute Cotton Mills Co., Ltd. On 31st March, 1922, it was served with a demand notice by the counter-petitioner, the Municipal Council of Vizianagram, for profession tax from 1st October, 1921 to 31st March, 1922, assessed at Rs. 125. The petitioner paid and preferred the appeal Ex. A to the Council pointing out that the company had been decreed exempt from profession tax in O. S. No. 521 of 1919.

The petitioner, receiving no reply to this appeal, gave the Council notice of suit, Ex. B, dated 28th August, 1922. No reply was received, and on 7th October, 1922 the petitioner filed the suit under revision. On the next day a Memorandum Ex. D was drafted in the Municipal Office, which was signed on 17th October, 1922, by the Chairman. The petitioner was informed that his appeal against the companies tax had been read, and that the proper assessment should have been Rs. 75 and Rs. 50 would be refunded.

On 6th November, 1922, the Council filed its written statement in the suit. It claims that the suit is barred under section 354 of Madras Act V of 1920; that the plaintiff had not been charged profession tax, but had been assessed, under clause 16 of Schedule IV, of Companies Tax and when plaintiff paid he had been given a receipt on the form intended for profession tax. Nevertheless plaintiff was bound to pay profession tax.

At the trial the defendant Council did not, it seems, attempt to prove that the tax had been originally levied as companies tax, and only receipted as profession tax on the wrong form. It was conceded that the tax was levied as profession tax, and the only question raised was whether the Council's retention of Rs. 75 out of the sum illegally levied could be justified on the ground that it had been allotted to companies tax and was therefore imposed under the authority of the Act within the mischief of section 354, and so irrecoverable by suit.

It is very doubtful if this defence is open to the Council. A Municipal Council cannot impose charges not under the authority of the Act, and then, when a suit is filed for their recovery, allot the money thus unlawfully obtained to some demand alleged to be under the authority of the Act and plead that no suit lies. But in the present suit the plea has no validity for the demand to which the collection has now been allotted is as illegal as that under which it was originally made.

A Council may levy a tax on companies [section 78 (1) (*b*)] if it publishes a notice of its intention [section 78 (3)] and then a notification in the District Gazette [section 80] and if the Chairman publishes that notification, companies shall be liable to pay the tax [section 92]. Only on such terms can a Council impose such a charge under the authority of the Act. Admittedly the Council published no notification under section 80 but the learned District Munsif finds that a Council my dispense with that notification. This finding is a misinterpre tation of section 80 which is mandatory and a perusal of section 92 ought to have made the matter perfectly clear. It is no use finding that the Council has "substantially complied" with the statute. Large powers are conferred upon these local bodies, upon the strict understanding that they observe the conditions of the statute to which they owe their origin, and to allow them to levy taxes upon private persons without such strict compliance would be a grave scandal. At any rate the Courts have no power to relieve local bodies from the statutory obligations imposed upon them.

I find that the levy of profession tax and the levy of companies tax were not made

under the authority of the Act. Plaintiff is entitled to sue, and to have a decree for a refund of the money sued for, with costs.

The decree of the lower Court is reversed and the petition allowed with costs.

Petition allowed.

A.I.R. 1926 Madras 154 (1).

JACKSON, J.

In re Khazi Muhammad Khan and others—Petitioners.

Criminal Revision No. 547 of 1925 and Criminal Revision Petition No. 461 of 1925, decided on 25th August, 1925, from the order of the Joint Magistrate, Hosur, dated 30th April, 1925.

Crim. Pro. Code, S. 147—No revision lies from finding of fact—Remedy is by Civil suit.

Finding of fact under S. 147 cannot be traversed by revisional proceedings, and as indicated by Sub-s. (4) the aggrieved party should seek his remedy in the Civil Court. [P. 154, Col. 1.]

V. C. Seshachariar—for Petitioners.

Judgment:—Petitioners seek to revise the order of the Sub-Divisional Magistrate, Hosur, directing them under section 147, Criminal Procedure Code not to interfere with bull-play on a certain site on each recurring Pongal. The point for determination was whether this right existed, and whether it had been exercised on the last occasion before the institution of the inquiry.

The Sub-Divisional Magistrate finds that the evidence of the interested parties Hindus on one side, and Mahomedans on the other, is directly conflicting but the Sub-Inspector is comparatively disinterested. He entirely supports the case of the Hindus, and says that bull-play has always taken place in the vacant site. On examining the site itself and the documents adduced by either side, the Sub-Divisional Magistrate comes to the same conclusion. That finding of fact cannot be traversed by revisional proceedings; and, as clearly indicated by sub-section (4) of section 147, the aggrieved party should seek his remedy in the Civil Court, and nothing is gained by protracting Magisterial proceedings which are intended to prevent an immediate breach of the peace. Neither party contended under section 145 (5), that no dispute existed.

The fact that the Mahomedans had built drains on the site would not necessarily imply that there was no right to bull-play. The order for costs under section 148 (3) follows the ordinary rule that costs follow result, but the learned Magistrate has not yet assessed them, at least, not in this order. When the amount is ascertained, the petitioners should be given a hearing as to what may be fairly levied.

The petition is dismissed.

Petition dismissed.

A.I.R. 1926 Madras 154 (2).

PHILLIPS, J.

Devaguptapu Narasimham and others—Plaintiffs-Appellants.

v.

Devaguptapu Chendramma and others—Defendants-Respondents.

Second Appeal No. 1574 of 1922, decided on 30th April, 1925, from the decree of the Additional Sub-Judge, Vizagapatam, in A.S. No. 112 of 1922.

Inam—Grant—Construction—The words "Inam is confirmed to you and your assigns" secure the grant for the heirs.

The words in an Inam title-deed, "The Inam is now confirmed to you, your representatives and assigns, to hold or dispose of, as you or they think proper", are not mere words of limitation but are effective to secure the grant to the heirs of the deceased grantee. [P. 155, Col. 1.]

C. Rama Rao—for Appellants.

Y. Suryanarayana—for Respondents.

Judgment:—The plaintiffs are the nearest heirs of one Venkataraju in whose favour (with others) three inam title deeds were issued in 1906 and 1907. Both the lower Courts have found that as Venkataraju was dead on the day on which these title deeds were issued he obtained no right to the suit property, and therefore the plaintiffs as his heirs have got no right.

The title deed runs as follows:—

"Title deed granted to (1) Devaguptapu Subbarayudu, (2) Devaguptapu Chendramma, (3) Devaguptapu Venkataraju and four others as per register,"

and it recites

"The inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper."

The question at issue is whether this is a grant to Venkataraju and his representa-

tives and assigns, or whether these words are words of mere limitation as contended for by the respondent. The treatment of such words as being words of limitation is a legal technicality and the question is, whether the Government in issuing this deed intended to adopt this technicality or whether they intended to use the words in their ordinary meaning. The words are, no doubt, ambiguous. Therefore, I think, it is relevant to refer to the Board's Standing Orders, Order 52 (2) which deals with this question. There it is laid down :—

"In case of the death of the holder of an enfranchised inam before the actual delivery to him of the title-deed, the deed should, in the first place, be entrusted to the Revenue Authorities for safe custody. The Collector should make inquiry as to who is the party entitled, as heir of the deceased, to receive the deed, and is enjoined to hand it over, exactly as received, to the heir of the deceased."

If these words were words of mere limitation, the grant to the deceased would fail, and if it was intended to give a fresh grant to the heirs, it would be necessary to issue a grant afresh in their name. Inasmuch as the Government have declared that that is not the procedure to be adopted, I think it is clear that these words are not mere words of limitation but are effective to secure the grant to the heirs of the deceased grantee, which is the intention of Government as expressed in the above Board's Standing Order. That being so, the plaintiffs are entitled to the properties covered by the grant.

A question is raised by the respondent as to the non-joinder of parties, but under Order 1, rule, 13, Civil Procedure Code, this should have been raised in the Trial Court and must now be deemed to have been waived.

As the lower appellate Court has not recorded any finding on the other issues in this suit, this decree must be set aside and the appeal remanded for disposal on the other issues. Costs will abide the result.

Stamp fee on the appeal memo. will be refunded to the appellant.

Case remanded.

A.I.R. 1926 Madras 155.

COUTTS TROTTER, C.J. AND WALLACE, J.

Chockalingam Pillai and another—Petitioners-Appellants.

v.

P. K. P. S. Pichappa Chettiar—Respondent.

Appeal No. 109 of 1925, Civil Revision Petition No. 208 of 1925 and Civil Miscellaneous Petition No. 1170 of 1925 decided on 3rd April 1925 against the Order of the Additional Sub-Judge, Ramnad, in I.A. No. 42 of 1925.

(a) *Civ. Pro. Code., O. 40, r. 1—Suit for Specific performance of contract of simple mortgage —Receiver cannot be appointed.*

A Receiver cannot be appointed in a suit for specific performance of a contract of simple mortgage. [P. 156, Col. 1.]

(b) *Civ. Pro. Code., O. 6, r. 17—Contract to sell—Specific performance—Amendment may be allowed to include a relief of possession.*

It is open to the Court in a suit for specific performance of sale, also to give a decree for possession and therefore in a suit for specific performance only, the plaintiff may be allowed to amend his plaint to include a relief as to possession. [P. 156, Col. 1.]

T. R. Ramachandra Aiyar and K. S. Venkataramani—for Appellants.

K. R. Venkatarama Aiyar (of the Madura Bar) and *Watrap S. Subrahmania Aiyar*—for Respondents.

Judgment :—This appeal is against the order of the Additional Subordinate Judge of Ramnad at Madura appointing a Receiver in respect of the A Schedule properties in the suit which, according to the plaintiff's case, the defendants 1 to 3 had contracted to sell to him, and of the B Schedule properties in the plaint which, according to the plaintiff, the defendants 1 to 3 had agreed to mortgage to him by simple mortgage. The suit is a suit for specific performance *inter alia* of this contract to sell and to execute a simple mortgage. Mr. T. R. Ramachandrier for the appellant contends that at any rate so far as the B Schedule properties are concerned, it is not open to the lower Court to appoint a Receiver, the point being that the lower Court cannot by way of Receivership do what it would not be entitled to do even by way of decree. At the highest, the plaintiff is entitled, if he succeeds, only to a simple mortgage on these properties, and

having obtained this simple mortgage he could not immediately sue for possession. He is not entitled on the simple mortgage to possession. The most he could do is to enforce a sale on foot of the mortgage. We think that this argument is sound and that the lower Court was not justified in appointing a Receiver so far as the B Schedule properties are concerned.

So far as the A Schedule properties are concerned, Mr. T. R. Ramachandrier has also argued that the lower Court has exercised its discretion improperly in appointing a Receiver in respect of properties of which the plaintiff, in the first instance at least, is only asking for specific performance of sale and not for possession. Subsequently, however, the plaintiff was allowed to amend his plaint and put forward a prayer for possession of these properties also. A Civil Revision Petition has been filed here against this amendment of the plaint and we deal with this now. Various rulings of this Court have been quoted to us, as also Form 47 of the first Schedule to the Civil Procedure Code, which set out that it is open to the Court in a suit for specific performance of sale, also to give a decree for possession. We are not therefore prepared to say that the lower Court exercised its discretion wrongly in permitting the amendment of the plaint and allowing the plaintiff to add a prayer for possession of the A Schedule properties. That being so, the plaintiff's prayer for possession will stand, and in these circumstances we do not think we can say the lower Court exercised its discretion wrongly when it appointed a Receiver in respect of these properties, a decree for possession of which the plaintiff would be entitled to if he succeeds.

In these circumstances we dismiss C.R.P. No. 208 of 1925. No order as to costs.

As regards C.M.A. No. 109, the lower Court's order is set aside so far as the B Schedule properties are concerned and the Receiver, if he has taken over charge of these properties must be discharged of it. No order as to costs.

C. M. A. partly allowed.

C. R. P. dismissed.

A.I.R 1926 Madras 156.

DEVADOSS, J.

Nallakakkan Ambalam—Plaintiff-Appellant.

v.

Sri Kallalagar Devasthanam—Defendant-Respondent.

Second Appeal No. 1642 of 1922, decided on 24th April 1925, against the decree of the District Judge, Madura, in A. S. No. 146 of 1921.

(a) *Madras Estates Land Act (1908), S. 46 —Landholder must also be owner to be able to confer occupancy rights.*

In order to enable a ryot to get occupancy right under section 46 the act must be the act of the landholder who is also the owner of the estate, though under the definition of the term "landholder" one need not be the owner of the estate in order to be landholder as in section 3. [P. 157, Col. 1.]

(b) *Trust—Manager—Person improperly appointed in place of another validly placed, cannot represent the trust.*

When there is the proper manager or trustee, a person who is appointed improperly in his place cannot be the real trustee and cannot represent the estate. [P. 157, Col. 2.]

T. M. Ramaswami Aiyar—for Appellant.

A. Srinivasa Aiyangar—for Respondent.

Judgment:—The first point urged in this second appeal is that the District Judge was not justified in finding that the land in dispute was old waste on the ground that the defendant Devasthanam did not raise the question specifically in the written statement. No doubt the written statement does not raise the question but there is evidence on record to justify the finding of the learned District Judge and this being a question of fact I am bound by the finding. Even though the point was not specifically raised in the written statement, in the pleading or in issues, yet both the parties seem to have adduced evidence as regards that and the matter was evidently argued before the learned Judge and he came to the conclusion that the land was old waste. That being so I do not think the plaintiff has been prejudiced by the finding of the Judge.

The next point urged by Mr. Ramaswami Aiyar is that the plaintiff acquired occupancy right by reason of section 46 of the Estates Land Act. His contention is that one Sundararama Sastri was the trustee at

the time and he took a Nuzzar of Rs. 175 and granted the land to the plaintiff with occupancy right. There is nothing specific in the evidence to show that Sundararama Sastri gave occupancy right. Granting for the sake of argument that he did intend to give occupancy right to the plaintiff, the question is whether he had the right to dispose of the Devasthanam land in a manner prejudicial to the interest of the Devasthanam. Sundararama Sastri happened to be the Acting Manager on account of the suspension of the Manager, one Anantakrishna Naidu. Anantakrishna Naidu filed a suit contesting the validity of the suspension order and the suspension of Anantakrishna Naidu was held to be illegal by the Civil Courts. During the pendency of the proceedings in the Civil Court, Sundararama Sastri placed the plaintiff in possession of the plaint land. That he received a Nuzzar is not seriously disputed and though the defendant does not admit that proper pattahs were tendered, yet there is the fact that some pattahs, Ex. A series, were tendered to the plaintiff. But the real question is whether Sundararama Sastri had the right to grant occupancy right over the Devasthanam lands in favour of the plaintiff. Under section 46 the landlord could confer occupancy right in respect of non-ryoti land on receiving 2½ times the rent. But clause 5 of section 46 says : "The sums payable under this section for the acquisition of the occupancy right shall be paid to the landholder who is the owner of the estate or part thereof and any application or proceeding under this section shall be made only to or against such landholder." Though the term 'landholder' may, for certain purposes, include Sundararama Sastri who was collecting the rents and who was recognised by the Collector and the Board, yet in order to enable the ryot to get occupancy right under section 46 the act must be the act of the landholder who is also the owner of the estate. Under the definition of the term 'landholder' one need not be the owner of the estate in order to be landholder for a person authorised to collect rents of the whole or portion of the estate by virtue of any transfer from the owner is landholder within the meaning of the term 'landholder' used in section 3. But there are certain things which can be done only by the landholder who is also the owner. Section 200 is an example of this. I therefore hold that though Sundararama Sastri was landholder for certain purposes he was not the owner of the estate and he could not therefore have given occupancy right to the plaintiff. The argument of Mr. Ramaswamy Aiyar is that somebody must represent the Devasthanam and at that time Sundararama Sastri represented the Devasthanam and therefore he must be taken to be the owner. The contention overlooks the fact that Sundararama Sastri could not properly represent the Devasthanam as its Manager for the time being, as the suspension of Anantakrishna Naidu was held to be invalid by the Civil Courts. When there is the proper manager or trustee, a person who is appointed improperly in his place cannot be the real trustee and cannot represent the estate. That being so, the act of Sundararama Sastri in favour of the plaintiff could not confer any right as against the Devasthanam. In the result the appeal is dismissed with costs.

Appeal dismissed.

A.I.R. 1926 Madras 157.

PHILLIPS, J.

Sree Rajah Vasireddi Sree Chandra Mouleswara Prasad Bahadur Manni-Sultan Zamindar Garu (Muktiala Estate) —Plaintiff-Appellant

v.

Yadavalli Kameswara Somayajulu and others—Defendants-Respondents.

Second Appeal No. 1867 of 1923, decided on 27th August 1925, against the decree of the District Judge, Kistna at Masulipatam, dated 5th March 1923 in A. S. No. 119 of 1922.

Madras Estates Lands Act (1908), S. 151—14 out of 16 acres sold for building purposes—Value of holding is materially impaired.

Where 14 acres out of 15 and odd acres of land leased for agricultural purposes is sold by the tenant by selling 14 acres out of 15·65 acres for building purposes so that the tenants in effect converted the agricultural land into building sites.

Held that they have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes. [P. 158, Col. 2.]

A. Venkatachalam—for Appellant.

K. V. Reddi—for Respondent.

Judgment:—The plaintiff (appellant) leased 15 acres 65 cents of dry land to the

predecessor of defendants 1 to 4 in 1907 for a period of 30 years. Defendants 1 to 4 have now sold 14 acres of land to defendants 5 to 10 and the 5th defendant has begun the erection of a building on 100 square yards, has planted about 25 or 30 trees and fenced an acre of this land and sunk a well. The plaintiff accordingly brings this suit under section 151 of the Estates Land Act for the ejectment of defendants 1 to 4. The sale deed of the 14 acres is not filed, but the 8th defendant who is the only defendant examined in the suit admits that the 14 acres were purchased for about Rs. 1,800 and that the land has been purchased for building purposes, cattle shed and storage of hay. Although therefore the 5th defendant alone has begun building on the land, it is clear that defendants 5 to 10 have all purchased the land for building purposes and defendants 1 to 4 have executed the sale-deed for that purpose. Both the lower Courts have found that the erection of this building by 5th defendant on two cents of land and the planting of fruit trees and the sinking of the well have not materially impaired the value of the holding for agricultural purposes.

It is contended for the respondent on the authority of *Hari Mohan Misser* v. *Surendra Narayan Singh* (1) that this is a finding of fact which is binding on me in second appeal, but his contention cannot be upheld in the present case, for section 151 contemplates a suit against the ryot for materially impairing the value of the holding. In this case the ryot is defendants 1 to 4 between whom alone and the plaintiff there is the relation of landlord and tenant. We are not concerned here with the action of 5th defendant. Except in so far as it is in pursuance of the act of defendants 1 to 4 the sale to defendants 5 to 10 is not binding on the plaintiff and inasmuch as each of the vendors is only entitled to 2⅓ acres, the landlord can object to the sub-division in less than 5 acres of dry land. When we come to consider whether the tenants have materially impaired the value of the holding we have to realise what it is that the tenants have done. The land is leased for agricultural purposes and by selling 14 acres out of 15·65 acres for building purposes the tenants have in effect converted the agricultural land into building sites. It is true that at present only a small extent of the land has been actually built upon but defendants 1 to 4 have agreed to buildings being erected upon the whole 14 acres and have precluded themselves from raising any objection thereto. When we therefore consider the holding as an agricultural holding there only remains 1 acre 65 cents of agricultural land. If the ryots wished to cultivate the whole they could not do so because of their contract with defendants 5 to 10 under which the nature of the holding is entirely altered and in this view it appears to me that they have materially impaired the value of the holding for agricultural purposes and rendered it substantially unfit for such purposes.

The plaintiff is accordingly entitled to a decree for ejectment.

Plaintiff has also claimed compensation. It cannot be suggested that the erection of this small building has materially injured the plaintiff and it would be very difficult to fix the amount of compensation. It is however recognised by Napier, J. in *Sankaralinga Moopanar* v. *Subramania Pillai* (2), that some compensation would be admissible as otherwise ryots will be enabled to convert agricultural land into town plots and take the whole increased value to themselves, but as in this case the buildings have not yet been erected over any considerable portion of the holding I do not consider that any compensation need be paid.

The Second Appeal is allowed and there will be a decree for ejectment with costs throughout.

Appeal dismissed.

(1) (1907) 34 Cal. 718=34 I.A. 133=11 C.W.N. 794=6 C.L.J. 19=9 Bom. L.R. 750=17 M.L.J. 861=2 M.L.T. 399 (P.C.).

(2) (1915) 29 M.L.J. 514=31 I.C. 273.

***A.I.R. 1926 Madras 159.**

JACKSON, J.

Kaman Mada and others—Defendants-Petitioners

v.

Malli and another—Plaintiff-Respondents.

Civil Revision Petition 913 of 1923, decided on 15th July, 1925, against the decree of the District Munsiff of Kollegal, dated 5th March, 1923, in Original Suit No. 153 of 1922.

Civ. Pro. Code, O. 33, r. 8 —Suit should be deemed to be instituted at the date of the presentation of the application for leave to sue as pauper and Court-fee is payable on that date.

In the case of a pauper, a suit is instituted when his application for leave to sue as pauper is made. The Court-fee is payable from the date of the presentation of the application and it is exactly that fee to which the Court must address its mind when it considers the pauper application. (2 All. 241, (P.C.), *Appl.*) [P. 159, Col. 2.]

O. S. Venkatachariar—for Petitioners.

Government Pleader—for Respondents.

Judgment:—The petitioners seek for revision of the decree of the District Munsif, Kollegal, in O. S. No. 153 of 1922 on the following ground:—

The petitioners are defendants and judgment-debtors in a pauper suit. In assessing the costs the Court has ordered them to pay Rs. 175 as Court-fee on the plaint which would be correct if the old Court Fees Act were applicable. But if on the day the plaint was filed the new Act was applicable, then the fee chargeable on the value of one year's maintenance would be considerably less.

The point for determination is, therefore, when was the plaint filed.

The application to sue as a pauper was presented under Order 33, rule 3 on 23rd December, 1921, when the old Act was in force. The applicant was allowed to sue as a pauper under Order 33, rule 7 on 30th June, 1922, when the new Act was in force. The application was then numbered and registered and deemed the plaint in the suit under Order 33, rule 8. The petitioners plead that it would only be so deemed for the purpose of levying the Court-fee on the date when it was numbered and registered. The counter-petitioner contends that it must be deemed to have been filed as a plaint from the date of presentation.

It is urged that until the numbering and registering there is no filing as contemplated by section 6 of the Court Fees Act. I do not think that anything turns on the technicality of the word "file." If for any purposes the application can rank as a plaint from the date of presentation, then it must be regarded as filed from the date. Now the Limitation Act lays down, (section 3), that in the case of a pauper, a suit is instituted when is application for leave to sue as pauper his made. That must mean that from the date of his application it is assumed that his plaint is filed; it cannot mean that limitation ceases to run by operation of an unfiled plaint. The language used by the Judicial Committee in *Stuart Skinner* v. *William Orde* (1) leaves no room for doubt in the matter. On page 250: "The petition should operate as a plaint without the necessity of filing a new case. The petition is filed and proceedings are taken."

The Limitation Act is in *pari materia* with the Code of Civil Procedure, and the stipulation in section 3 of the Act must be read along with Order 33, rule 8 of the Code. The application shall be deemed the plaint in the suit from the date when the application is made. That being so it would be anomalous to have a plaint in the suit for which no Court-fee was payable till a later date. The Court-fee is payable from the date of the presentation of the application and it is exactly that fee to which the Court must address its mind when it considers the pauper application. It considers the fee on the date of presentation and whether the applicant can afford to pay it, not what the fee may be in future if ever it should become payable.

For the above reasons I see no cause to revise the order of the lower Court.

The petition is dismissed with costs.

Petition dismissed.

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(1) (1870) 2 All. 241=6 I.A. 126=4 C.L.R. 331=3 Suther 637=4 Sar. 31 (P.C.).

*** A.I.R. 1926 Madras 160.**

PHILLIPS AND KRISHNAN, JJ.

P. M. A. Muthia Chettiar and others—6th Defendant-Appellants

v.

Venkatasubbarayulu Naidu and others—*Plaintiffs* and *Defendants 1, 3 to 5, 9 to 21, 24 and 25*—Respondents.

Appeal No. 389 of 1919 decided on 8th January, 1925, against the decree of the Court of the Temporary Sub Judge of Vellore, in O.S. No. 18 of 1918.

* *Limitation Act, Sch. I, Art. 132—Option to enforce a default clause contained in the mortgage-deed being left with the mortgagee—Period of limitation begins to run from the time when money became payable and not from the date of default.*

Where there was a clause in the mortgage deed that in default of payment of interest, the whole amount, principal and interest, upto that date should become due and where on a construction of the language of the document it was clear that the option was reserved with the mortgagee to enforce or not the default clause, at his pleasure.

Held that the period of limitation started to run not on the date of default but on the date when the money became due, under the terms of the contract, under Art. 132 of the Limitation Act. 9 L.W. 479; (1918) M.W.N. 586; (1921) M.W.N. 384; A.I.R. 1925 Mad. 150; *Foll.* 1922 P.C. 412; 1922 P.C. 23; 37 All. 400 and 43 All. 671, *Not Foll.*

A. Ramachandra Aiyar—for Appellants.

A. Krishnaswami Aiyar, T. Kumaraswamiah, S. Ramaswami Aiyar and *S. Krishnaswami Aiyangar*—for Respondents.

Judgment:—The only question that arises in this appeal is one of limitation. This suit is brought on a mortgage deed, dated 20th September, 1890, in 1916, the mortgage money not being payable under the deed until 1904. There is also a clause in the deed that in default of payment of interest, the whole amount, principal and interest, up to that date should become due. It is argued before us, in the first place, that this default clause leaves no option to the mortgagee as to whether he shall or shall not enforce it; but on a construction of the language of the document, which is translated in this Court as follows:—"If I should fail to pay * * * you shall be at liberty to recover", it is clear that the option is reserved with the mortgagee to enforce this clause, at his pleasure. That being so, the question is whether the period of limitation started to run on the date of default, or when the money became due, under the terms of the main contract, namely, 1904, under Art. 132 of the Limitation Act. The view that the money becomes due, within the meaning of this article, at the date of the first default, has been adopted by the Allahabad High Court, in *Gaya Din* v. *Jhumman Lal* (1) and that decision has been followed in two subsequent cases in *Nathi* v. *Tursi* (2) and *Collector of Jaunpur* v. *Jamna Prasad* (3). The case in *Gaya Din* v. *Jhumman Lal* (1) has been considered by this Court in *Narna* v. *Ammani Amma* (4), in which a division Bench took a view, different from that of the Allahabad High Court and that view has subsequently been followed, in *Ramadh Bibi Ammal* v. *Kandasami Pillai* (5) *Lachakkammal* v. *Sokkayya Naick* (6) *Kaliappa Nadar* v. *Sami Iyar* (7) and *Appayya* v. *Venkataramayya* (8) and to one or other of those cases we both have been parties. There is no definite pronouncement of the Privy Council on this point, although there is a dictum in support of the view taken in this Court in *Juneswar Dass* v. *Mahabeer Singh* (9); the other cases of the Privy Council cited before us namely *Kishan Narain* v. *Palamal* (10) and *Muhammad Hafiz* v. *Muhammad Zakariya* (11) are decisions under Order 2, rule 2 of the Code of Civil Procedure, and are not authorities on this point. In this state of affairs, we prefer to follow the course of decisions in this Court, in preference to the view of the Allahabad High Court: and consequently, this appeal must fail and is dismissed with costs of plaintiff, and 3rd respondent.

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(1) (1915) 37 All. 400=28 I.C. 910=13 A.L.J. 510.
(2) (1921) 43 All. 671=19 A.L.J. 712=63 I.C. 886.
(3) A.I.R. 1922 All. 37=44 All. 360=20 A.L.J. 140.
(4) (1916) 39 Mad. 981=4 L.W. 77=20 M.L.T. 174=35 I.C. 418=(1916) 2 M.W.N. 125=31 M.L.J. 865.
(5) (1919) 9 L.W. 479=25 M.L.T. 154=51 I.C. 724=(1919) M.W.N. 82.
(6) (1918) M.W.N. 586=48 I.C. 191.
(7) (1921) M.W.N. 384=62 I.C. 762.
(8) A.I.R. 1925 Mad. 150=20 M.L.W. 620.
(9) (1875) 1 Cal. 163=3 I.A. 1=25 W.R. 84=3 Sar. 581 (P.C.)
(10) A.I.R. 1922 P.C. 412 (P.C.)
(11) A.I.R. 1922 P.C. 23=44 All. 121=49 I.A. 9=3 P.L.T. 279=24 Bom.L.R. 341=47 M.L.J. 248=15 M.L.W. 377=20 A.L.J. 17=26 C.W.N. 297=35 C.L.J. 126=(1922) M.W.N. 89=30 M.L.T. 224=1 P.W.R. 1922 (P.C.).

In this view, it is unnecessary to decide the further point upon which the lower Court relies, namely, that the limitation was saved by reason of the acknowledgment of the debt.

The balance of Rs. 50, due to the Court-guardian will be paid by the appellant.

Appeal dismissed.

A.I.R. 1926 Madras 161.

PHILLIPS, J.

Popakannu Erruppa Reddi and others —Appellants

v.

Mutcheli Peddamuniswami Setti and others—Respondents.

Second Appeal No. 495 of 1923, decided on 13th July, 1925, against a decree of the Sub-Judge, Chittoor, in A. S. No. 373 of 1921.

Madras Estates Land Act (1908), S. 131—Suit in Civil Court for relief on the ground of fraud is not barred.

The right to set aside a sale conferred by S. 131 of the Estates Land Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. (26 M.L.J. 36, *Foll.*) [P. 161, Col. 2.]

A. Ramaswawi Aiyar—for Appellants.

N. Chandrasekhara Aiyar—for Respondents.

Judgment :—The factsf cund in this case which, I must accept are as follows: —The appellants were tenants under the plaintiffs of the suit lands. During the tenancy they defaulted in the payment of the kist due to the superior landlord and the lands were brought to sale and purchased, some by the 6th defendant himself, and some by the 6th defendant's father-in-law, Lakshmana Reddi. Both the lower Courts have found that these sales were brought about by the fraud of the defendants and have accordingly given a decree for recovery of the lands from the defendants with arrears of rent.

In appeal here it is argued that this suit should have been brought in a Revenue Court inasmuch as it was necessary for the plaintiffs to set aside the revenue sale. Reliance is placed on the ruling in *Ramanathan* v. *Ramaswami* (1). That ruling, however, very clearly and carefully differentiates the case reported in *Gouse Moideen Sahib* v. *Muthialu Chettiar* (2), where it was held that the right to set aside a sale conferred by section 131 of the Estates Land Act does not take away the right of suit in the ordinary Civil Courts to set aside the sale on the ground of fraud. Here we are concerned with fraud; consequently, in accordance with the principle laid down in *Gouse Moideen Sahib* v. *Muthialu Chettiar* (2), I hold that it is not necessary to bring this suit in a Revenue Court. If the defendants (appellants) were allowed to take advantage of this sale which they brought about solely to defraud the plaintiffs of their rights, it would be giving them the advantage of their own fraud. That is a course which no Court would deliberately pursue. This objection, therefore, fails.

It is also argued that Lakshmana Reddi should have been made a party to this suit. The plaintiffs did not choose to make him a party and of course the decree will not be binding upon him. He is a very close relation of the defendants. He actually came to Court and produced documents on their behalf, but he did not ask to be impleaded, nor did he give evidence, nor did the defendants ask that he should be impleaded as a party. The 6th defendant merely said that the suit should be dismissed because he was not a party. I agree with the learned Subordinate Judge and the District Munsif that it was not necessary for the plaintiffs to make him a party, provided that the plaintiffs are satisfied with a decree which is judicially not binding upon him. This objection also fails.

In view of the concurrent findings of facts of both the lower Courts the decree appealed against is right. The second appeal is dismissed with costs.

Appeal dismissed.

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(1) (1914) 39 Mad. 60=27 I.C. 409.

(2) (1914) 26 M.L.J. 36=14 M.L.T. 528=21 I.C 762=(1914) M.W.N. 55.

* A.I.R. 1926 Madras 162.

PHILLIPS AND KRISHNAN, JJ.

Arumuga Thambiran and others—Plaintiffs 1 to 4, and a supplemental plaintiff—Appellants

v.

Namasivaya Pandara Sannadhi and others—Petitioners-Respondents.

Appeals Nos. 43 and 44 of 1921, decided on 26th February, 1925, against the decrees of the Court of the Sub-Judge of Kumbakonam in O. S. Nos. 71 and 72 of 1918.

(a) *Civ. Pro. Code, O. 22, r. 1—Suit for removal of trustee for breach and framing of scheme—Defendant dying pending suit—Suit as regards scheme does not abate—Civ. Pro. Code, S. 92.*

In a suit under S. 92, Civ. Pro. Code, for removal of the defendant-Pandara Sannadhi and framing a scheme the death of the defendant pending the suit does not cause the whole suit to abate. In order to justify a suit for a scheme under S. 92, it is necessary for the plaintiffs to allege a breach of trust and a prayer for a scheme is therefore not ancillary to a prayer for the removal of the trustee and the cause of action survives against therepresentative of the deceased. [P. 162, Col. 2, and P. 163, Col. 1].

(b) *Civ. Pro. Code, S. 11 — Suit under S. 92, Civ. Pro. Code—Death of defendant—Application to appoint receiver—Court's remarks in proceeding on application about abatement of suit will not be* res judicata *in appeal from the order holding suit as abated.*

In an appeal against an order, declaring that the suit abated on account of the death of the defendant also in respect of the prayer for a scheme for management under S. 92, an application was made for appointing a receiver. In the course of the hearing, the Court remarked that it was doubtful if on the plaint as it stood, the suit had not abated. At the hearing of the appeal itself from the order:

Held, that the order on the receiver application was not *res judicata* because, the decision was not necessary, and that there was really no decision on the question involved in the appeal. (6 All. 269; 48 Cal. 499; A.I.R. 1924 P.C. 202, *Dist*, [P. 163, Col. 2.]

(c) *Madras Religious Endowments Act (I of 1925) proceedings instituted before the Act—Act does not apply.*

There is nothing in that Act, which gives retrospective effect in respect of proceedings already instituted. [P. 163, Col. 2.]

S. Srinivasa Ayyangar, S. Muthia Mudaliar and *A. C. Shanmuga Nainar*—for Appellants.

T. Rangachariar, K. S. Jayarama Ayyar, S. V. Narayana Ayyar, R. Sadagopachariar and *V. N. Venkatavaradachariar*—for Respondents.

Judgment:—The plaintiffs, in this case, have brought their suits under section 92 of the Code of Civil Procedure for the removal of the defendant from the office of Pandara Sannadhi, and for the framing of a scheme, in relation to the mutt. The Advocate-General has also joined the suit, as a supplemental plaintiff. After the institution of the suit and before it was tried, the defendant died, and the Subordinate Judge has held that owing to the defendant's death, the suit has abated and cannot be revived, on the ground that it is a personal action against the defendant and that the second relief in the suit, namely, that of the framing of the scheme, is an ancillary relief, dependant on the removal of the defendant from his office of trustee. Against this decision, the plaintiffs have appealed; and it is contended in the appeal that as two reliefs are claimed, namely, the removal of the defendant and the framing of the scheme, which are distinct and separate reliefs, the suit may well be prosecuted with reference to the second relief, namely, the framing of the scheme. It is pointed out that in a very similar case it was held by the Privy Council that the cause of action did survive: *Raja Anand Rao* v. *Ramados Daduram* (1). Apart from this authority, we have also a case in this Court, *Sivagnana Desika Gnanasambhanda Pandarasannadhi* v. *Advocate-General of Madras* (2), in which the same conclusion was arrived at. Although the plaint is mainly taken up with allegations of misconduct, on the part of the respondents, and the prayer for the scheme is only mentioned at the end of the plaint, without giving any special reasons why the scheme is necessary, yet, when we come to read under section 92 of the Code of Civil Procedure, it is quite clear that in order to provide a cause of action for a scheme suit, there must be an allegation of a breach of trust, or it must, otherwise be necessary to obtain directions of the Court. In order, therefore, to justify this suit for a scheme, it is necessary for the plaintiffs to allege a breach of trust and it is very difficult to see how this second relief can be deemed to be ancillary to the removal of the defendant. It is absurd to suppose that the plaintiffs

(1) (1921) 48 Cal. 493=48 I. A. 12=13 M.L.W. 318=(1921) M.W.N. 24=17 N.L.R. 37=6 I. C. 737=25 C.W.N. 794 (P.C.).

(2) (1915) 2 L. W. 148=28 M.L.J. 174=27 I. C. 874=(1915) M.W.N. 185.

and the Advocate-General have merely brought this suit, to satisfy a vindictive spite against the defendant and that that is their sole cause of action and, consequently, that the rest of the suit must fail, as the defendant can no longer be held responsible. The two reliefs are distinct; the second relief is to a certain extent dependant on the first, because it is necessary to allege a breach of trust in order to constitute the necessary cause of action.

Mr. Rangachariar for the respondent has not referred us to any authority against those, cited above; and we are satisfied that the cause of action thus survived against the representative of the deceased defendant, for the purpose of framing a scheme. We may also observe that, in addition to the prayer for the scheme generally, there is a prayer for directions, as to the utilisation of the surplus funds of the institution, which are alleged to be very large indeed.

A further objection is taken for the respondents that this question is *res judicata*, in that it has already been decided by a Bench of this Court, which disposed of an application for the appointment of a receiver in this suit. No doubt that Bench in its judgment says:

> "The plaint before us deals only with the misconduct of the deceased Pandara Sannadhi and does not refer to the absence of any means of preventing it";

and again,

> "in paragraph 21, where the necessity for a scheme is suggested, it is referred to, only in connection with the removal of the then incumbant, not as independently justifiable on its merits."

It is contended that this judgment has decided the present appeal. This appeal was not before that Bench, nor do we think that it purported to decide it. Mr. Rangachariar relies on three decisions of the Privy Council, reported in *Ram Kirpal* v. *Rup Kuari* (3), *Hook* v. *Administrator-General of Bengal* (4) and *Sir Rameshwar Singh* v. *Hitendra Singh* (5). In these cases the principle was laid down that section 11 of the Code of Civil Procedure is not exhaustive on the question of *res judicata*; but all these cases can be distinguished from the present one, in that the prior decision which was relied upon, as binding on the parties, in subsequent proceedings between them, was, with reference to a question which directly arose and had to be decided in the prior proceedings, being directly in issue. In the present case, however, there was no necessity to decide this appeal, in an application for the appointment of a receiver; and although the Bench expressed an opinion, as to the meaning of the plaint in this suit, as a reason for refusing to appoint a receiver, it can certainly not amount to *res judicata*, in the sense applied by the Privy Council in the above cases. For this proposition, we need only refer to *Massam* v. *Thorley's Cattle Food Co.* (6). Apart from this, we are not at all clear that that Bench of this Court did really decide the point, for they merely said:

> "It is not clear that the respondent's claim to a scheme, the only relief for which they can now ask, can be supported separately, on the allegations they have made."

That merely amounts to saying that they have not definitely proved, in these interlocutory proceedings, the question which has now been argued before us. In any case, it does not amount to *res judicata*. With all respect for the opinion expressed in that judgment, we have now come to a contrary conclusion.

A further suggestion is made that this suit may be affected, by the recently passed Religious Endowments Act; but there is nothing in that Act, which gives retrospective effect, in respect of proceedings already instituted, and therefore this objection must also fail.

This appeal therefore is allowed with costs and the suit will be remanded to the lower Court, for disposal according to law. Court-fee on the appeal memorandum will be refunded.

Appeal No. 44 of 1921, is not pressed and is dismissed with costs of the 20th Respondent.

These appeals having been set down to be spoken to this day, the Court delivered the following :—

(3) (1884) 6 All. 269=11 I.A. 37 (P.C.)

(4) (1921) 48 Cal. 499=48 I.A. 187=19 A.L.J. 366=40 M.L.J 423=29 M L.T. 336=(1921) M.W.N. 313=33 C.L.J. 405=23 Bom. L.R. 648; 14 L.W. 221=60 I.C. 631=25 C.W.N. 915 (P.C.)

(5) A.I.R. 1924 P.C. 203=5 P.L.T. 491=47 M.L.J. 286=20 M.L.W. 456=34 M.L.T. 182=26 Bom. L.R 1153=29 C.W.N. 413=5 L.R. P.C. 175=22 A.L.J. 968=40 C.L.J. 431=3 Pat. L.R. 180 (P.C.)

(6) (1880) 14 Ch. D. 748=42 L.T. 851=28 W.R 966.

Judgment.—Appellants 3 and 4 are allowed to withdraw and the judgment in Appeals Nos. 43 and 44 of 1921, will stand as regards Appellants 1, 2 and 5.

Appeal No 43 allowed.
Appeal No. 44 dismissed.

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* A.I.R. 1926 Madras 164.

RAMESAM AND JACKSON, JJ.

G. Govindaswami Pillai—Plaintiff-Appellant

v.

V. E. N. K. R. R. M. A. Ramanathan Chettiar and others—Defendants-Respondents.

Appeal No. 1 of 1923, decided on 10th August, 1925, from the decree of the Additional Sub-Judge, East Tanjore at Mayavaram, dated 31st August, 1922, in Original Suit No. 39 of 1921.

* *Specific Relief Act, S. 42—Suit by co-trustee for joint possession—Property in possession of third person—Relief of injunction is not necessary.*

The plaintiff in a suit for joint possession of trust property along with other trustees is not bound to ask for an injunction where the properties are in the possession of a third person. [P. 164, Col. 2.] Though an injunction may be granted if the plaintiff wants it, it cannot be said to be a relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. 43 Bom. 507 (P.C.), *Foll.*) [P. 165, Col. 1.]

T.R. Ramachandra Aiyar and *S. Srinivasa Aiyar*—for Appellant.

C. S. Venkatachari—for Respondents.

Judgment:—The plaintiff is the appellant before us. He and the defendants 1, 2 and 3 are trustees of the temple of Chayavanam in Tanjore District. Defendants 2 and 3 were appointed in 1911 and 1st defendant in 1908. The plaintiff alleged that one Ramalingam Pillai was the common agent of the parties and on account of his mismanagement disputes arose, which culminated in proceedings under section 145, Criminal Procedure Code. During the pendency of those proceedings Ramalingam Pillai died but the Magistrate ordered the attachment of the temple and the properties. The plaint in para 9 alleges that the order of the Magistrate attaching the properties is illegal and that the plaintiff is entitled to joint possession of the properties. The cause of action is given as the order of the Magistrate dated 17th August, 1918, and the plaintiff prays for a declaration that "he is entitled to joint possession and enjoyment of the properties described hereunder along with the defendants." There is no prayer in respect of the office of trusteeship. Several issues were framed in the case but the suit was dismissed by the Subordinate Judge with reference to the 6th issue, which and issues 5, 7 and 8 were all the issues that were considered by him. He held that the plaintiff was bound to ask for an injunction and as he has not asked for it the suit as framed is bad under section 42 of the Specific Relief Act and dismissed the suit. We are unable to agree with this view. Mr. Venkatachari, the learned counsel for the respondents concedes that he is not able to cite any case in which it has been held that the plaintiff is bound to ask for an injunction, in a dispute regarding properties where the properties are in the possession of a third person. In *Kalabhai* v. *Secretary of State* (1) there is an expression of opinion by Chandavarkar and Ashton, JJ., that the suit in the form in which it was brought is bad. That suit was against the Secretary of State for a declaration that the plaintiff was entitled to hold the land which was the subject-matter of the suit free of assessment. It may be that in such a case an injunction is a proper relief to ask for but we do not wish to express any final opinion about it. The learned Judges granted an amendment and this question was really unnecessary. The cases in *Thakur Prasad* alias *Shumboo Narain* v. *Punkal Singh* (2) and in *Kunhamed* v. *Kutti* (3) related to decrees. It may be said that in the case of decrees an injunction to the defendant not to execute a decree is the proper relief. *Kunj Bihari* v. *Keshavlal Hiralal* (4) related to an office and it was said in the case of an office a prayer for possession is unnecessary and a prayer for injunction will give all that can also be obtained by a prayer for possession. In *Rachappa Subrao* v. *Shidappa Venkatrao* (5) Sir Lawrence Jenkins said: "It is at once apparent that as to the whole of the

(1) (1904) 29 Bom 19=6 Bom. L.R. 648.
(2) (1907) 8 C.L.J. 485.
(3) (1891) 14 Mad. 167=1 M.L.J. 338.
(4) (1904) 28 Bom. 567=6 Bom. L.R. 475.
(5) (1918) 43 Bom. 507=46 I.A. 24=17 A.L.J. 418=25 M.L.T. 298=36 M.L.J. 437=29 C.L.J. 452=21 Bom. L.R. 489=10 L.W. 274=24 C.W.N. 33 (P.C.).

property except the house no consequential relief could have been prayed and that even as to the house the injunction prayed was demurrable in the sense that no cause of action was disclosed which could have supported this relief." In that case the property other than the house was in the possession of the Collector and their Lordships thought that it was unnecessary to ask for an injunction. Following this opinion of the Privy Council we think that, though an injunction may be granted if the plaintiff wants it, it cannot be said to be a relief which the plaintiff is bound to ask when he does not feel any apprehension from the conduct of the defendant and when he does not feel it necessary to ask for it. We think the suit is maintainable in the form in which it is framed and allowing the appeal we set aside the decree of the Subordinate Judge and remand it to him for disposal according to law. The cost in the High Court will abide the result. The Court-fee paid by the appellant will be refunded.

Decree set aside: Case remanded.

AIR 1926 Madras 165.

KRISHNAN, J.

A. S. P. L. M. R. Ramaswami Chettiar and others—Petitioners

v.

S. R. M. S. V. R. Ramanathan Chettiar—Respondent.

Criminal Revision Case No. 727 of 1924 and Criminal Rev. Petition No. 609 of 1924, decided on 23rd April, 1925, against the order of the Sub-Divisional Magistrate, 1st Class, Devakottai Division, dated 27th September, 1924.

Crim. Pro. Code, S. 133—Channel may include a catchment area with a water course in the centre.

The word "channel" is not defind in the Code but the word is quite wide enough to include a catchment area in the centre of which there is a water course. Where such water course is obstructed and the water which flows into the water course is attempted to be carried away by certain persons to their own village tank by building a bund and cutting a new channel and by cutting down a new portion of the old bund of the catchment area to make the water run away in a direction different to that of the water course and to prevent it falling into the *Urani*.

Held that their act can be held to be an obstruction to the water course. [P. 166, Col. 1.]

S. Swaminadhan—for Petitioners.

T. R. V. Sastri (A. G.) and *E. Vinayaka Rao*—for Respondent.

J. C. Adam—for the Crown.

Order:—This is an application to revise an order passed under section 133 of the Criminal Procedure Code with reference to a water course running into a *urani* in the village of Puduvayal in Ramnad District. The Magistrate in the first instance had held that this *urani* into which this water course ran was a private one and therefore he could not take action under section 133, Criminal Procedure Code. On the parties coming up in revision to this Court, this Court revised that finding and held that the *urani* was a public tank and directed fresh order to be passed. The Magistrate has now taken evidence and under section 133 has directed the petitioners before me to restore the embankment of the catchment area to its original condition about a foot high and to close the newly opened channel from the north to the south, marked-A in Ex. A, and to remove all obstructions caused by them to the free flow of the water into the *urani* within 15 days from the date of the order. Dr. Swaminadhan appearing for them has contended that this order was an incompetent order and that section 133 does not apply to the facts of this case. His contention is based on the allegation that there is no river or channel in the present case which has been obstructed and he contends that under the second paragraph of section 133 it is only an unlawful obstruction to a way, river or channel which may be lawfully used by the public or an obstruction in a public place that can be ordered to be removed. He contends that the present order of the Magistrate directing the restoration of the embankment of catchment area is quite beyond the scope of section 133. I am unable to accept his arguments. It is clear from the complaint that has been filed in the case that there is a water course taking water to the *urani* in question and the allegation of the respondents before me was that this water course had been obstructed partly by building up a bund in it, partly by cutting open another channel to take away the water from it and partly by cutting away the embank-

ment at a point B round that catchment area. The word "channel" no doubt is not defined in the Code but I think the word is quite wide enough to include the state of affairs in this case. We have a catchment area in the centre of which there is a water course which is obstructed and the water which flows into the water course is attempted to be carried away by the petitioners before me to their own village tank, and the way they do it is by building a bund and cutting a new channel and by cutting down a new portion of the old bund of the catchment area, make the water run away in a direction different to that of the water course and to prevent it falling into the *urani*. That, I think, can be held to be an obstruction to the water course. The point was not properly taken in the lower Court and hence we do not find any discussion of it, in the judgment of the Magistrate, for he begins by saying "The only question that remains to be considered is whether the counter-petitioners interfered with the embankment of the catchment area and put up a new channel as alleged in the petition." If the point had been properly put forward clear evidence would have been available to show what exactly the position of the catchment area is and how the cutting open the bund of that catchment area affects the water course or the channel in the centre of the catchment area. I am therefore inclined to think that this is an order which the Magistrate could have competently passed under section 133 and on the merits the petitioners have no case whatever. My attention was called to the case in *Jagarnath Sahu* v. *Parameswar Narain* (1) where the learned Judge held that a field which was on a lower level than the adjoining fields and over which the surplus water of these fields used to flow into a tank, even if it could be described as a channel, was not such a channel as had been or could be lawfully used by the public and action could not be taken under section 133 of the Code of Criminal Procedure for the removal of any obstruction from it. This ruling is based on the fact that the fields over which the water used to flow was not a public field and hence section 133 could not be applied to it. Their Lordships are apparently prepared to concede that this field over which water flowed could be described in a wide sense as a channel. That case is not therefore in the petitioners' favour. Here, the finding being that the *urani* is a public *urani*, the water course carrying the water to it must be held to be a public water course and any interference with that water course will fall under section 133. The only point taken before me failing, the petition must be dismissed.

Petition dismissed.

(1) (1914) 36 All. 209=15 Cr. L.J. 229=12 A.L.J. 248.

A.I.R. 1926 Madras 166.

WALLACE, J.

Sri Paramahamsa Sriranga Narayana Jeer Swamigal—Petitioner

v.

Sri Paramahamsa Ahobila Jeer Swamigal and others—Respondents.

Civil Revision Petition No. 20 of 1925 and Civ. Misc. Petition No. 183 of 1925, decided on 12th March, 1925, from the order of the Sub-Judge, Trichinopoly, in C.M.A. No. 4 of 1924.

(a) *Civ. Pro. Code, O. 39, r. 1—Breach of plaintiff's right threatened—Proper course is to maintain status quo.*

In the matter of an interlocutory order where a breach of right of plaintiff is threatened the proper course for a Court is to maintain the *status quo* until the disposal of the suit. [P. 167, Col. 2.]

(b) *Civ. Pro. Code, S. 115—Judge deciding a case on his private opinion—Order is without jurisdiction.*

Judicial matters cannot be decided on the private opinions of the Judge nor can that opinion be substituted for a decision on evidence, even though the taking of that evidence may involve much time and trouble. A decision based on such private opinion is without jurisdiction. [P. 167, Col. 2.]

T. R. Ramachandra Aiyar and *S.R. Dikshit*—for Petitioner.

K. Bashyam Aiyangar—for Respondents.

Judgment:—This Revision Petition is against the order of the Subordinate Judge of Trichinopoly cancelling a temporary injunction granted by the District Munsif, Srirangam in O. S. No. 430 of 1924, on his file. The plaint in that suit was filed by the head of the Tengalai Mutt at Srirangam and the principal defendant is the Jeer of the Ahobila Mutt; the other defendants are the trustees of the Srirangam Temple. The general relief claimed in the plaint is that the Jeer

of Ahobila Mutt should be restrained from bringing into the Srirangam Temple certain paraphernalia and emblems pertaining to his office some of which bear the Vadagalai Namam, when he proposes to enter the temple for the purpose of worship. The trustees are made parties because they have by a resolution permitted him to enter accompanied by these emblems. The plaintiff's contentions as I read the plaint are mainly two. *First*, that such entry involving the introduction of Vadagalai Namams is opposed to usage and tradition, is offensive to the worshippers in the plaint temple which is claimed to be exclusively Tengalai, is a sacrilege to the Deity, and this is therefore a breach of trust by the trustees whose duty it is to preserve and not to destroy the essential customs and usages of the temple of which they are trustees, and *secondly*, that by according to the head of the Ahobila Mutt honours which are not permitted and are not claimed by the plaintiff himself, the plaintiff's own position and sanctity are likely to suffer in the eyes of the ordinary worshippers. Pending the trial, the District Munsif granted the injunction sought for. The Subordinate Judge has reversed that order, and the plaintiff comes up in this Revision Petition against the Subordinate Judge's order.

The plaintiff is bound to show that the lower Court has exercised its jurisdiction irregularly or illegally. His main point is that the Subordinate Judge has not at all considered his cause of action based on a breach of trust by the trustees, but has only regarded his contention about his personal humiliation.

The extent of the plaintiff's authority to control the ritual in the temple, the validity of his claim that the temple is exclusively Tengalai and other matters are challenged and these matters have not been so far gone into by the lower Courts. The Subordinate Judge professed to base his order on the assumption that the plaintiff's statements of fact in the plaint were correct,

> " that he fills the capacities he claims and that the Jeer and trustees will be introducing an innovation when the former is allowed to enter the outer gates of the temple with his paraphernalia.".

Then he goes on to lay down correctly that if the trustees make alterations in the ritual or decide questions of respect to visitors, etc., which affect the religious sanctity of the temple, they cannot in law do this, if it amounts to a breach of their trust. He goes on to consider whether it is a reasonable contention that the resolution of the trustees is subversive of the Tengalai character of the trust; but in considering that question, he does not at any stage consider more than whether the plaintiff's personal grievance is well founded, and whether the grievance gives plaintiff any cause of action. He finds that this grievance is imaginary and sentimental and that it is no ground for a civil action. I would, here, emphasise the undesirability of the lower Court in appeal from an interlocutory order laying down that a plaintiff has no cause of action. He goes on casually to remark that it is difficult to see how the introduction of the Jeer's paraphernalia with Vadagalai Namams into the temple for a short time could alter the ritual of the temple or go counter to its usages. Now, clearly it is not a matter which can be decided merely on the opinion of the Judge. It is the chief issue in the suit to be decided on the evidence. The Subordinate Judge merely dismissed this claim as an ebullition of sectarian hatred. That may or may not be so, but it cannot be decided merely by the Judge's own personal feelings that the entry of the Jeer with his paraphernalia into the temple could not have " the far-reaching effect of affecting the character of the temple as a Tengalai institution ". I do not find in his order any consideration, from a judicial point of view, of the question, whether or not the plaintiff's contention that the trustees have committed a breach of trust is so unreasonable as to be refused a judicial hearing. The Subordinate Judge assumes that it is an innovation on the established usage. In such a case, in the matter of an interlocutory order, I should have thought, the proper course was to maintain the *status quo* until the disposal of the suit. The assumption may, of course, be a wrong one but the Subordinate Judge has not looked at the case from that point of view. His order in effect is :—

> " Granted that this is an innovation my private impression is that it will not affect the character of the temple and therefore, I dismiss the plaintiff's petition."

This is not a judicial order or a proper exercise of jurisdiction. Judicial matter cannot be decided on the private opinions of the Judge nor can that opinion be substituted for a decision on evidence, even

though the taking of that evidence may involve much time and trouble.

It is urged for the 1st defendant, the Jeer, that the lower Court did not think it worth while enlarging on this part of the case, because the suit so far as it is founded on an alleged breach of trust is not maintainable, because no sanction has been obtained under section 92 of the Civil Procedure Code. There is nothing in the Subordinate Judge's order to indicate that, and so far as this Court is concerned, I do not think it proper at this stage to go into the question whether section 92 applies. I understand there is an issue on this very point, and it is certainly not a matter concluded against plaintiff by authority. It may be advisable—I merely throw out the suggestion—that the trying Court should dispose, first, of this issue as to whether the suit so far as the relief based on the breach of trust is concerned is maintainable.

I am of opinion, for reasons given, that the lower Court has not exercised its jurisdiction regularly and that the order under revision cannot be supported and must be set aside. The appeal against the District Munsif's order will have to be re-heard and I therefore allow the petition and direct the appeal against the District Munsif's order to be re-heard by the District Judge, to whom I hereby transfer the appeal for hearing. The injunction order passed by the District Munsif is thus restored pending the re-hearing of the appeal. The petitioner will get his costs in this petition from the 1st defendant and the other parties will bear their own costs.

Order set aside.

** A.I.R. 1926 Madras 168.

SPENCER AND MADHAVAN NAIR, JJ.

P. V. Veerannan Ambalam—Petitioner

v.

Ayyachi Ambalam—Respondent.

Civil Revision Petition No. 644 of 1923, decided on 23rd September, 1925, from the decree of the District Munsif of Melur, dated 12th March, 1923.

**(a) *Contract Act, Ss. 30 and 65—Chit fund—Agreement to subscribe Rs. 2 every time and win prize of Rs. 100 by lots—Promoter to get only interest on sums deposited—Other persons to get back their money without interest—Agreement is wagering.*

In a chit transaction 500 persons undertook each to subscribe two rupees at each instalment and there were to be 50 drawings, at each of which the winner was to get Rs. 100 and walk out without any liability to subscribe for any subsequent instalments. In other words, the promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawing had taken place and 50 subscribers had drawn the prize of Rs. 100. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. The promoter was able to pay the prizes to those who drew the winning numbers out of the subscriptions paid into his hands by the others, and he recouped himself from loss at the end by putting the money left in his hands from each instalment of subscriptions out to usury and pocketing the interest.

Held that the whole transaction amounted to a lottery and the agreement between the promoter and the subscribers, amounted to a wagering agreement within the meaning of S. 30 of the Contract Act.

Held further that the agreement to repay the subscriptions in a case like this is not severable from the prize arrangement and the provisions of S. 65 cannot be invoked, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception. (A.I.R. 1925 Mad. 870, *Dist.*; A.I.R. 1925 Mad. 281, *Rel.*) [P. 169, Cols. 1 and 2.]

*(b) *Penal Code, S. 294-A—Maintenance of lottery office is punishable by Criminal Law—Under Civil law obligations arising out of lotteries, public or private, are irrecoverable—Contract Act, S. 30.*

The Criminal Law by S. 294-A, I.P.C. only makes punishable the keeping of an office for holding a lottery and the publication of proposals for drawing a lottery. The civil law however goes further and prevents obligations arising out of lotteries being enforced in a Court of law, whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking. [P. 170, Col 1.]

A. N. Krsihnaiyangar—for Petitioner.

K. V. Srinivasa Iyer—for Respondent.

Spencer, J.:—Two questions have been argued in this Civil Revision Petition. The first is whether the chit transaction, in which the petitioner was the promoter and the respondent was a subscriber, partook of the character of a lottery or consisted of wagering agreements between the subscribers and the promoter. The second is whether the respondent is entitled to recover the money which he subscribed either upon the terms of the contract between him and the petitioner, or by

reason of the obligation cast by section 65, Indian Contract Act, upon persons who have received any advantage of restoring it upon an agreement or contract becoming void or being discovered to be void.

The mere fact that the order in which the members of a Mutual Benefit Society take their benefits is determined by the drawing of lots does not constitute the transaction a lottery [vide *Wallingford* v. *Mutual Society* (1)]. The drawing of lots at a partition of family property into equal shares in this country would stand on a similar footing. In the particular form of chit transaction that is before us 500 persons undertook each to subscribe two rupees at each instalment and there were to be 50 drawings, at each of which the winner was to get Rs. 100 and walk out without any liability to subscribe for any subsequent instalments. In other words, the promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers, and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs. 100. The promoter was secure against loss as he got Rs. 2 from each of the 500 subscribers for the first instalment and he paid out Rs. 100 to the winner. After the 50th drawing those who had not drawn a prize were entitled to get their money back without interest. The promoter was able to pay the prizes to those who drew the winning numbers out of the subscriptions paid into his hands by the others, and he recouped himself from loss at the end by putting the money left in his hands from each instalment of subscriptions out to usury and pocketing the interest. The chance of getting a prize of Rs. 100 for a payment of Rs. 2 at the first drawing, of Rs. 4 at the second, of Rs. 6 at the third, and so on, free from any further liability to the winner was the bait for attracting investors. The adventitious character of the gains also had the effect of making the whole transaction a lottery and the agreement between the promoter and the subscribers, a wagering agreement within the meaning of section 30 of the Contract Act. All who took part in what the law regards as an unlawful transaction were *in pari delicto* and no participator in it can invoke the help of the law for enforcing his claims to recover any money entrusted to any person to abide the result of the drawings, even though the return of the sums subscribed by those who were not lucky enough to draw winning tickets was one of the conditions of the transaction. I agree with the opinion of Odgers, J., in *Nagappa Pillay* v. *Arunachalam Chetty* (2) that the agreement to repay the subscriptions in a case like this is not severable from the prize arrangement. Neither can a subscriber invoke section 65 of the Contract Act, for the agreement in this case did not become void nor was it discovered to be void but it was void for illegality from its inception (see Indian Contract and Specific Relief Acts by Pollock and Mulla, 4th edition, pages 365-368) and the object of the subscription, which was the formation of an association for conducting an unlawful system of lottery, has been accomplished. When money has been paid under an illegal contract which has been partially carried into effect, it cannot be recovered back (vide *Kearley* v. *Thomson* (3).)

The respondent's vakil relied upon *Shanmuga Mudali* v. *Kumaraswami Mudali* (4) which, with due respect, I feel difficulty in regarding as a decision based on sound principles. That case and the one before us possess the common feature that the prize winners in the first 50 drawings were not bound to subscribe to instalments after they had won a prize. The significance of this feature in a chit transaction which makes it a gamble has been missed by the learned Judges. In *Duraiswami Mudali and another*, Crl. R. C. 305 of 1890 (1 Weir's Rulings page 251) there was a similar feature in a chit transaction and it was observed by Collins, C. J. and Shephard, J.: "This is clearly a lottery, for it depends entirely on the drawing of lots whether or not the prize of Rs. 100 falls to any given subscriber. As the prize winner thereafter ceases to be a subscriber to the fund, it must necessarily follow that the rest, out of whose subscriptions the prize has been paid and who continue to be sub-

(1) [1880] 5 A. C. 685=43 L.T. 258=50 L.J. Q.B. 49=29 W.R. 81.

(2) A.I.R. 1925 Mad. 281.

(3) (1890) 24 Q.B.D. 742=59 L.J.Q.B. 288=63 L.T. 150=38 W.R. 614=54 J.P. 804.

(4) A.I.R. 1925 Mad. 870=21 M.L.W. 403=1925 M.W.N. 655.

scribers, are the losers". At p. 403 of 21 L. W. Venkatasubba Rao, J., expresses an opinion that the fact that the money for the prizes really comes out of the interest on the capital fund contributed differentiates this case from the cases of lotteries. He says at page 409 "what the 449 members lose is the interest upon their money and what the first 49 members gain is a portion of the interest thus lost by the other subscribers." But in *Richards* v. *Starck* (5) it was held that the loss of interest upon a subscriber's subscription was a sufficient loss to make a contract resting on a future event of an uncertain nature a gaming or wagering contract. In the present chit transaction out of 500 subscribers there were 450 losers of interest on their money deposited with the promoter. The remaining 50 made a gain, the amount of which varied according to an order determined by the drawing of lots which thus depended not on any skill but on pure chance.

It is true, as Ramesam, J. observes, that the Criminal Law by section 294 (A) I.P.C. only makes punishable the keeping of an office for holding a lottery and the publication of proposals for drawing a lottery. The civil law however goes further and prevents obligations arising out of lotteries being enforced in a Court of law, whether the lottery is held in an office to which the public have access or in a private place to which admission is not to be had for the mere asking. The learned Judges were evidently much influenced in their decision by the case of *Wallingford* v. *Mutual Benefit Society* (5). That was a case of legitimate business free from speculation in which there were no losers and no one gained an unearned sum of money by the chance of drawing of lots. The same may be said of the Kuri chit dealt with in *Vasudevan Nambudri* v. *Mamood* (6).

The Civil Revision Petition is allowed with costs and the plaintiff's suit is dismissed.

Plaintiff and Defendant will each bear their own costs in the trial of the Small Cause Suit in the District Munsiff's Court.

Madhavan Nair, J.—I have had the advantage of reading my learned brother's judgment with which I agree. The suit which has given rise to this C.R.P. was instituted by the respondent for the recovery of a sum of Rs. 119-13-5 being the principal and interest due to him on account of the 48 instalments of subscriptions paid by him to a chit fund conducted by the Petitioner. The chit fund consisted of 500 subscribers, each subscribing Rs. 2 per mensem. At the end of each month a chit was drawn by lots and the winner was paid Rs. 100. Thereafter his connection with the chit fund ceased altogether and he was not under any obligation to continue his subscription. According to the rules of the fund, the drawings would thus go on for 50 months when the chit fund would be wound up, the stakeholder paying back to the remaining subscribers the total amounts subscribed by each of them. The respondent, a non-prize winner, after subscribing for 48 instalments asked the petitioner, the stakeholder, to return to him with interest the money, he had subscribed. The petitioner, refusing to refund the amount contended that the chit fund was a lottery and that a suit was not maintainable to recover the amount. The learned District Munsiff holding that the chit in question was not a lottery so far as non-prize winners like the plaintiff were concerned, gave him a decree for the amount claimed.

It is argued for the petitioner that the transaction set forth above constitutes "agreements by way of wager" between the stakeholder and the subscriber and, as such, is void both on principle and on the authority of the decisions of this Court, and that therefore the decree of the lower Court should be set aside. In *Sankunni* v. *Ikkorakirti* (7) it was held by Phillips, J., that a "Kuri" conducted on similar lines was a lottery and that the plaintiff's suit to recover the money paid was not maintainable. This decision was followed by Krishnan and Odgers, JJ., in *Nagappa Pillay* v. *Arunachalam Chetty* (2) though the learned Judges differed on the question whether it was possible to hold that the agreement to repay the subscription at the end of the period was severable from the arrangements to give the prize. In 21 L.W. 403, Ramesam and Venkatasubba Rao, JJ. did not follow these decisions, their opinion being mainly influenced by a decision of the House of Lords (1880) 5 App. Cas. 685. It may be stated that the chit

(5) (1911) 1 K.B. 296=80 L.J.K.B. 213=103 L.T. 813=27 T.L.R. 29.
(6) (1899) 22 Mad. 212.
(7) (1919) M.W.N. 570= 10 L.W. 155= 37 M.L.J. 209.

fund in all those cases was conducted in the same manner as in the present case, the successful drawer of the winning ticket having nothing to do with the chit fund after drawing his prize.

In the light of these decisions and of what is meant by an "agreement by way of wager" we have to determine whether the present case has been rightly decided by the learned District Munsiff.

The Indian Contract Act does not contain any definition of a "wagering contract." Section 30 states that agreements by way of wager are void. In *Thacker* v. *Hardy* (8) Cotton, L. J. said "The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature—that is to say —if the event turns out one way A will lose but if it turns out the other way he will win." In *Subramanyam Pattar* v. *Kirudadasan* (9). It was pointed out that in a chit fund transaction the contracting parties are the stakeholder on the one side and each of the subscribers on the other side and there are as many separate contracts as there are subscribers. On analysis it will be found that the contract of the stakeholder with the subscribers in the present case partakes of the nature of a wagering contract. As pointed out in my learned brother's judgment "The promoter laid odds of 98 to 2 at the first drawing against any particular subscriber drawing the winning ticket. At the second drawing he laid odds of 96 to 4 with each of the remaining 499 subscribers and so on till 50 drawings had taken place and 50 subscribers had drawn the prize of Rs. 100." This shows that the arrangement is really a bet between the subscribers and the stakeholder as to how a future event of an uncertain nature, *i.e.*, the drawing of a winning ticket, will eventually turn out. If a subscriber happened to draw one of the winning tickets, *i.e.*, if the uncertain event turned one way, obviously he would gain an increased amount of money ; would he lose if the event turned out the other way ?

Since according to the rules, the non-prize winners get back their subscription amount, it is argued that the present case falls within the principle of the decisions in *Iyyanarkone* v. *Vidumadakone* (10), *Kamakshi Achari* v. *Appavu Pillay* (11) and *Vasudevan Nambudri* v. *Manmad* (6) wherein it was held that in chit fund transactions to which subscribers contribute monthly subscriptions, each subscriber in his turn as determined by lot taking the entire subscription for one month, there was no element of chance or risk, the money paid by each subscriber being eventually returned to him. In 1 M H.C R, 448 such a transaction was thus characterised by the learned Judges, "It is not the case of a few out of a number of subscribers obtaining prizes by lot. By the arrangement all get a return of the amount of their subscription. It is simply a loan of the common fund to each subscriber in turn, and neither the right of the subscribers to the return of the contributions, nor to a loan of the fund is made a matter of risk or speculation. No loss appears to be necessarily hazarded nor any gain made a matter of chance." I do not think the same can be said of the transaction in the present case. I have already shown how the subscribers' gain is made a matter of chance. As regards the loss the plaintiff no doubt gets back the entire capital which he has subscribed. In one sense therefore it is true that the transaction involves no loss in any event to the plaintiff as he is to have his money returned to him, but he loses his interest. In England it has been pointed out in two cases of wagering contracts, similar in this respect, *viz.*, loss of interest, to the present case, that this loss of interest is sufficiently a loss to bring the contract within the spirit, though not, perhaps within the actual wording of the definition, of a wagering contract. See *Richards* v. *Starck* (5). In *Duraiswamy Mudali* (12) in which also, as in the case before us, the prize-winner after securing the prize ceased to be a subscriber, the fund closing after a stated period with a refund of their subscriptions to the unsuccessful members it was held by Collins, C.J. and Shephard, J. that the transaction was clearly a lottery, for it depended entirely on the drawing of lots whether or not the prize of Rs. 100 fell to any given subscriber. The learned Judges state, "As the prize-winner thereafter ceases to be a subscriber to the

(8) L.R. 4 Q.B.D. 685.
(9) (1912) M.W.N. 1235.
(10) (1858) S A. No. 169 of 1857, Mad. S.D. 1858 page 53.
(11) (1864) 1 M.H.C. 448.
(12) Weir, 251.

fund, it must necessarily follow that the rest, out of whose subscriptions the prize has been paid and who also continue to be subscribers, are the losers. The case therefore is quite different from that in 1 M.H.C.R. 448". These decisions were not brought to the notice of the learned Judges in 21 L.W. 403.

In my view the agreement in this case shows that the plaintiff gave his subscriptions to the defendant upon the terms that in an uncertain future event he was to recover, if that event went one way, the sum subscribed with considerable increment and in the other event, he was to recover the total amount subscribed by him but without interest. This means that the transaction was in substance a wagering contract which may be described in the language of Channel, J. in (1911) 1. K.B. 296 "as a bet on terms very favourable to the plaintiff."

For the above reasons I am of opinion that the decisions in S.A. No. 169 of 1857, Madras S D. 1858, 1 M.H.C.R. 448 and I.L.R. 22 Mad. 212 are clearly distinguishable and that the chit fund transaction in this case is an agreement by way of wager and is therefore void.

In the decision in 21 L.W. 403 strongly relied on by the respondent, one learned Judge, Venkatasubba Rao, J. states, "There is some element of chance in regard to the first 49 subscribers, but the dominant feature of the transaction is that it enables a large number to gradually lay by money and receive their savings in a lump sum and the scheme is in their case an incentive to thrift." With due respect to the learned Judge, I am inclined to think that it cannot be said that the primary object of a person in taking a chit in a fund like the present one is to lay by money for receiving it back in a lump sum. The chance of winning a prize of Rs. 100 on payment of a subscription of Rs. 2 at the first drawing, Rs. 4 at the second drawing, and so on till the fifty drawings are completed is the attraction which tempts the subscribers to join in such a chit fund.

In arriving at their conclusion the learned Judges in 21 L. W. 403 were mainly influenced by the decision of the House of Lords in *Wallingford* v. *Mutual Benefit Society* (1). In that case a society called the "Mutual *Benefit* Society" was registered under the Companies Act. Its declared object was to accumulate capital by means of monthly subscriptions from members, to advance such capital to the members in rotation, to secure payment of such advances by taking over and holding real or other securities and ultimately to divide among the members all the profits that had been made. The mode of operation of the Society appeared to be this. "To obtain subscriptions from members, to advance them money on interest upon 'certificates of appropriation'". By article 27 it was declared that "appropriations shall be allotted in two ways, the first and every fourth one thereafter, by drawing, free of any premium or interest, while those intermediate shall be allotted to the member or members tendering the highest premium for the same respectively. All appropriations were to be repaid by equal quarterly payments extending over 20 years from the advance." It was held that though the benefits of the Society were made available to the members by a process of periodical drawings, the society did not come within the mischief of the Lottery Acts and that the transaction it carried on was not a gambling transaction. The facts of the case show that amongst the subscribers there were no losers and no one derived any undue gain by the chance of drawing lots. As pointed out in Vol. XV, Halsbury, Laws of England, p. 301. "Where the scheme has for its object the carrying on of a legitimate business, the fact that it provides for the distribution of its profits in certain events by lot will not vitiate the scheme." The case resembles the decisions 1 M.H.C.R. 448 and I.L.R. 22 Mad 212 already referred to and on principle is clearly distinguishable from the present case. It may be mentioned that Ramesam, J. deals with the case in 21 L.W. 403 as a suit to enforce the terms of a contract collateral to another transaction which can be enforced, even when the main transaction is void on account of being a wagering contract, unless it amounts to an offence punishable by law; though in the course of the judgment the learned Judge agrees with Venkatasubba Rao, J. that the main contract itself is not void.

The respondent argues that, if the transaction is an agreement by way of wager and is invalid on that account, he is still entitled to get a refund of the amount claimed by him either under section 65 of

the Indian Contract Act, or on the ground that the agreement to return the amount is severable from the arrangement to give the prize. I entirely agree with the opinion of Odgers, J. in 47 M.L.J. 876 for the reasons given by him in that judgment that the claim of the respondent in this case cannot be substantiated on either of the above grounds.

In the result I must hold that the decision of the learned District Munsif is wrong and this civil revision petition must be allowed with costs, as ordered by my learned brother.

Petition allowed.

A.I.R. 1926 Madras 173.

SPENCER, O.C.J., AND VISVANATHA SASTRI, J.

Venkataranga Aiyar and another—Defendants 3 and 4-Appellants.

v.

C. S. Ramasamy Aiyar and others—Plaintiff and Defendants 1, 2 and 5-Respondents.

Appeal No. 252 of 1922, decided on 7th August, 1925, against the decree of the Additional Sub-Judge, Coimbatore.

(a) *Civ. Pro. Code, S. 100 — Finding of fact based on oral evidence — High Court is loth to disturb.*

When the High Court is called upon to disturb findings of fact based entirely upon oral evidence, it should feel some hesitation before coming to a different conclusion from that of the Judge who heard and saw the witnesses deposing, especially when that course would involve giving credit to witnesses who have been disbelieved in the Court below, and when it involves accepting a story which, judged merely upon probabilities, sounds hard to accept. [P. 173, Col. 2.]

(b) *Transfer of Property Act, S. 55 – Vendor not expressly covenanting to clear off mortgages— Decree for specific performance cannot direct payment of mortgages fully by vendors—Specific Relief Act, S. 27 (b).*

Where there is no express covenant that the vendors should themselves clear off the encumbrances before executing the sale-deed, the decree in a suit for specific performance of the sale cannot direct that the vendors should pay the incumbrances themselves fully before the execution of the sale-deed, if the price be insufficient. [P. 174, Col. 2.]

A. Krishnaswami Aiyar and *T. V. Ramanatha Aiyar*—for Appellants.

T. M. Krishnaswami Aiyar and *S. S. Ramachandra Aiyar*—for Respondents.

Spencer, O.C.J. :—This is a suit for specific performance of a written and registered agreement, dated 26th October, 1917, to sell immoveable property entered into by the 1st and 2nd defendants and their brother, Velusamy Goundan. Defendants 3 and 4, who appeal put forward an anterior oral agreement on 15th October, 1917, to sell the lands to them. The existence of this prior agreement formed the subject of the 2nd issue which the trial Court found against these defendants. The correctness of this finding is the main question argued in appeal. When we are asked to disturb findings of fact based entirely upon oral evidence, we must always feel some hesitation before coming to a different conclusion from that of the Judge who heard and saw the witnesses deposing. This is additionally so, when that course would involve giving credit to witnesses who have been disbelieved in the Court below, and when it involves accepting a story which, judged merely upon probabilities, sounds hard to accept. The story told by D. Ws. 8 and 9 is that they went from Darapuram to Kolinjivadi to ask a creditor to remit penal interest on a mortgage debt due by the brother of D. W. 8 and were accompanied to the creditor's house by the Assistant Karnam of the village, D. W. 6. When passing the 4th defendant's house, the Karnam was called in and they went in too and witnessed the oral agreement to sell the plaint lands and advance of Rs. 100. The date of this transaction is fixed by the endorsement of payment on Ex. VIII A which is October 16th, the difference of one day being accounted for by saying that on October 15th the creditor obstinately refused to make any remission but that he relented on the following day. I think it is probable that October 16th was the real date of these witnesses' visit to the money-lender and that the story that they followed Sami Sastri to his bath asking about the remission of interest and that the document was not referred to, nor was any account of interest taken till the next day, was introduced to make the story, that they went on the 15th, credible. The fact that D.W. 6 once owned considerable property, does not in my opinion, enhance the value of his testimony or make the story more credible. If the contracting parties wanted witnesses of their contract and went to the length of calling strangers in for that purpose,

for fear that one or the other party would go back on the agreement, it would have been just as easy to get the terms reduced to writing. In this case, there are not even receipts produced for delivery of the title deeds or for payment of the advance said to have been made at the time. The finding of the lower Court upon this issue must, therefore, be confirmed.

On November 10th, the appellants obtained sale deeds which are Exs. III-B and III-C, knowing at the time as found by the trial Court, that defendants 1 and 2 had agreed to sell their lands to the plaintiff. Their brother, Velusami, sold his one-third share to the plaintiff for Rs. 3,666-10-8 under Ex. E, (*i.e.*) for one-third of the price agreed upon in Ex. A, the written agreement of 26th October.

The second point argued in this appeal is that the decree for payment of Rs. 750 as damages cannot stand. Section 19 of the Specific Relief Act provides that if specific performance ought to be granted but is not sufficient to satisfy the justice of the case, compensation for breach of the contract may also be given to the plaintiff. The present is not such an extreme case as to give further relief in addition to the relief of specific performance. The plaintiff will be sufficiently compensated by getting a decree for specific performance together with costs. The direction that defendants should pay Rs. 750 as damages will, therefore, be excluded from the decree.

The next question is as to the form of the decree given in the Lower Court. The decree directs :

"That plaintiff do pay the sale price of Rs. 7,000 for the shares of defendants 1 and 2 to the mortgagees in discharge of the mortgage debts secured by the properties.....and that the defendants do pay the said mortgagees, the balance, if any, under the mortgages aforesaid".

Mr. Alladi Krishnaswami Aiyar objects to the provision that his clients defendants 3 and 4 should pay the balance, if any, under the mortgages. This objection has not been made a ground of appeal ; but as the decree is before us, we must see that it is not only a just decree but one that is executable. Under section 18 (*c*) of the Specific Relief Act, a purchaser has a right to compel his vendor to redeem encumbrances in cases where the vendor professes to sell the property unencumbered and the property is mortgaged for an amount not exceeding the purchase money. Under section 27 (*b*), the specific performance of a contract may be enforced not only against parties to the contract but also against any other persons claiming under them by a title arising subsequently to the contract, except transferees for value who have paid their money in good faith and without notice of the original contract. Under these provisions the plaintiff can compel the defendants 3 and 4 who have purchased the rights of defendants 1 and 2 with notice to perform the contract entered into by defendants 1 and 2. Ex. A, which embodies the terms of the agreement between the plaintiff and his vendors, entitles the vendors to receive the balance remaining after deducting the debts due under the mortgages upon the lands conveyed, but does not specifically impose any liability upon the vendors to convey the lands to the purchasers free of encumbrances. At that time, it was probably thought that the price agreed upon would be sufficient to discharge all the mortgages existing at the time. Since then, interest has been running and although the mortgagees are not made parties to this suit and the amount of the encumbrances now existing has not been ascertained, it is probable that that money will not be sufficient to dicharge these debts. There is, in this case, no express covenant that the vendors should themselves clear off the encumbrances before executing the sale deed and, therefore, it cannot be enforced against any transferees from those vendors as part of the contract which they have become liable to perform. Section 55, clause 1, Sub-clause (*g*) of the Transfer of Property Act imposes a statutory liability upon all vendors of immoveable property to discharge all encumbrances on the property existing at the time of sale except where the property is sold subject to encumbrances. Clause 2 which provides for the benefit of contracts mentioned in that rule passing to every person to whom the interest is transferred, relates only to the implied contracts mentioned in that particular rule, *viz.*, that the transferor has a subsisting transferable title and, if the vendor is in a position of trust to the buyer, that he has not encumbered the property. There is no similar provision for the benefit of implied contracts in Clause 1 passing to transferees.

In *Srinivasa Chari* v. *Gnanaprakasa Mudaliar* (1), it was held that the purchaser of the equity of redemption from a mortgagor not being a party to the covenant, was not entitled to the benefit of the implied covenant in respect of payment of public charges, which are some of the obligations referred to in Sub-clause (*g*) of section 55 (1).

Section 27 of the Specific Relief Act does not provide for the specific enforcement of personal covenants against persons who claim under the original vendor, even though such covenants may arise out of the original contract of sale. For these reasons, the liability of defendants 3 and 4 to pay off the mortgages upon the suit property cannot be declared by the decree in the present suit.

The Lower Court's decree will therefore have to be amended and redrafted in the following form:

1. That plaintiff do pay into Court on or before the 1st day of November, 1925, the sum of Rs. 3,500 towards the sale deed to be executed by defendants 1, 3 and 4 and a further sum of Rs. 3,500 towards the sale deed to be executed by defendants 2, 3 and 4.

2. That these sums do go towards the discharge of the mortgage debts referred to in Exs. III-B and III-C respectively.

3. That upon such payments being made, defendants 1, 3 and 4 do execute in favour of the plaintiff a sale deed in respect of the lands comprised in Ex. III-C and defendants 2, 3 and 4 do execute a sale deed in respect of the lands comprised in Ex. III-B.

4. That defendants do deliver possession of the properties to the plaintiff, the delivery by defendants 1 and 2 being free from all encumbrances; and

5. That defendants do pay the plaintiff his costs in the suit and bear their own.

With this modification the appeal is dismissed with costs.

After the plaintiff obtains a sale deed in his name for the suit lands, he will be entitled to redeem any encumbrances existing upon the properties so belonging to him. We decide nothing as to his right to recover the cost of redemption from any persons who may be liable to reimburse him.

Visvanatha Sastri, J.:—I agree with what has fallen from my Lord.

Decree modified.

(1) (1907) 30 Mad. 67=2 M.L.T. 36.

** A.I.R. 1926 Madras 175.

COUTTS TROTTER, C.J., AND VISVANATHA SASTRI, J.

Gandha Korliah—Plaintiff-Appellant.

v.

Janoo Hassan—Defendant-Respondent.

Original Side Appeal No. 83 of 1924, decided on 24th August 1925, from the Judgment of Waller, J., in Civil Suit No. 9 of 1923.

***Shipping—Voyage frustrated—Advance freight can be recovered—Contract Act, S 58.*

Whether a chartered ship is a common carrier or not, the general principle of the Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. (40 Bom. 529 and A.I.R. 1925 Mad. 727, *Ref.*) [P. 177, Col. 1.]

S. Srinivasa Aiyar—for Appellant.

K. Sundara Rao—for Respondent.

Judgment—This case raises a point of some interest that has been much discussed in the English Courts and has very recently been the subject of a decision by Mr. Justice Macleod, as he then was, sitting in the High Court of Bombay. [*Boggiano and Co.* v. *Arab Steamers Co., Ltd.* (1)]. It is not disputed by the Appellant that if Mr. Justice Macleod's judgment is correct he is out of Court. The defendant was the owner of two steamers which were chartered by the plaintiff for the carriage of rice from Akyab to the Coromandel Coast. The importation of rice was only permitted—and Mr. Justice Waller, the Trial Judge, has very rightly found that this was a fact perfectly within the knowledge of the parties—if and when a certificate could be obtained from the Food Comptroller. The learned Judge has also rightly found—and this part of his judgment is not challenged—that neither party to the contract committed himself to a guarantee that such a certificate would be forthcoming. As to that no question arises and the learned Judge therefore thinks that the execution of the contract became impossible owing to an act which is neither under the control of the parties nor which they had put themselves in the position of having warranted to be in existence, namely, the certificate. In these circumstances the

(1) (1915) 40 Bom. 529=18 Bom. L.R. 126.

shipper says that he is entitled to be paid back certain moneys which he had paid to the shipowner and these moneys are described in the contract as being paid for freight at the rate provided for in the charter party.

"1. Rs. 450 only advance on acceptance of charter party and to be deducted from the freight of second trip.

"2. Half of the freight to be paid as the vessel reaches Akyab and takes the cargo.

"3. The balance freight to be paid as the vessel reaches the port of destination."

It is sought to be said by the appellant in this case that this contract between the parties is not to be regarded as being governed by the general law of India laid down in the Contract Act but by the English Common Law. The appellant's vakil has very properly accepted the position that in circumstances such as the present the money that passed from one hand to the other is recoverable by Indian Law but irrecoverable by the English Common Law. If that were all that was to be said about it, it is quite plain that we should have to be guided by the Statute Law that obtains in this country and should not be justified in going past the Indian Statute to the English Common Law; but a very ingenious argument is put forward, the same argument that was really put forward in the Bombay case. It is said that a ship in this position is a common carrier and that in accordance with the decision of the Privy Council in *Irrawaddy Flotilla Company* v. *Bugwandas* (2) the contract between the parties is not to be supposed to be governed by the Indian Contract Act but by the English Common Law regarding the liabilities and rights of common carriers. It is said that the moment you show that a person is a common carrier you have proved the existence of a certain type of contract of a special kind which, according to the Privy Council decision, is not governed by the provisions of the Indian Contract Act. There appear to me to be two objections and the first is this: that it is more than doubtful whether a ship under charter as distinct from a general ship taking the goods of several shippers under separate bills of lading on the same voyage is properly described as a common carrier at all. It is not necessary to decide that point fortunately in this case but it is one that has been frequently discussed in commercial circles and amongst commercial lawyers for the past 70 years and there are a very considerable number of expressions of opinion by eminent commercial lawyers on the Bench that a chartered ship is not a common carrier. If that be right, the appellant's case is ended at once. It appears to me that we can put the case on an even more solid footing than that in the following way. Let us assume that in a contract of carriage by sea all those features which are peculiar to the contract of affreightment are governed by the English Common Law and therefore would not be touched even in this country by the provisions of the Indian Contract Act. But there are other incidents in the relation of ship-owner and shipper in a contract of affreightment which are in no way peculiarly confined to a contract of affreightment and which are independent of the special provisions of maritime law. That that is so, I think, is clear from many of the cases which were cited before us, so that the question narrows itself down to this, is money paid in the present circumstances by way of an advance freight a special feature of a contract of affreightment deriving all its validity and force from the law maritime or does it derive its validity and force from the general English Common Law? The answer is to be found in the decision of the Divisional Court in *Blakeley* v. *Muller and Co.* (3) which is reported as a foot-note to the *Civil Service Co operative Society, Ltd.* v. *General Steam Navigation Company* (4). There Channel, J., dealing with one of the Coronation cases as they are commonly called, expressly says that it is an incident of the English Common Law and says that it is the same principle of the Common Law which prevents the refunding of advance freight on a charter party where the voyage is not completed and the freight therefore not earned. That way of putting it was assented to in the judgment of the Earl of Halsbury, L.C., Lord Alverstone, C. J. and Cozens-Hardy, L. J. where after citing the passage which I have read, the Earl of Halsbury, L.C. says he concurs with every word of that. If that be the right principle that was laid

(2) (1891) 18 Cal. 620=18 I.A. 121=6 Sar. 40 (P.C.)

(3) (1903) 88 L.T. 90=67 J.P. 51=19 T.L.R. 186

(4) (1903) 2 K.B. 756=72 L.J.K.B. 932=89 L.T 429=52 W.R. 181=9 Asp. M.C. 477=20 T. L. R. 10.

down by Channel, J., it follows that the inability in England to recover advance freight on the frustration of the venture is derived from the general principles of the common law and not from any supposed peculiar incident attaching to maritime contracts of affreightment. That being so, even if a chartered ship is a common carrier, the answer would be that matters relating to the recoverability of freight paid in advance although they happen to occur in a charter party which is a maritime document of affreightment are nevertheless to be regarded as being regulated by the ordinary common law or statute law, whether English or Indian. Then you get back to this position : that being the common law of the land or the statute law of the land—and the general principle is different in India from what it is in England—therefore, just as we should apply the common law in England, so we should apply the express statute that obtains in India. It therefore seems to me that we should take the view that, whether a chartered ship is a common carrier or not, nevertheless the general principle of the Indian Contract Act applies and advance freight when paid can be recovered back by the shipper on the frustration of the venture. That appears to be in accordance with the view expressed by Phillips and Odgers, JJ., in *Sivanadian Chettiar* v. *Batchu Surayya* (5). Our decision is also in accordance with that in *Boggiano and Co.* v. *The Arab Steamers Co., Ltd.* (1) with which we respectfully agree. The appeal will be dismissed with costs.

Appeal dismissed.

(5) A.I.R. 1925 Mad. 727.

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*A.I.R. 1926 Madras 177.

JACKSON, J.

Vemulamanda Bhadrayya and another—Defendants-Appellants

v.

Penumetcha Jaggaraju—Plaintiff-Respondent.

Appeal No. 71 of 1923, decided on 21st July, 1925, from the Appellate Order of the Sub-Judge, Narsapur, dated 26th January, 1923.

Limitation Act, Art. 182—Previous application time-barred—Plea of bar must be raised at the earliest opportunity—Civ. Pro. Code, S. 11.

The plea that a previous application for execution was barred by limitation and hence the subsequent application was not valid should be raised at the earliest possible opportunity. (A.I.R. 1924 Mad. 673, *Rel. on.*)

K. Venkatarama Raju—for Appellants.

P. Somasundaram—for Respondent.

Judgment :—Appeal against the order of the Subordinate Judge of Narsapur, in A. S. No. 191 of 1922.

2. The decree-holder, in O S. No. 1156 of 1913 filed execution applications, in 1914, 1918 and 1919. On 7th December, 1921 the judgment-debtor moved the Court of execution under Order 47 of the Civil Procedure Code for a declaration that the execution petition of 1918 was barred by limitation, and thus the proceedings of 1919 would also not be valid.

3. It has been found by the District Munsif in the original proceedings that the petitioner was duly appraised of the execution petition of 1919 and then was the time that she should have contested the validity of that of 1918. The question for determination is whether she can raise the plea at this late stage.

4. The case reported in *Rajitagiripathy* v. *Bhavani Sankaran* (1), is good authority for holding that such pleas should be advanced at the earliest opportunity and if the party fails to take action, he cannot raise them on subsequent occasions. The Privy Council ruling reported in *Raja of Ramnad* v. *Velusami Tevar* (2), is to the same effect. The passage quoted on page 756 of Rustomji's Limitation Act, 3rd Edition :

> "The reasonable contruction of the words of Cl. 5, Art. 182, would seem not to allow a roving examination into all the previous applications in order to ascertain whether there might not be a weak link in the chain"

seems, as the learned commentator himself observes, to be unequivocally worded. It might run,

> "there is nothing in law absolutely prohibiting a party from examining all the previous applications ; but, in practice, he will often find that he is barred by *res judicata*."

(1) A.I.R. 1924 Mad. 673.

(2) (1921) 48 I.A. 45=19 A.L.J. 168=40 M. L. J. 197=13 L.W. 290=(1921) M.W.N. 51=33 C.L.J. 218=25 C.W.N. 581=23 Bom. L.R. 701=29 M.L.T. 345 (P.C.)

5. I find that the present case is one where the party had full opportunity of raising the question at the time of the application of 1919 and she cannot raise it after the proceedings of 1918 and 1919 have been allowed by her to be treated as in accordance with law. The findings of the Lower Courts are correct.

6. I see no force in the contention that the learned Subordinate Judge gave no finding; he distinctly states what he holds to be the correct view, but adds that it is unnecessary because he has also found that no petition lies under section 47 of the Code of Civil Procedure, a point which requires no consideration, since I have confirmed the order of the Lower Courts on the merits.

7. The appeal is dismissed with costs.

Appeal dismissed.

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* A.I.R. 1926 Madras 178.

PHILLIPS, J.

Sinna Karuppan and others—Defendants-Appellants

v.

R. M. P. S. Muthiah Chettiar and others—Plaintiffs-Respondents.

Second Appeals Nos. 855 to 1039 of 1922, decided on 30th July, 1925, against the decrees of the District-Judge, Ramnad at Madura.

** Civ. Pro. Code, O. 7, r. 10—Plaint returned—Period between date of presenting and date of return should be excluded under Limitation Act, S. 14.*

Where a plaint is returned under O. 7, r. 10, the time to be excluded under S. 14, Limitation Act, is the period from the date of presentation until the date of return of the plaint. (3 M.L.J. 190, *Diss.*; 7 M.L.J. 261; 22 Bom. L.R. 1387 and (1887) A.W.N. 302, *Rel. on.*) [P. 179, Col. 1.]

K. Bashyam Aiyangar and *A. Srinivasa Aiyangar*—for Appellants.

A. Krishnaswami Aiyar, C. S. Rama Rao and *M. Patanjali Sastri*—for Respondents.

Judgment:—All these suits were filed in four batches by the plaintiffs, the first being filed in the Subordinate Judge's Court on the Small Cause Side. The Subordinate Judge held that the suits were not of a Small Cause nature and that they should be filed either on the Original Side or else in the Revenue Court. The alternative was given for the reason that the plaintiffs claimed both varams and it was held that if they were entitled to both varams, the suits would lie in a Civil Court. Whereas, if they were not entitled to both the varams, the suits would lie only in a Revenue Court. The suits were accordingly filed in the Civil Court on the Original Side. The question was then determined and it was found that the plaintiffs did not possess both the varams and the plaint was returned to the Revenue Court. The only question which arises here is one of limitation, *i.e.*, whether the time taken for prosecuting these suits in the Small Cause Court and the Civil Court (Original Side) should not be excluded. The lower Appellate Court has held that the plaintiff has prosecuted these suits with due diligence, and consequently, under section 14 of the Limitation Act he is entitled to exclude the whole of the period. The period allowed is the period from the date of the filing of the plaints to the date on which the plaints were finally returned by the Court for representation. It is now argued that this is not the correct period allowed, the contention being that the proceedings terminated on the date of the appellate order and not on the date on which the plaints were originally returned. This was the view taken by a Bench of this Court, in *Krishna Variar* v. *Kunji Taravanar* (1) a case decided after the Civil Procedure Code of 1882 came into force; it merely purported to follow the decision in *Abhoya Churn Chuckerbutty* v. *Gour Mohan Dutt* (2) which was based on the old Code of 1859 in which there was no provision identical with Order 7, rule 10. When the Civil Procedure Code distinctly orders a Court to return a plaint for representation, and at the same time to endorse on it the date of presentation, the date of return, the party presenting it and the statement of the reasons for returning it, I regret I cannot agree with the view that the proceedings with reference to that plaint can be said to have terminated, when there was still an act to be done by the Court which had seisin of the plaint. With all respect, I am of opinion that the decision in *Krishna Variar* v. *Kunji Taravanar* (1), cannot be justified by reason of Order 7, rule 10 Civil Procedure Code and I am supported

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(1) (1893) 3 M.L.J. 190.
(2) 24 W.R. 26.

in this view by subsequent cases of this Court. In *Bapu Ammal* v. *Govinda Padiayachi* (3), the time to be excluded is held to be from the date of presentation until the date of return of the plaint and this view is also adopted in *Basvanappa* v. *Krishnadas* (4) and *Bisheshar Singh* v. *Ram Daur Singh* (5). The District Judge has therefore rightly calculated the time to be excluded from the period of limitation.

The next argument is directed to a question of fact, namely, whether the plaintiff was exercising due diligence during the whole of that period. The Lower Appellate Court found that he did so and no facts have been put before me to justify me in interfering with this finding of fact. In fact, the arguments are all based on what might have happened, and no assertion is made as to any particular act of the plaintiff, to show that he did not exercise due diligence. I must presume that the lower Court has considered all the circumstances and I cannot interfere with the conclusion at which it has arrived.

The last point taken is with reference to certain suits in which it was said that the amount became payable when the kodai harvest was reaped, namely, in September or October. A large number of plaints were filed in October, three years later. Although some were filed in November, it does not appear in which of these cases the crop was harvested in October, nor, whether in these cases, the plaints were not filed also in October, even if it is assumed that the cause of action arises at the moment that the last piece of crop is out. I am not, however, prepared to accede to this contention; for, ordinarily, the rent of each year becomes due on the last day of the year, and there is no evidence that that was not the case in respect of the suit-tenancies. If that date is taken, all the suits were within time. I am not at all satisfied either that the cause of action arose in October or that it has been shown that in any particular case, the crops were cut at or before that time. The plaintiff gave the date of the cause of action in the plaint and no objection was taken in the written statements, and consequently, that must be taken as the correct date.

(3) (1897) 7 M.L.J. 261.
(4) (1920) 22 Bom. L.R. 1387.
(5) (1887) A.W.N. 302

The Second Appeals fail on all these points and are dismissed with costs in S.A. No. 1922 of 855. There are 185 appeals to which this judgment applies but the respondent is only represented in S. A. No. 1922, of 855 the argument being the same in all the cases. Considering the large number of suits involved, I fix the fee at Rs. 75.

Appeals dismissed.

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*A.I.R. 1926 Madras 179

KRISHNAN, J.

Subramanian Chetty—Petitioner

v.

Ramaswami Chetty and others—Respondents.

Civil Revision Petition No. 226 of 1923, decided on 1st May, 1925, from the order of the District Munsif, Devakotta, dated 27th October, 1922.

*(a) *Civil Pro. Code, S. 73—Existence of money decree and application for execution before realisation of assets are necessary—Execution application need not be such as to end successfully.*

The only two conditions laid down in S. 73 and which the decree-holder must comply with are that he must have a money decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. There is no condition that the execution application put in by the party should be such as would have ended in his successfully obtaining satisfaction of his decree, *e. g.*, even an application for the arrest of a person who could not have been arrested, is sufficient. [P. 180, Col. 2.]

*(b) *Lim. Act, Art. 182—Relief not likely to be granted by Court—Application is still in accordance with law. (Obiter).*

An application praying for a relief which perhaps the Court would not have granted is still treated as an application in accordance with law for the purposes of Art. 182. (37 Bom. 42, *Foll.* [P. 180, Col. 2.]

*(c) *Civil Pro. Code, S. 73—Revision is allowed though remedy by suit is available—Civ. Pro. Code S. 115.*

The special remedy by way of suit under S. 73 does not prevent a Court from interfering under S. 115 where there is a manifest error in the order under S. 73, and putting setting that error aright as otherwise the parties will be driven to unnecessary litigation. [P. 181, Col. 1.]

M. Patanjali Sastri—for Petitioner.

B. Sitarama Rao, S. R. Muthuswami Aiyar and *P. C. Krishnaswami Aiyar*—for Respondents.

Judgment :—This is an application to revise an order passed under section 73 of the Civil Procedure Code by the District Munsif of Devakotta. The petitioner before me was one of the decree holders against a common judgment-debtor whose assets had been realised within the meaning of section 73 of the Civil Procedure Code and were held by the Court. Section 73 says :—

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

Now, the petitioner before me put in an application for execution of his decree which was a decree for payment of money passed against the same judgment-debtor, to arrest him, and this application had been admittedly made before the receipt of the assets with which we are concerned in this case. His application to be paid rateably from the assets has, however, been rejected on the ground that, when he applied for the arrest of the judgment-debtor, that man was not living within the jurisdiction of the Munsif's Court but was living in Penang, where the District Munsif of course had no jurisdiction and could not therefore have ordered his arrest. This finding of fact has been arrived at mainly on the ground that, in another petition for execution by the same decree-holder, he has stated that the man was living at Penang ; but he has explained it by saying that that statement was wrongly put in by the vakil's clerk who drafted that application. It is therefore doubtful whether the judgment-debtor was on the date on which the application was made in Penang. Assuming, however, that the judgment-debtor was at Penang at the time of the decree-holder's application for arrest, the question is "Does that prevent him from obtaining the advantage of rateable distribution ?" The section is intended to distribute equitably the assets of the common-debtor realised by the Court among the decree-holders and the one condition that is laid down to make sure of the fact that those creditors have been deligent is that creditors must have previously applied for execution of their decrees, this condition excluding creditors who have taken no steps to realise their debts ; but there is no condition that the execution application put in by the party should be such as would have ended in his succesefully obtaining satisfaction of his decree. The only two conditions laid down are that he must have a money decree against the same person and that he must have applied for execution of that decree before the assets were realised. If these two conditions are fulfilled, he is entitled to join in the rateable distribution. In the present case I see no reason to exclude the decree-holder on the finding of the District Munsif. The fact that his application was for the arrest of a person who could not have been arrested is quite immaterial so far as section 73 is concerned. It is even possible to imagine, that, though the judgment-debtor was not, on the date when the execution application was put in, living within the jurisdiction of the District Munsif, he might have come there before the order is passed by the District Munsif for his arrest, and there is nothing to prevent the District Munsif passing the order, if, by the time he passes his order, the judgment-debtor is within his jurisdiction, although at the time the application was made, he was not within his jurisdiction. But these questions are outside the scope of section 73. All that the Court has to be satisfied about is that there is a money decree of which satisfaction has not been obtained against a judgment-debtor and that the decree-creditor has shown his deligence by applying for execution of that decree before the assets were realised. On these conditions being fulfilled the decree-creditor is entitled to join in the rateable distribution. No case exactly in point has been brought to my notice, but some cases have been cited with reference to article 182 of the Limitation Act which speaks of applications for execution made in accordance with law. Even according to those cases which construe those words "applications in accordance with law," an application, like the present one would be fully in conformity with the requirements of the law ; though it prayed for a relief which perhaps the Court would not have granted, it is still treated as an application in accordance with law for the purpose of article 182 of the Limitation Act — see *Bando Krishna* v. *Narasimha* (1). I hold therefore that the petitioner before me was entitled to join in the rateable distribution.

(1) (1912) 37 Bom. 42=14 Bom. L.R. 861.

It has been urged before me by the learned Vakil for the respondent that, as under section 73 of the Civil Procedure Code, there is a special remedy provided, namely, that of a suit, I should not interfere in revision at all. No doubt, in some instances, Courts have held that it will be convenient to make the parties adopt that remedy, but that provision does not prevent a Court from interfering under section 115 where there is a manifest error in the order under section 73, and putting that error correct, as otherwise the parties will be driven to unnecessary litigation. I think this is a case in which a manifest error has been made by the District Munsif and I feel therefore justified in interfering with the order of the Lower Court and I modify that order by directing the District Munsif to make a fresh order under section 73 giving rateable distribution to the petitioner before me for both of his decrees. The case will be remitted to the District Munsif for the purpose of passing fresh orders. Each party will bear their own costs of this petition.

Case remitted.

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* A.I.R. 1926 Madras 181.

PHILLIPS, J.

Kuppuswami Mudaliar—Plaintiff-Appellant

v.

Chockalinga Mudaliar — Defendant-Respondent.

Second Appeal No. 1701 of 1922, decided on 17th July, 1925, from the decree of the Additional Sub-Judge of East Tanjore at Mayavaram, in A. S. No. 65 of 1921.

** Limitation Act, Art. 142—Suit for possession by vendee alleging dispossession of his vendor—Article applies.*

Art. 142 applies to a suit for recovering possession by plaintiff alleging title by purchase and that his vendor was dispossessed by defendant. There is nothing in that article to show that it applies only to suits based on possessory title and that it does not apply to suits for possession based on title. (Case Law discussed).

C. Narsaimhachariar and *N. Sundaresa. Aiyar*—for Appellant.

S. Vardachariar—for Respondent.

Judgment:—The facts of this case are stated in the Lower Appellate Court's judgment. Both the Lower Courts have dismissed the suit as being barred by limitation applying article 142. There were three items of property in the suit and although an appeal is preferred as regards all the three it is not now pressed as regards the third item, as admittedly the suit is barred by Order 21, rule 63, so far as that item is concerned. As regards the other two items the appellant's contention is that article 144 and not article 142 is applicable to this case. It is not disputed that if article 142 is applicable, article 144 cannot be invoked, as it is merely a residuary article. The argument is that article 142 has no application to suits for possession based on title, but that it refers only to suits based on possessory title, that is to say, that if a man has title and is in possession and is dispossessed, it is open to him to sue under article 142, because he was in possession, for the restoration of that possession; but he need not do that, but may bring his suit under article 144 basing his claim on title as opposed to possessory title. There is nothing in the article itself to support this contention, nor does the point appear to have been considered in any of the cases cited before me or decided one way or the other. The argument seems to be put forward in order to get rid of the applicability of article 142. As against this argument I may refer to three cases decided by the Privy Council, namely: *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1); *Mahammad Amanulla Khan* v. *Badan Singh* (2) and *Dharani Kanta Lahiri* v. *Gabar Ali Khan* (3). It is clear that all these three suits were based on title and although an argument has been attempted to show that the title set up was a mere possessory title, I do not think it can be sustained, more especially as regards the case reported in *Mahammad Amanulla Khan* v. *Badan Singh* (2). These three cases were held to be governed by article 142, and consequently if we accept the contention now put forward, it necessarily involves the conclusion that these three cases have been wrongly decided. Reliance is placed on other cases decided by the Privy Council in support of the

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(1) (1888) 16 Cal. 473=16 I.A. 23=5 Sar. 321 (P.C.).

(2) (1889) 17 Cal. 137=16 I.A. 148=23 P.R. 1890=5 Sar. 412 (P.C.).

(3) (1912) 25 M.L.J. 95=15 Bom. L.R. 445=17 C.L.J. 277=17 C.W.N. 389=(1913) M.W.N. 157=13 M.L.T. 185 (P.C.).

argument put forward by the appellant: *Secretray of State for India* v. *Chellikani Rama Rao* (4); *Kuthali Muthavar* v. *Kunharankutty* (5), *Basanta Kumar Roy* v. *Secretary of State* (6) and *Radha Gobind Roy Saheb* v. *Inglis* (7). In *Secretary of State for India* v. *Chellikani Rama Rao* (4) the plaintiff was a person who claimed by reason of adverse possession. There was no suggestion that he had ever been dispossessed and therefore it was clearly not a suit under article 142. In *Kuthali Muthavar* v. *Kunharankutty* (5) the plaintiff established his title to the land and also acts of possession, and against that the defendant set up other acts of possession which were not held to constitute adverse possession against the plaintiff. The question of dispossession does not seem to have been considered at all and therefore I cannot consider that the case is an authority for the contention put forward. In *Kumar Basanta Kumar Roy* v. *The Secretary of State for India in Council* (6) and *Radha Gobind Roy Saheb* v. *Inglis* (7) there was no question whatever of dispossession and consequently article 142 would not apply. In none of these cases is any reference made to the three cases first mentioned clearly because the facts are quite different. The case in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi* (1) seems to me to be directly applicable here. In *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna* (8) there is an *obiter dictum* of Heaton, J., which is approved by a single Judge of this Court in *Peria Jeeyangarswami* v. *Esoof Sahib* (9). It is as follows:—

"It was indeed urged that it is a general principle that any one suing in ejectment must prove possession within twelve years and the authorities seem to bear out that contention; but the reason for this is that possession is commonly the effective assertion of title which is relied on and the cases accordingly deal with that particular kind of assertion of title. But it is not the only one; there is another which in some cases is equally good; and that is an assertion of title made in Court and established by a decree. . . . (such title) is good against them also and entitles to possession whether the title-claimant has or has not been in possession within twelve years."

This exception to the general rule does not appear to be applicable to the facts of the present case. We find, moreover, another remark in the same judgment:—

"I do not think that Art. 142 has any application to claims which neither in terms nor in substance are claims to possession, made necessary by reason of dispossession or discontinuance of possession."

This judgment of Heaton, J. has given rise to the argument that in the present suit there was no dispossession of the plaintiff. It is not disputed that there was dispossession of his predecessor-in-title, nor is it disputed that plaintiff can have no better rights than his vendor. If there had been no dispossession by the defendant, that is to say, if defendant had not come into possession by dispossessing the plaintiff's vendor or some other person, the plaintiff would have no cause of action against the defendant, for defendant would not be in possession if he had never dispossessed anybody, for there is no suggestion that defendant merely occupied the property when vacant. It is admitted in the plaint that he did come into unjust possession by dispossessing Vythilingam, plaintiff's vendor, and in the plaint itself the cause of action is said to have arisen on the 11th of July, 1905, the date on which the defendant unjustly took possession in pursuance of an order of Court. The suit is clearly based on this dispossession and the article applicable is article 142. That being so, the burden is on the plaintiff to prove that he was in possession within twelve years of the suit. Both the Lower Courts have found that he has not proved this, and this finding is not attacked here.

On that finding this second appeal must fail and is dismissed with costs.

Appeal dismissed.

(4) (1916) 39 Mad. 617=43 I.A. 192=31 M.L.J. 324=20 C.W.N. 1311=(1916) 2 M.W.N. 224 =14 A.L.J. 1114=20 M.L.T. 435=4 L.W. 486=18 Bom. L.R. 1007=25 C.L.J. 69 (P.C.).

(5) A.I.R. 1922 P.C. 181 (P.C.)

(6) (1917) 44 Cal. 858=44 I.A. 104=1 P.L.W. 593=32 M.L.J. 505=21 C.W.N. 642=15 A.L.J. 398=25 C.L.J. 487=19 Bom. L.R. 480=(1917) 1 M.W.N. 482=6 L.W. 117= 22 M.L.T 310 (P.C.).

(7) (1880) 7 C.L.R. 364=3 Suther 809 (P.C.).

(8) (1910) 35 Bom. 79=12 Bom. L.R. 956.

(9) A.I.R. 1925 Mad. 834.

A.I.R. 1926 Madras 183 (1).

JACKSON, J.

Suggusetty Subbayya—Appellant

v.

Irugulapati Gangayya—Respondent.

Appeal No. 111 of 1924, decided on 20th August, 1925, against the order of the Additional Sub-Judge., Bezwada, in A.S. No. 34 of 1924.

Limitation Act, S. 19—Payment by debtor—Debtor denying payment altogether but leaving no evidence in support—Decree-holder crediting the money towards principal and interest—Court may presume in decree-holder's favour.

Where a debtor makes a payment, and the decree-holder relies on it as saving limitation as having been made towards principal and interest but the debtor denies the payment altogether and offers no evidence to support his allegations, the Court is entitled to presume that the payment was made towards principal and interest. (31 All. 495, *Expl.*) [P. 183, Col. 1.]

Ch. Raghava Rao—for Appellant.

P. Satyanaryana Rao—for Respondent.

Judgment:—The only question raised in this appeal is really one of fact, whether the payment on which the respondent relies to save limitation was made on account of interest. The best evidence in such a matter is the evidence of the payer himself and if he had gone into the box and explained how he came to pay the Rs. 25, for principal only, the task of judging this question might have been considerably lightened. Unfortunately, he chose to deny payment altogether which the Lower Appellate Court finds to be untrue. It is then driven to presumptions and presumes from the evidence of the decree-holder's clerk that the money was paid towards the decree, and that that includes principal and interest. I think that is a fair presumption, because ordinarily one does not split up the principal and interest in a decree. Another presumption was open to the learned Subordinate Judge, that if petitioner lied, he had something to conceal; and possibly, it was his knowledge that he paid for principal and interest when he paid towards the decree, which drove him to falsehood. Each case must be decided on its own facts; and merely because a presumption has been unfounded in one case, as that which is discussed in *Muhammad Abdulla Khan* v. *Bank Instalment Company Limited in Liquidation* (1), it does not follow that a presumption may not be made in another case. In the Allahabad case, the Judges say that the presumption will not enable them to hold that the payment was made for interest; not, that in all cases it is invalid. The appeal is dismissed with costs.

Appeal dismissed.

(1) (1909) 31 All. 495=6 A.L.J. 611.

* A.I.R. 1926 Madras 183 (2).

KRISHNAN AND WALLACE, JJ.

In re Peramasami Rayudu and another—Accused.

Criminal Revision Case No. 882 of 1924 and Cr. Referred No. 96 of 1924 decided on 28th April, 1925, by the Sessions Judge, Guntur.

* *Crim. Pro. Code, S. 162—Accused can ask for copy of witness's statement to police, during his cross-examination and not before.*

The stage when the accused is entitled to ask for a copy of deposition of a witness before police is when the witness is under cross-examination, and has already made the statement which the accused wishes to contradict by proof of his former statement to the police. [P. 184, Col. 1.]

J. C. Adam—for the Crown.

Judgment:—The general point raised the letter of reference is, at what stage, in an enquiry or trial, is an accused person entitled under section 162 of the Criminal Procedure Code to ask the Court to furnish him with copies of statements made by prosecution witnesses to the police in the course of investigation. The wording of the section fixes the stage as "when any witness is called for the prosecution." It will be observed, however, that the purpose of furnishing the copy is to *contradict* the witness. This obviously implies that the witness has already made a statement which is open to contradiction, and, therefore, the stage at which the copy is to be furnished is the stage when the witness has made a statement which lays him open to contradiction by his former statement to the Police. We cannot subscribe to the contention that, before cross examination is opened at all, the accused is entitled to copies of all statements made by prosecution witnesses at the police investigation, that in effect, he is entitled to a copy of the prosecution brief. It

appears to us, so far as we can gather from the meagre records on the point in this case, that that was the nature of the request put forward by the accused's pleader, and if that surmise is correct, then the refusal of the Stationary Sub-Magistrate was justified.

In practical working of the section what will usually happen is this. The accused's pleader will ask the witness what statement, if any, on any particular point he made to the police during the investigation, and when he replies, then the pleader may request the Court to refer to the statement before the police and furnish the pleader with a copy, having due regard to the 2nd proviso of the section. This 2nd proviso seems to have been overlooked by the learned Sessions Judge when he wrote the 2nd para. of his letter of reference.

As to para. 3 of the reference, we think it quite clear that the stage when the accused is entitled to ask for a copy, is, as indicated above, when the witness is under cross-examination, and has already made the statement which the accused wishes to contradict by proof of his former statement to the police.

No facts are made out in this case from which we can conclude that the provisions of section 162, Criminal Procedure Code as interpreted above were not complied with in this case.

We therefore return the records.

Records returned.

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* A.I.R. 1926 Madras 184.

WALLACE, J.

Thutta Venkataswami — Defendant-Appellant

v.

Vissamsetti Kotilingam and another— Respondents.

Appeal No. 57 of 1923, decided on 30th April, 1925, from the Appellate Order of the Sub-Judge, Kistna at Ellore, in A.S. No. 244 of 1922.

* (a) *Civ. Pro. Code, O. 21, r. 2—Judgment-debtor agreeing to pay some percentage to all creditors—Decree-holder party to such composition cannot resile.*

An agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree debt in full satisfaction of the whole debt is an adjustment which can be recorded under O. 21, r. 2, as an adjustment of the decree, and once it is come to, it is not open to a single creditor to resile from the fresh contract. [P. 184, Col. 2].

* (b) *Civ. Pro. Code, O. 21, r. 2—Adjustment is settling decree independent of terms of decree.*

Adjustment is clearly not the same thing as satisfaction. It is some method of settling the decree which is not provided for in the decree itself. [P. 185, Col. 2.]

V. Govindarajachari—for Appellant.

V. Suryanarayana—for Respondents.

Judgment:—The question for decision in this appeal is whether an agreement by a decree-holder in a composition by his judgment-debtor with his creditors generally to accept a percentage of his decree debt in full satisfaction of the whole debt is an adjustment which can be recorded under Order 21, rule 2 as an adjustment of the decree. The Lower Appellate Court has held that it could not be recorded, and the appellant (the judgment-debtor) appeals.

The respondent, who is the transferee from the original decree-holder, at one stage of his argument, challenged the existence of any composition, but both the Lower Courts have held on the evidence that there was a composition between the judgment-debtor and his creditors, under which they agreed, some of them to accept 75 per cent. of their debt and some 80 per cent. in full satisfaction, and the present decree-holder was in the latter class. He had filed an execution petition for the whole decree amount on 14th September, 1921, but dropped it after the composition agreement. It is quite clear that he was a party to that mutual agreement. That the present transferee-respondent was also aware of the composition is clear from the fact that the sum for which the decree was transferred to him was not the full amount of the decree, but practically the amount which the decree-holder under the composition had agreed to take.

This composition was in October, 1921, about one month after the decree. On 18th November, 1921, the judgment-debtor, the appellant, deposited into the first Court the amount due to his decree-holder under the adjustment on the footing of the decree, that is, 80 per cent. of the full amount due. It appears from the evidence that the money was first tendered to the decree-holder but he said that he had already transferred the decree to the

present 1st respondent. It does not appear that the money was then tendered to the 1st respondent, but it was paid into Court by the judgment-debtor on 18th November, 1921, along with his application to record satisfaction, to which application both the original decree-holder and the transferee were made parties. This deposit was mentioned by the judgment-debtor in his affidavit in the I.A., dated 16th November, 1921, and this fact was not controverted either by the decree-holder or his transferee. I am asked to remand the case for a finding as to the tender but it is unnecessary, since to the knowledge of both these parties the money was deposited into the Court for payment to the party entitled to execute. If the adjustment therefore can be pleaded as a bar in execution, the amount which the decree-holder had agreed to accept in full discharge of the decree was paid into Court on 18th November, 1921. No time was fixed under the composition for payment, but one month after the composition is certainly a reasonable time.

That a mutual agreement by creditors to accept a less sum than their full debts in full discharge of their debts is an enforceable contract in this country is not, I think, open to doubt. The illustrations to section 63 of the Indian Contract Act seem to me to make this clear. On the other side, it is argued that that section itself implies an original contract to which there was a promisor and a promisee; but I do not think the language used must necessarily import more than an ordinary obligation and implied promise of a debtor to pay back his creditor. Illustrations (*b*), (*c*) and (*e*) are, so far as appears from the language used, ordinary debts and not debts due under any contract. When the illustrations allude to a specific contract debt it is so specifically stated—*see* Illustration (*d*). Illustration (*e*) is practically conclusive for the purpose of this case, that such a composition with creditors is an enforceable contract, though in the case of illustrations (*b*) and (*c*) there may be no new contract created, and though until actual tender of payment, it may be still open to the creditor to refuse to accept part payment in full satisfaction, a case analogous to that in the decision of the Calcutta High Court reported in *Debendra Narain Sinha* v. *Sourindra Mohan Sinha* (1). In the case of illustration (*e*) there is a fresh contract for which there is consideration, namely, the agreement of other creditors also to be content with part-payment and thus release money for the discharge of other debts.

Now, if that is the position in the case of an ordinary debt, I fail to see how it is changed when the debt is embodied in a decree. In either case, the arrangement is an adjustment of the debt due, though it cannot be enforced unless certified [*vide Veerappa Chettiar* v. *Arumugam Poosari* (2) and the *ratio decidendi* of *Periathambi Udayan* v. *Vellaya Goundan* (3)], and payment in terms of the adjustment will be under the terms of its full satisfaction for the debt. It is contended that parties to a decree cannot vary their decree right. This seems tantamount to saying that there can be no adjustment of a decree. Adjustment is clearly not the same thing as satisfaction. If rule 2 of Order 21 meant to say that the decree is otherwise satisfied in whole or in part it would have said so. Adjustment is some method of settling the decree which is not provided for in the decree itself. If the decree-holder can still execute the decree in full in spite of the adjustment, then there has been no adjustment at all. This seems to me therefore clearly a case to which Order 21, rule 2 applies.

The respondent, however, further pleads that the decree-holder is entitled to resile from the adjustment if he likes, and that, if he resiles, then the decree has not been adjusted, to use the words of the rule, "to the satisfaction of the decree-holder." As noted above, such a result may be permissible when there has been no mutual composition between the judgment-debtor and the creditors; but when there is this composition, it is not open to a single creditor to resile from the fresh contract. The respondent contends that, even if that be so, the method of enforcing the contract on him is not by forcing him to abide by the execution proceeding, but by leaving the judgment-debtor to sue him for damages for breach of contract; and this is the view that the Lower Appellate Court has taken. If this fresh contract is, as I hold, an adjustment of the debt, I cannot see why such an adjust-

(1) (1914) 24 I.C. 391.
(2) (1907) 17 M.L.J. 527.
(3) (1897) 21 Mad. 409=8 M.L.J. 51.

ment should not be recorded. That is the purpose of the rule, unless the unfortunate debtor, after he has secured his composition, is then thrown into the position of having to sue any and every creditor who chooses to resile from the composition. An adjustment of that sort would be worse than no adjustment at all. The adjustment when made was "to the satisfaction of the decree-holder," and that is what is meant by these words when used in the rule.

The next point taken is that the tender was not made to the transferee and that it will not bind him. This again cannot be upheld. The transferee succeeds to the contract made by his tranferor and is bound to accept whatever the transferor was bound to accept. In this case I think it is clear that the decree-holder agreed under a mutual composition scheme to accept payment of 80 per cent. of his debt in full satisfaction of his debt, if paid within a reasonable time; and the money was paid within a reasonable time. This, therefore, was an adjustment of the debt tantamount to full satisfaction of the decree, and the judgment-debtor is entitled to plead that as a full defence to any execution application and to have this full satisfaction recorded under Order 21, rule 2.

I, therefore, reverse the order of the Lower Appellate Court and restore that of the District Munsif with costs here and in the Lower Appellate Court. The transferee decree-holder may draw out the money deposited by the petitioner in the First Court.

Order set aside.

A.I.R. 1926 Madras 186.

PHILLIPS, J.

Poovanalingam Servai—Plaintiff-Appellant.

v.

Veerayi and others—Defendants-Respondents.

Second Appeal No. 265 of 1923, decided on 17th August 1925, from the decree of the Sub-Judge, Sivaganga, in A.S. No. 60 1921.

Partition—Parties not governed by Hindu Law—Principle of working out equities in favour of each co-tenant applies.

The principle that in a partition suit all equities between the members of the co-parcenary should be worked out allotting to each member the share to which he is equitably entitled, is not restricted to co-tenants governed by Hindu law. (26 Mad. 686 *Ref.*) [P. 186, Col. 2]

A.V. Narayanaswami Aiyar—for Appellant.

K.V. Sesha Aiyangar—for Respondents.

Judgment:—In this case, the 1st defendant and the 2nd defendant jointly purchased the suit property, the 1st defendant paying Rs. 340, and the second defendant Rs. 60, the understanding being that each was to have half the property and the excess money paid by the 1st defendant was on behalf of the 2nd defendant and repayable by him. The 1st defendant subsequently redeemed a usufructuary mortgage on the land and paid the whole of the mortgage money and took possession. Just prior to this redemption, the plaintiff bought the 2nd defendant's share in the property and now brings this suit for redemption of his share of the usufructuary mortgage and for partition and for delivery of possession of his separate share.

The second appeal has been argued at very great length on the assumption that this is a pure redemption suit, but this overlooks the fact that it is in effect and in name a partition suit, for the plaintiff seeks to recover a demarcated half share of the suit property. The Lower Courts have ordered the plaintiff before getting possession of his half share to pay to the 1st defendant Rs. 140 the purchase money paid by her on behalf of the second defendant. There can be no doubt that in a partition suit all equities between the members of the co-parcenary should be worked out allotting to each member the share to which he is equitably entitled. It is argued for the appellant that this principle is only applicable to the Hindu Law of Partition and that, under any other law, these equities cannot be enforced, but no reasons are assigned for drawing such a distinction. We certainly have the authority of an American writer (Freeman on Co-tenancy and Partition) that such equities should be adjusted. This seems to be only reasonable and in accordance with what is right and proper. Freeman, at p. 675, mentions the very same equity as is in dispute here. The passage runs:

"If one of the co-tenants.....has advanced more than his proportion of the purchase money, the Court may decree that payment of the excess be-

made to him, and in default of such payment, that the moiety of the tenant in default may be sold to satisfy the amount equitably due from it."

No English cases on the point have been cited, but I may refer to *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz* (1). There it was held that where a tenant paid the public revenue on the land, he was entitled to a charge for that amount against his co-owner. At p. 703, there is the following passage:

"But when once the right of contribution is established as in the present case, it certainly cannot be an inequitable or violent stretch of such right to make it a charge against the co-owner's share."

Even if there is no legal charge in the present case, yet on equitable principles such a charge can be enforced and when it comes to partitioning the property between two co-tenants, this equity should in my opinion be enforced. On this ground alone, I think the second Appeal must fail and therefore I do not propose to discuss the various arguments put forward on the footing that this is a mere suit for redemption.

Another point has been raised, namely, that the 1st defendant is not entitled to interest on the Rs. 140. The Lower Courts have awarded interest from the date of payment until the date of the decree. This, I think, is wrong. The plaintiff has not been allowed mesne profits, because the 1st defendant had paid whole of the money due on the usufructuary mortgage, but from the date the 1st defendant got into possession, the purchase money of Rs. 140 cannot bear interest; for she has, in lieu of interest, possession of the land. Until that date, the 1st defendant has certainly suffered damages in having had to pay the excess amount of the purchase money and on that ground, I think, she is entitled to interest. The interest from 22nd July, 1918 to 16th June, 1920 is therefore disallowed.

Subject to this modification, the second appeal is dismissed with costs.

Decree varied.

(1) (1903) 26 Mad. 686=13 M.L.J. 83 (F.B.).

*A.I.R. 1926 Madras 187.

DEVADOSS AND WALLER, JJ.

Alaga Pillai—Plaintiff-Appellant

v.

Ramaswami Thevan and others—Defendants-Respondents.

Letters Patent Appeal No. 28 of 1924, decided on 11th September, 1925, from the decree of Wallace, J., in A.I.R. 1925 Madras 143

* *Evidence Act, S. 116—Tenant let in possession by A but evicted by true owner—Tenant attorning to true owner can then challenge title of A—Madras Land Encroachment Act (III of 1905), S. 7.*

Although a tenant is not entitled to set up the title of a third person even though the title is that of the Government, yet he is entitled to plead that he was evicted by the true owner, whether the true owner be the Government or a private person and that after such eviction he attorned to the true owner. In such a case the landlord who let him into possession cannot rely upon the law of estoppel as contained in S. 116 as preventing his former tenant from pleading a *jus tertii* in a third person. [P. 189, Col. 1.] The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession the threat to put him out of possession amounts in law to eviction. A notice under S. 7 of the Madras Land Encroachment Act (III of 1905) amounts in law to such an eviction. [P. 188, Col. 1.]

S. Muthiah Mudaliar—for Appellant.

C.A. Sheshagiri Sastri—for Respondents.

Judgment:—This appeal is against the judgment of our learned brother Wallace, J., allowing Second Appeal No. 834 of 1921. The only point in this appeal is whether section 116 of the Indian Evidence Act is a bar to the plaintiff's suit. It is found that the defendants were let into possession of the plaint property 40 years before the suit by the plaintiff's paternal grandfather. The plaintiff brought the suit for ejecting the defendants from the possession of the plaint property. The District Munsif of Shiyali dismissed the suit as being barred by limitation.

On appeal the Additional Subordinate Judge of Tanjore at Mayavaram set aside the decree of the District Munsif and gave a decree to the plaintiff for possession of the property and directed him to pay Rs. 400 as compensation being the value of the house on the suit property. Wallace, J. set aside the decree of the Subordinate Judge and restored that of the District Munsif. The plaintiff has preferred this appeal.

Mr. Muthiah Mudaliar for the appellant contends that the defendants were not entitled to set up the title of the Government in answer to the plaintiff's suit. His argument is that the plaint land is a portion of Survey No. 498 and that he is the owner of the whole survey number though he paid tax only for the trees standing thereon, and the defendants having been let into possession by the plaintiff's predecessor in-title are bound to deliver possession to the plaintiff. Under section 116 of the Indian Evidence Act no tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had at the beginning of the tenancy a title to such immoveable property. No tenant can set up a *just tertii* in a third person in answer to a suit by the landlord. But it is well settled that where the true owner evicts the tenant, the tenant could attorn to the true owner and set up the title of the true owner in answer to a suit for ejectment by the landlord who let him into possession. So long as his tenancy is subsisting the tenant is not entitled to set up the title of a third person. But if he is evicted from the possession of the land by the true owner then the tenancy ceases and after the eviction he could attorn to the true owner. The eviction need not be by actual dispossession of the tenant. If the true owner is armed with a legal process for eviction which cannot be lawfully resisted even though the tenant is not put out of possession the threat to put him out of possession amounts in law to eviction. In this case the Government served upon the defendants notice Ex. III (*b*) under section 7 of the Madras Land Encroachment Act (III of 1905). The Land Encroachment Act provides means by which persons in unauthorised occupation of Government land may be evicted. Under section 7 before taking proceedings under section 5 or section 6 the Collector or Tahsildar or Deputy Tahsildar, as the case may be, shall cause to be served on the person reputed to be in unauthorised occupation of land being the property of Government a notice specifying the land so occupied and calling on him to show cause before a certain date why he should not be proceeded against under section 5 or under section 6. Under section 3 any person unauthorisedly occupying any land which is the property of the Government shall be liable to pay the full assessment imposed on the land. Under section 5 a person in unauthorised occupation of land belonging to Government may be made liable to pay what is known as penal assessment. Under section 6 any person unauthorisedly occupying any land for which he is liable to pay assessment under section 3 may be summarily evicted by the Collector. Ex. III (*b*) is a notice issued under section 7 and on the failure of the defendants to comply with the terms of the notice eviction would have followed as a matter of course. The defendants paid the assessment and a year before the suit was brought they accepted patta from the Government. Ex. III (*b*) the notice under section 7 of the Madras Land Encroachment Act (III of 1905) amounts in law to eviction. If the plaintiff had title to the land he should have brought a suit against the Government for a declaration that the land is his and for the recovery of the penal assessment levied from him as well as from his tenants. He did not take any action against the Government. The explanation given by Mr. Muthiah Mudaliar is that the plaintiff was a minor at the time and he attained majority only within three years before the suit. But that would not save his right against the Government.

The case in *Kunhunni Menon* v. *Sankaran Valia Raja Avergal* (1) is distinguishable from the facts of the present case. In that case there was no one eviction by the owner having paramount title. If a tenant attorns to a third person, though he has true title, that would not protect him against a suit of the landlord in ejectment. It is unnecessary to discuss the cases cited by Mr. Seshagiri Sastri for the respondent, such as *Hill* v. *Saunders* (2), *Matthey* v. *Curling* (3) and *Doe* v. *Barton* (4). In *Ram* v. *Pramatha*(5) it was held that it was open to the tenant to prove a subsequent cesser of landlord's title by ouster by the holder of a title paramount and to attorn to the latter without actually going out of possession. The eviction by the true owner or the owner of the paramount title puts an end to the tenancy and if the tenant attorns to

(1) (1917) 7 L.W. 574=(1918) M.W.N. 376=8 L.W. 44=24 M.L.T. 79.
(2) 107 E.R. 1157.
(3) (1922) 2 A.C. 180.
(4) 113 E.R 432.
(5) A.I.R. 1922 Cal. 237.

the true owner he does not do so as a tenant of the landlord who let him into possession but accepts a new tenancy from the true owner. It does not matter in cases of this kind that the true owner is the Government A tenant is not entitled to set up the title of the third person even though the title is that of the Government. But he is entitled to plead that he was evicted by the true owner whether the true owner be the Government or a private person and that after such eviction he attorned to the true owner. In such a case the landlord who let him into possession cannot rely upon the law of estoppel as contained in section 116 of the Indian Evidence Act, as preventing his former tenant from pleading a *jus tertii* in a third person. The defendants in this case were evicted by the Government from the plaint land before the date of the suit and the acceptance of patta by them was after the eviction and therefore the plaintiff cannot succeed against the defendants unless he is able to make out a title against the Government. The Secretary of State is not a party to the suit and there is no finding that the plaintiff has a better title than the Government, whereas the evidence seems to point the other way.

In the result the Letters Patent Appeal is dismissed with costs.

Appeal dismissed.

A.I.R. 1926 Madras 189.

PHILLIPS, J.

Chandayya Hegde--Defendant-Appellant

v.

Kaveri Hegadthi and others—Plaintiffs-Respondents.

Second Appeals Nos. 1416 to 1418 of 1923, and Civ. Mis. Petition No. 2637 and 2638 of 1925, decided on 3rd August, 1925, from the decrees of the Sub-Judge, South Kanara.

Malabar Law—Aliyasantana *law*—*Separate maintenance*—*Mere inconvenience does not give rise to a claim*—*Some members living outside for some days*—*No right exists to claim maintenance for those days.*

The right of a member of an *Aliyasantana* family to maintenance in the *tarwad* house is undoubted and under certain circumstances he is entitled to separate maintenance outside; [P. 189, Col. 2.] but the right to separate maintenance cannot be put on the mere ground that there is no such complete harmony in the house as to ensure the happiness of the claimant. Mere inconvenience is not sufficient to warrant separate maintenance. There is also no right to claim maintenance charges for a period when some members resided away for a portion of the year with their husbands or wives. [P. 190, Col. 1.]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondents.

Judgment:—These three suits are brought for maintenance against the 1st defendant who is the *ejman* of the Aliyasantana family to which the plaintiffs belong. Separate maintenance is claimed in all the three suits on the ground that the defendant had refused to maintain the plaintiffs. Both the Courts have found that this case is untrue and that there was no refusal by the defendant to maintain the family but both the Courts have given a decree for maintenance. The Lower Appellate Court has held that "defendant and the plaintiffs are not moving well and that a joint mess in the family house has become extremely inconvenient," and on that ground has awarded separate maintenance. The right of a member of an Aliyasantana family to maintenance in the *tarwad* house is undoubted and under certain circumstances he is entitled to separate maintenance outside. It has been held that when a wife goes to live with her husband or when a husband goes to live with his wife in a separate house they are entitled to separate maintenance [*vide Maradevi* v. *Pammakka* (1), *Kunhi* v. *Ammu* (2), *Muthu Amma* v. *Gopalan* (3) and *Govindan Nair* v. *Kunju Nair* (4)]. But it is not suggested in these cases that any of the members has gone to reside separately for any proper purpose. One Seshappa, the head of the branch which brings the Suit No. 133 of 1920 did apparently leave the *tarwad* house for a year or two but he admits that he returned there when he found that both his branch and the other two branches were being treated alike. It is not suggested that any of the other members has gone away to live separately, except temporarily and from time to time. It is now urged for respondents that they are entitled to separate maintenance because of the

(1) (1911) 36 Mad. 203=22 M.L.J. 309=11 M.L.T. 112=(1912) M.W.N. 109.

(2) (1912) 36 Mad. 591=24 M.L.J. 559=(1912) M.W.N. 1233.

(3) (1912) 36 Mad. 593=23 M.L.J. 496=13 M.L.T. 120.

(4) (1919) 42 Mad. 686=36 M.L.J. 565=(1919) M.W.N. 302=26 M.L.T. 189.

quarrels that have taken place in the family. There have been suits between the *ejman* and some members of the family and also one suit between two branches of the family, but there is no evidence to show that these disputes have been of such a nature as to make it impossible or dangerous for the members to continue to live together in the same house and take meals together. The Lower Appellate Court has merely found that their living together was extremely inconvenient. It has been pointed out in *Kunchi* v. *Ammu* (2) that the right to separate maintenance cannot be put on the mere ground that there is no such complete harmony in the house as to ensure the happiness of the claimant. Mere inconvenience therefore is not sufficient to warrant separate maintenance. It may be observed that the Lower Appellate Court does add to these reasons the following: "I therefore agree with the Lower Court in holding that the plaintiffs are entitled to claim separate maintenance," and he must be deemed to have adopted the District Munsif's reasoning. When we look at the findings of the District Munsif we see nothing more definite than the finding of the Subordinate Judge. The District Munsif elaborately discusses the evidence and finds the plaintiffs are not debarred from claiming maintenance, but the mere fact that they are not debarred in suitable circumstances from so claiming is no evidence that such suitable circumstances do exist and that point he has not considered, his main ground being that the defendant had refused to permit the plaintiffs to "freely participate in the family income." Defendant had acted up to the terms of a family *karar* which defined the rights of the parties and it was not incumbent on him to distribute any spare money that he had in his pocket among all the other members or even among some of them. Similarly the District Munsif seems to think that when some members resided away for a portion of the year with their husbands or wives, as the case might be, they were entitled to claim rom the *ejman* a sum equivalent to their maintenance during the period of absence. Such a right has certainly never been recognised by the Courts and the District Munsif gives no authority for his opinion. Even, therefore, if we take the findings of the District Munsif together with those of the Subordinate Judge, no adequate reasons have been given for awarding separate maintenance in these suits. In view of these findings it is unnecessary for me to say anything about the rate of maintenance; but I would point out that the Subordinate Judge has given very inadequate reasons for rejecting the actual income shown in the leases and accepting in preference some vague estimate of what the yield would have been and the price that it would have fetched. He has also divided the income into exactly equal shares for each person and allotted it accordingly, not taking into account the right of the *karnavan* to something more and the right of those members who continued to live jointly in the family house to enjoy the same mode of living as they formerly enjoyed subject only to the rights of those who have separated from the family.

Second Appeal No. 1416 of 1923 has been compromised as between the defendant and all the plaintiffs except the 3rd. There will be a decree in accordance with that compromise and also be a decree dismissing the suits with costs throughout, the costs in S. A. No. 1416 being met by the 3rd plaintiff alone.

Appeal allowed.

A.I.R. 1926 Madras 190.

ODGERS AND VISWANATHA SASTRI, JJ.

Mahalinga Naicker—Plaintiff-Appellant

v.

Vellaya Naicker and another—Defendants-Respondents.

Second Appeal No. 73 of 1923, decided on 24th September, 1925, against the decree of the Sub-Judge, Ramnad at Madura, in A. S. No. 74 of 1921.

Madras Estates Land Act (I of 1908), S. 131—Ryot applying under S. 131 and failing—Subsequent suit in Civil Court is not barred.

The Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Estates Land Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of S. 189 of the Estates Land Act. The fact therefore that two unsuccessful applications were made by the ryot under S. 131 does not take away this right of suit under the Civ. Pro. Code. (A. I. R. 1923 Mad. 6 (F. B.), *Foll.*) [P. 191, Col. 2.]

B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Appellant.

A. Venkatarayaliah and *L. Venkatanarasiah*—for Respondents.

Viswanatha Sastri, J. :—Plaintiff is the appellant. He sued to set aside a sale held under the provisions of Ch. 6 of the Estates Land Act, and for a permanent injunction restricting defendants from interfering with his enjoyment, on the following grounds :—(1) that the sale was held without due notice to him ; (2) that there was no publication ; and (3) that the price was grossly inadequate. The First Court held on all these points in favour of the plaintiff, and passed a decree as prayed for. Defendants appealed, and the Appellate Court held that a Civil Court had no jurisdiction to entertain such a suit and allowed the appeal. That such a suit will lie in a Civil Court, has been held by a Full Bench of this Court, in *Raja of Ramnad* v. *Venkatramaiyer* (1). The vakil for the respondents contended that this ruling would not apply ; because there was an application to set aside the sale under section 131 of the Act and that Order 21, rule 92 (1), of the Civil Procedure Code barred the suit. This rule runs as follows :—

"Where no application is made under rr. 89, 90 or 91 or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

I may here state that rule 89, is similar to section 131 of the Estates Land Act, and it was represented that the applications put in by plaintiff under this section were dismissed, because the proper sum was not deposited. Section 192 of the Estates Land Act relates to the application of the Civil Procedure Code to "suits, appeals and other proceedings under the Act" and it lays down that "subject to the other provisions of this Act and subject to the following modifications and additions, the provisions of the Civil Procedure Code shall apply to all suits, appeals and other proceedings under this Act, so far as they are not inconsistent therewith." And in clause (*a*), it is stated that section 310 A (corresponding to rule 89 of Order 21) shall not apply. Now if rule 89 of Order 21 of the Code of Civil Procedure does not apply to proceedings under the Estates Land Act, I fail to see how rule 92 (1) of Order 21 can be made applicable simply on the ground that section 131 of the Estates Land Act is similar to rule 89 of Order 21. As observed in the Full Bench case above referred to the jurisdiction of Civil Courts is taken away only in cases referred to in section 189 of the Estates Land Act and it was not even suggested that there is anything in this section to bar the suit out of which this Second Appeal arises.

I would, therefore, allow the appeal and setting aside the decree of the Lower Appellate Court, direct that that Court do rehear the appeal. Appellant will get his costs in this Court and costs in the Lower Appellate Court will abide and follow the result. Appellant will get a refund of the Court-fee paid on the memorandum of appeal.

Odgers, J. :—I agree. It was stated in the referring judgment in *Rajah of Ramnad* v. *Venkataramaiyer* (1), as well settled, that the Civil Courts have jurisdiction in all cases in which they would have had jurisdiction prior to the Act except in so far as such jurisdiction is expressly or by necessary implication taken away by the provisions of section 189 of the Estates Land Act. The question put before the Full Bench was quite general in its terms. It is admitted that the only distinction between this case and that dealt with by the Full Bench is that two unsuccessful applications were made by the ryot under section 131. I cannot see that this makes the slightest difference in principle and a suit by a ryot who says his property has been improperly sold is expressly said by the Full Bench to be outside the restricting provisions of the Madras Estates Land Act. I agree to the order proposed by my learned brother.

Appeal allowed.

(1) A.I.R. 1923 Mad. 6 (F.B.).

*** A.I.R. 1926 Madras 191.**

JACKSON, J.

Neelam Venkataratnammu — Plaintiff-Appellant

v.

Venjamoore Varaha Narasimhacharyulu Defendant—Respondent.

Second Appeal No. 256 of 1923, decided on 3rd August 1925, from the decree of the Sub-Judge, Cocanada, in A. S. No. 84 of 1921.

Registration Act, S. 49—Unregistered gift deed is admissible to show circumstances then existing.

An unregistered gift deed can be received in evidence, not to prove any definite gift, but to prove that there was talk of making some assignment at that date. The Court cannot receive the document in evidence to prove a gift and then infer

that the possession of the donee was adverse, and then justify its acceptance of the document on the ground that it confined itself to the inference, and was not concerned with the fact of the gift. [P. 192, Cols. 1 and 2.]

P. Satyanarayana Rao—for Appellant.

V. Govindarajachari—for Respondent.

Judgment:—Appeal from the decree in A. S. No. 84 of 1921 on the file of the Court of the Subordinate Judge of Cocanada, O. S. No. 32 of 1920 on the file of the Court of the Principal District Munsif of Cocanada.

Plaintiff sues for certain portions of a house site. Both Courts dismissed his suit and plaintiff appeals.

Issue 2, whether plaintiff was in possession within twelve years prior to suit, is a question of fact on which both Courts find against plaintiff; and he only seeks to traverse that finding in this second appeal by urging that the learned Subordinate Judge erred in accepting as evidence the unregistered gift deed, Ex. V. There is no doubt that Ex. V. is a transaction affecting an interest in immoveable property and as such cannot be received in evidence unless it is registered. The Subordinate Judge, however, relying upon *Varada Pillai* v. *Jeevarathnammal* (1) has admitted the document for the purpose of proving that possession was adverse. In the reported case it was sought to prove a gift for which there was no registered deed by its recital in a petition which also had not been registered. The Judicial Committee decided that the petition could not serve as proof of the gift, but, turning to another question, what was the nature of Doraiswami's possession, the petition could be admitted in evidence. Thus the petition was not evidence of a gift, but evidence that some one had petitioned on the footing of a gift. Care must be taken not to extend this principle too far. For instance, in the present case, the Court cannot receive Ex. V in evidence to prove a gift and then infer that the defendant's possession was adverse and justify its acceptance of Ex. V on the ground that it confines itself to the inference, and is not concerned with the fact of the gift. Because the inference is only based upon the fact, and if the fact cannot be proved by the unregistered instrument, nothing can be proved on which to found an inference.

But the document can go in, not to prove any definite gift, but to prove, for what it is worth, that there was talk of making some assignment at that date. That, at least, is how I interpret the ruling in *Varada Pillai* v. *Jeevarathnammal* (1). In C. R. P. No. 710 of 1923 I had occasion to examine this very question with the aid of the ruling in *Saraswathamma* v. *Paddayya* (2), and I observed: "In my opinion, if the document is filed on the strict understanding that it must not evidence any transaction affecting immoveable property its scope in the majority of cases will be very small. At most I think it will evidence, as observed by Venkatasubba Rao, J., an intention." In the present case I doubt if Ex. V could evidence more than that the house-site was too small to admit of a backyard and the vendor was corresponding about it. But even on that assumption, and supposing that he read the whole document, I do not consider that the finding of the learned Subordinate Judge is vitiated. There is direct oral evidence of defendant's adverse possession, and the District Munsif found in his favour, even after rejecting Ex. V as inadmissible. There is no dispute about the exact areas occupied, and Ex. V is really only useful in corroborating the oral evidence by showing that at the date when it was written there was trouble about the insufficiency of the site. When it comes to considering the actual measurements in Ex. V they are of more help to the appellant than to the defendant because there are certain discrepancies between the original area in the document and that now occupied. *Vide* para. 6 of the Lower Appellate Courts' judgment.

So it cannot be argued that the appellant was prejudiced by their consideration; and all that really operated upon the mind of the learned Subordinate Judge, in my opinion, was the part of Ex. V which can legitimately be regarded as evidence.

Accordingly I see no reason to remand the suit for fresh findings.

No other ground of appeal was raised or appears to be valid.

The appeal is dismissed with costs.

Appeal dismissed.

(1) (1919) 43 Mad. 244=46 I.A. 285=38 M.L.J 313=27 M.L.T. 6=22 Bom. L.R. 144=18 A.L.J. 274=24 C.W.N. 346=(1919) M.W.N. 724=10 L.W. 679 (P.C.).

(2) A.I.R. 1923 Mad. 297.

* A. I. R. 1926 Madras 193

PHILLIPS, J.

M. R. Govinda Row (Trustee of Piranmalai Devasthanam)—Plaintiff—Appellant.

v.

Chinnathurai Pillai—Defendant—Respondent.

Second Appeal No. 831 of 1924, Decided on 12th August 1925, against the decree of the Dist. Judge, Ramnad at Madura, D/- 27th August 1923 in A. S. No. 853 of 1921.

(a) *Madras Estates Land Act* (1908), *S.* 26—*Land lying fallow for even four years is not waste land.*

"Bringing into cultivation" within S. 26 means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land lies allow for one, two or even four years cannot constitute it as waste land. [P 193 C 2]

* (b) *Limitation Act, Art.* 134 — *Suit by trustee to set aside alienation by prior trustee is not governed by Art.* 134 — *Limitation runs from the date of new trustee's accession to office* — *Limitation Act, Art.* 144.

Ordinarily trust property belonging to Hindu religious institutions is not vested in the so-called trustee who is not in the position of an express trustee as understood in English Law and, therefore, a suit by trustee to set aside alienation of trust property by previous trustee is not governed by Art. 134 and even if Art. 144 applies, the period of limitation runs not from the date of alienation but from the date of the accession of the plaintiff trustee to his office : 13 *Mad.* 277, *Foll.*; *A. I. R.* 1922 *Patna* 243, *not foll.* [P 193 C 2, P 194 C 1]

T. L. Venkatarama Aiyar—for Appellant.

K. Rajah Aiyar—for Respondent.

Judgment.—The plaintiff in this case is the Manager of the Piranmalai Devasthanam and he sues to recover rent in respect of certain lands belonging to the Devasthanam which were granted on a permanent lease at a favourable rent by one of his predecessors. The lower appellate Court has held that the suit is barred by limitation because the starting point of limitation under Art. 134 is the date of the transfer which in the present case was more than 12 years before suit. He has come to this conclusion on the ground that the lease was void ab initio as the trustee of the Devasthanam had no right to grant a permanent lease of the trust properties and that therefore the period started from the date of the lease. The appeal was also opposed by the respondent on the ground that the lease was justifiable under S. 26 of the Estates Land Act, that is to say, because it was a lease granted for the purpose of bringing waste land into cultivation. Although the lease recites that this land was overgrown, that the irrigation source was out of repair and that the land was uneven, it does not appear that the land was waste land within the meaning of S. 26. I agree with the District Judge that "bringing into cultivation" means cultivating land which had not previously been cultivated or at any rate had not been cultivated for a long period. The mere fact that land lies fallow for one, two or even four years cannot constitute it a waste land within the meaning of that section. Otherwise land lying fallow for even one year would come within the definition.

The main question is whether the suit is barred by limitation. The lower appellate Court has held that the permanent lease being invalid must be deemed to have been invalid from the date of the alienation and that therefore the limitation period must be calculated from that date, the possession of the lessee being adverse from that date. In this conclusion I think the District Judge is clearly wrong. The point was decided in *Mahomed* v. *Ganapati* (1) in a case precisely analogous to the present, and it was there held that the period of limitation ran, not from the date of the permanent lease, but from the date of the accession of the plaintiff trustee to his office. This was followed in *Sathianamma Bharati* v. *Saravanabagi Ammal* (2). In *Vidya Varuthi* v. *Baluswami Aiyar* (3) the same point was decided with reference to a mutt and a Matadhipathi or Pandarasannadhi of that Mutt. Although in that case the religious institution in question was a mutt, a perusal of the judgment shows clearly that their Lordships draw

(1) [1889] 13 Mad. 277.
(2) [1894] 18 Mad. 266=4 M.L.J. 223.
(3) A.I.R. 1922 P.C. 123.

no distinction between a mutt as such and other Hindu religious institutions. The two cases I have cited above are referred o in their Lordships' judgment and referred to with approval. The basis of the decision is that ordinarily trust property belonging to Hindu religious institutions is not vested in the so-called trustee who is not in the position of an express trustee as understood in English Law. As the property does not vest in him Art. 134 of the Limitation Act is not applicable because the property has not been conveyed or bequeathed in trust and afterwards transferred by the trustee, as the manager of the institution is not a trustee within the meaning of the article. That this is the view taken by their Lordships is, I think, clear from the passage in the judgment at page 847 : " From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would prima facie follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a 'trustee' to whom property has been 'conveyed in trust' and who by virtue thereof has the capacity vested in him which is possessed by a 'trustee' in the English Law."

For the respondent it is urged that *Vidya Varuthi* v. *Baluswami Aiyar* (3) does not apply to the present case, but he is not able to point out any principle on which a distinction can be drawn. Reliance is placed on another case of the Privy Council in *Subbaiya Pandaram* v. *Muhammad Mustapha* (4), but that was a case of a specific trust and consequently it was held that Art. 134 was applicable. I am clearly of opinion that Art. 134 is not applicable to the present suit.

It is then argued that under Art. 144 the suit would be barred, the contention being that from the date of the alienation there was possession adverse to the idol and consequently that after 12 years of such adverse possession the suit is barred. This is the view expressed in an obiter dictum in *Ramrup Gir* v. *Lal Chand Marwari* (5) and the proposition is sought to be supported by *Damodar Das* v. *Lakhan Das* (6). The former case seems to be directly opposed to the Madras decisions and therefore I need not further consider it. As regards the case in *Damodar Das* v. *Lakhan Das* (6), the facts show that the dispute was between two chelas or trustees and, in so far as the idol was concerned, it was not held that the idol had lost any rights in the property. The question decided was that one particular chela had by adverse possession required a right of management as against the representative of another chela. That is not the point here. The point has been dealt with in *Jagadindra Nath Roy* v. *Hemanta Kumari Devi* (7). In that case property belonging to an idol had been alienated and the alienation occurred during the minority of the trustee. The contention raised there was that this minority of the plaintiff was of no avail, inasmuch as time had begun to run as against the idol. This contention was negatived by their Lordships on the ground that the idol had no power to bring a suit except through the trustee. Consequently there could be no question of a suit being barred inasmuch as it could not have been brought at an earlier date. There is, therefore, no reason why, even if Art. 144 is applied, the decision in *Mahomed* v. *Ganapati* (1) should not apply. Following that decision I must reverse the decree of the District Judge and restore the decree of the Deputy Collector with costs throughout.

Appeal allowed.

(4) A. I. R. 1923 P. C. 175.
(5) A.I.R. 1922 Patna 243.
(6) [1910] 37 Cal. 885=37 I.A. 147=14 C. W. N. 889=12 C. L. J. 110=(1910) M. W. N. 303=7 A.L.J. 791=8 M.L.T. 145=20 M.L.J. 624=12 Bom. L.R. 632 (P.C.).
(7) [1904] 32 Cal. 129.

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* A. I. R. 1926 Madras 194

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Official Receiver, Tanjore — Appellant.

v.

R. M. Nagaratna Mudaliar—Respondent.

Appeal No. 46 of 1925, Decided on 20th April 1925, against the order of the Dist. J., East Tanjore, at Negapatam, D/- 30th January 1925, in I.A. No. 50 of 1925.

✻ (a) *Civil P. C., O. 34, R. 14—Security given in execution—Security can be sold—No separate suit is necessary—Civil P. C., O. 20, R. 11.*

Where the charge is created by the decree itself O. 34 R. 14 can have no application: Security given by a judgment-debtor in execution for due performance of the decree can be enforced and the property covered by the bond can be sold in execution by the decree-holder, without being compelled to file a regular suit: [41 *Mad.* 327 and *A. I. R.* 1924 *Cal.* 485 *Foll.*] The fact that the security bond is taken under O. 20, R. 11 makes no difference. [P. 196, C. 2, P. 197, C. 1.]

(b) *Provincial Insolvency Act* (1920), *S.* 52—*Section does not apply to money decree-holders who have obtained securities in execution.*

Section 52 does not apply to decree-holders obtaining security in execution for satisfaction of their money decrees. The exemption from the operation of the section which must be understood to have been given to secured creditors must be extended to money decree-holders who have obtained securities in the course of execution. [P. 198, C. 1; P. 201, C. 1.]

T. M. Krishnaswami Aiyar and *S. Panchapegesa Sastri*—for Appellant.

S. Varadachari and *A. Ganesa Aiyar*—for Respondent.

Venkatasubba Rao, J.—I shall briefly state the facts that have given rise to this appeal. Execution was taken out of a money decree and the judgment-debtor agreed to pay the decree-holder interest at an enhanced rate and executed in his favour a security bond in respect of certain immovable properties. As a result of this an order was made postponing execution under O. 20, R. 11, Civil Procedure Code. The judgment-debtor was subsequently adjudicated an insolvent and on the decree-holder seeking to attach the properties secured and bring them to sale, the official receiver applied to the insolvency Court for an order to stay the sale directed by the executing Court. The application was refused by the District Judge of East Tanjore and this appeal has been filed questioning the correctness of his order.

Mr. Varadachariar, the learned vakil for the decree-holder, objected that apart from the merits of the case the insolvency Court would have no power to make an order binding upon the Court executing the decree. As on hearing full arguments on the other contentions raised we intimated that we were against the appellant; Mr. Varadachariar did not have to argue the point relating to the power of the insolvency Court. I shall therefore proceed to deal with the case as if the objection to the property being sold had been raised before the executing Court itself.

Mr. T. M. Krishnaswami Aiyar, the learned vakil for the appellant, advanced two main contentions:—(1) A security of this kind cannot be enforced in execution, as to do so will contravene the terms of O. 34, R. 14, Civil Procedure Code; (2) that under S. 52 of the Provincial Insolvency Act (V of 1920) the executing Court on being informed that the judgment-debtor has become an insolvent is bound to stay the sale and direct the property to be handed to the receiver in insolvency.

I shall deal with these contentions in the order in which I have stated them.

The first contention is based on the terms of O. 34, R. 14, Civil Procedure Code. It runs thus:—

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgaged * * * * * * * *."

Every essential is wanting in this case. The section contemplates a mortgage and a decree. Under the section there must be first a mortgage and then a decree in respect of a claim arising under the mortgage. The position here is reversed. Long previous to the mortgage there was a decree and it was impossible that the decree could be in respect of a claim arising under a mortgage which was non-extant. The section therefore does not in terms apply.

Where the charge is created by the decree itself O. 34, R. 14 can have no application: See *Sowbagia Ammal* v. *Manicka Mudaliar* (1) and *Indramani* v. *Surendra Nath* (2).

Where the security comes into existence subsequent to the decree, the principle applies a fortiori and O. 34, R. 14 cannot be a bar.

In this connexion I may notice two sets of cases to which reference has been made at the bar.

First: cases under S. 145, where in execution security was sought to be enforced against a surety.

Second: cases under certain other sections of the Code where the judgment-debtor was the party against whom security was attempted to be enforced.

(1) [1917] 33 M. L. J. 601=(1917) M. W. N. 782 =22 M. L. T. 386=6 L. W. 701.

(2) A. I. R. 1922 Cal. 35.

Let me first deal with cases under S. 145. In *Mukta Prasad* v. *Mahadeo Prasad* (3) the property of the surety was allowed to be sold in execution. The ground of the decision was that he rendered himself personally liable and his personal liability could not be enforced by the very property given as security being attached and sold. In *Amir* v. *Mahadeo Prasad* (4) it was held that although the surety had made himself personally liable the charge against the property could be enforced only by means of a regular suit. I may point out that though *Mukta Prasad* v. *Mahadeo Prasad* (3) was in this case distinguished, the ground of the distinction is wrong as what was attempted to be sold was not merely the judgment-debtor's equity of redemption. It *Mt. Chandrabati* v. *Madho Prasad* (5) the bond created a personal liability but it was held that the property given as security could not be sold in execution although the personal liability of the surety could be otherwise enforced: In *Rajendra Lal Dass* v. *Lakhmi Narain Khanna* (6), S. 145 was held inapplicable as the surety had not undertaken any personal liability and the properties were not allowed to be sold in execution. In *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (7) their Lordships of the Judicial Committee observe that if the surety has not rendered himself personally liable, S. 145 has no application, but when there is a personal liability undertaken the question is left open.

An examination of most of these cases will show that what is mainly said to be in the way of the security being enforced is the repealed S. 99 of the Transfer of Property Act or the provision now corresponding to it, namely, O. 34, R. 14, Civil P. C.

These cases, in my opinion, may be easily disposed of as they deal with a specific section of the Code which gives express rights against a surety and what these rights are, must be determined with reference to that section alone. We are not now in this appeal concerned with S. 145.

(3) [1916] 38 All. 327=14 A. L. J. 385.
(4) [1916] 39 All. 225=15 A. L. J. 76.
(5) [1914] 19 C. W. N. 178
(6) [1915] 19 C. W. N. 961.
(7) [1919] 42 All. 158=46 I. A. 228=38 M. L. J. 302=22 O. C. 212=6 O. L. J. 682=18 A. L. J. 263=22 Bom. L. R. 521 (P. C.).

I shall now deal with cases where a security bond was executed by a party to the suit itself. In *Shyam Sunder Lal* v. *Bajpai Jainarayan* (8) an application was made by the defendant judgment-debtor for stay of execution and it was granted upon his giving security in the sum of Rs. 10,000. By the security bond which was executed certain properties were mortgaged as security for the due performance of the decree. The decree-holder applied for realization of the decree amount by sale of the properties comprised in the bond. S. 99 of the Transfer of Property Act was relied on by the judgment-debtor who opposed the application. It was held that that section was not a bar as the bond was not addressed to the decree-holder, but was in favour of the Court and that therefore there was no mortgage created.

In *Tokhan Singh* v. *Girwar Singh* (9) the judgment-debtors executed a bond to the Registrar of the Court as security for the costs of the respondents in appeal to the Privy Council. They sought to enforce the security by selling in execution of the decree for costs the property comprised in the bond. It was held that a valid mortgage was created and that under S. 99 of the Transfer of Property Act the security could not be enforced without the institution of a regular suit.

Although *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) was distinguished in *Tokhan Singh* v. *Girwar Singh* (9) on the ground that in the former case the bond was given to the Court and in the latter it was executed to the Registrar, these decisions are in truth irreconcilable.

S. 99 of the Transfer of Property Act has been replaced by O. 34, R. 14 of the Civil Procedure Code. The repealed section ran thus :

"Where a mortgagee in execution of a decree for the satisfaction of any claim, whether arising under the mortgage or not, attaches the mortgaged property, he shall not be entitled to bring such property to sale otherwise than by instituting a suit under S. 67* * * * * *."

O. 34, R. 14 has been reproduced in an earlier part of this judgment.

The effect of the alteration is to confine the operation of the rule to cases where a mortgagee has obtained a personal decree

(8) [1903] 30 Cal. 1060.
(9) [1905] 32 Cal. 494=9 C. W. N. 372=1 C. L. J. 118.

against the mortgagor on the mortgage debt. In such a case, the mortgagee can have the property sold only by instituting a regular suit for sale. The Madras High Court in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) recognising the effect of this alteration has held that the provision now in force does not stand in the way of the property given as security being sold in execution. In that case immovable property was given by a judgment-debtor as security for the due performance of a decree pursuant to an order made under O. 41, R. 5 (3), Civil P. C. and it was held that the property could be sold in execution without recourse being had to an independent suit.I may mention that in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11) the Calcutta High Court held that S. 99 did not operate as a bar. This was decided later than *Shyam Sundar Lal* v. *Bajpai Jainarayan* (8) and *Tokhan Singh* v. *Girwar Singh* (9) and previous to *Subramaniam Chettiar* v. *Rajah of Ramnad* (10). The referring Judges advert to the conflict of authority and indicate a clear preference in favour of the view that the property can be sold in execution.

In the most recent case, *Jyoti Prakash* v. *Mukti Prakash* (12) the view of the Madras High Court has been followed.

The weight of authority therefore supports the view that security given by a judgment-debtor can be enforced and the property covered by the bond be sold in execution.

In the cases mentioned above, security was not taken under O. 20, R. 11 and on this ground it may be contended that there is no direct authority on the question raised. But in principle is there any difference ? O. 20, R. 11 contemplates a complete or qualified stay of execution and some of the sections, at any rate, considered in those cases provide similarly for stay of execution. If the view of the law taken in those cases is correct the fact that in the present case the security bond was taken under O. 20, R. 11 makes no difference and we must hold that the decree-holder in execution of his decree and without being compelled to file a regular suit can bring the property to sale.

In regard to cases that arise under O. 20, R. 11, the principle may be thus stated. Unless it is shown that the security was taken in satisfaction of the decree it was presumably intended that the order made should be capable of execution. If on a construction of the order the Court comes to the conclusion that the decree is not satisfied and there is no bar created which precludes the decree from being executed, it is the duty of the Court to allow execution by enforcing sale. Whether it be regarded that what is sought to be executed is the original decree itself or an executable order made under the special provision of the law contained in O. 20, R. 11, it makes very little difference.

In *Subramanian Chettiar* v. *Rajah of Ramnad* (10) the learned Judges took the view that it is not only the right of the decree-holder to bring the property to sale in execution but that under S. 47, Civil P. C. the remedy by way of regular suit is not open to him. It is not necessary to rest my judgment on this ground.

General considerations were strongly pressed before us both in favour of and against the acceptance of this view.

In *Tokhan Singh* v. *Girwar Singh* (9) and in *Amir* v. *Mahadeo Prasad* (4) the view that it is impolitic to sell the property in execution is set forth. In the first case Mukerjee, J., says thus :

"It is quite conceivable for instance that after a property has been given in security by the judgment-debtor an interest may be acquired in it by other persons ; if it is sold in execution of the decree, it would in such a case be necessarily sold behind the back of persons interested who would have no opportunity to redemption and their interest would not be prejudiced by the sale and they would be entitled to enforce their claim by independent suits."

Weighty reasons are given for the view I am disposed to take by the referring Judges in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11). The provision is embodied in the law for the protection of the decree-holder and it must be interpreted to operate to his advantage. By refusing to sell the property in execution far from securing to the decree-holder the due execution of his decree the Court renders the decree itself incapable of execution against the property covered by the security. This is clearly unjust. This view is shared by

(10) [1917] 41 Mad. 327=34 M. L. J. 84=6 L. W. 762=(1917) M. W. N. 872.
(11) [1913] 17 C. L. J. 267.
(12) 1924 A. I. R. Cal. 485.

the learned Judges who decided *Subramaniam Chettiar* v. *Rajah of Ramnad* (10), for to quote their very words : " It would be a most mischievous state of law if such a thing (a mortgage suit) were necessary and it would fetter the discretion of the Court in accepting immovable property as security * * * * " In my opinion if it is permissible to advert to such general considerations the balance of convenience is clearly in favour of the view taken by the Calcutta Judges and the learned Judges of this Court.

Mr. Varadachariar suggested that if there are subsequent encumbrancers their right will be to proceed against the surplus money, if any. On the other hand, Mr. T. M. Krishnaswami Aiyar urged that such encumbrancers will be entitled to redeem the purchaser at the sale. I do not propose to express any opinion on this point as this has only e remote bearing on the question to be decided in the appeal.

Then arises the question : Is there anything in the security bond or the order of the Court which precludes the security from being enforced in execution ? In my opinion there is no obstacle created. On the contrary, the effect of the security bond seems to recognize this right of the decree-holder. The debtor renders himself personally liable, creates the charge and covenants that the security bond shall be in force till the decree is entirely satisfied. The order of the Court recites the fact that the security bond has been executed. On a construction of the bond and the order I am of the opinion that the parties intended that the security should be capable of being realized in execution.

I have now disposed of the first contention raised by Mr. Krishnaswami Aiyar. I shall proceed to deal with the second contention, namely, that based upon S. 52 of the Insolvency Act. Under that section, where after execution has issued the executing Court receives notice of the insolvency of the judgment-debtor it is bound to direct the property if in its possession to be delivered to the Receiver in insolvency. It is conceded by Mr. T. M. Krishnaswami Aiyar that this does not apply to mortgage decree-holders and this is obvious enough. But he says that the decree in question being a money decree the fact that the decree-holder is a secured creditor makes no difference and that S. 52 applies. I am unable to agree. S. 52 is somewhat generally worded, but it must receive a construction not repugnant to the general scheme of the Act, namely, to save the rights of secured creditors. It is sufficient to refer in this connexion to S. 28 (6), S. 47 and S. 51 (2). There is nothing in the wording of these sections to show that money decree-holders who have obtained security are excluded. Under S. 2, 'creditor' is defined as including a decree-holder, 'debt' as including a judgment-debt and 'secured creditor' is described as a person holding a mortgage charge or lien on the property of the debtor as security for a debt due from him. I am clearly of the opinion that S. 52 does not apply.

I have so far dealt with the two main contentions raised on behalf of the appellant. There is a subsidiary point which has been taken on his behalf and I shall now proceed to deal with it. It is said that the decree was passed against the father only but that the bond was executed by the father and the sons and that therefore the property cannot be sold in execution. There might be some force in the argument if the bond had been executed not by the sons of the judgment-debtor but by others. But in the present case the decree-holder's right is not enlarged nor is the liability of the executants affected by reason of the existence of the security bond. It was executed by the father as the guardian of his minor sons and whether they were parties to it or not their right would still be the same, namely, to question the debt if it is tainted with illegality or immorality. The circumstance that sons are also parties to the bond therefore makes no difference.

The order appealed against must be upheld and the appeal fails and is dismissed with costs.

Madhavan Nair, J.—The facts of the case are fully set out in my learned brother's judgment. The first question arising for our decision is whether the immovable properties given by the judgment-debtor as security pursuant to an order made under O. 20, R. 11, Cl. (2), Civil Procedure Code, can be realized by the decree-holder in execution or can only be realized in a separate suit.

The material portion of the security bond runs as follows :—

".....Whereas on your petition attachment has been ordered of our lands in Tenkarai Isanur for the said decree amount, whereas you have consented at our request not to proceed with the attachment and sale, we have hereby given as security to you for the amount of Rs. 12,620-4-0 being the amount up to date under the said decree our properties as mentioned in the schedule.....We shall pay you without trouble or compulsion the abovesaid decree amount, etc., according to the terms of the kararnama petition (viz., petition under O. 20, R. 11 of the Code of Civil Procedure).....If we do not pay you accordingly you shall execute the said decree according to the terms of the kararnama petition, and for the balance, if any, after what is so realized by you, we undertake to pay you up to the limit of Rs. 12,620-4-0 on the security of the said properties and on our personal responsibility."

The circumstances relating to the execution of the security bond clearly show that the parties to the security bond intended that if the attachment and sale of the properties became necessary it should be done in execution. The security bond was executed after attachment was ordered; the judgment-debtor made himself personally liable; and the bond is to remain in force till the decree is fully satisfied. The security is intended to be operative if the judgment-debtor does not pay the decree amount and interest. Provision for the contingency of non-payment being made by the security bond, the parties could not have meant that when such contingency arose they should institute a separate suit to realise the properties covered by the bond. There can be no doubt that the parties intended that the properties should be realised if necessary in execution. But whatever be the intention of the parties, if there is any legal impediment in the way of realisation by execution, then the decree-holder will have to realise his security only by means of a separate suit. It has been strenuously argued by Mr. T. M. Krishnaswami Aiyar on behalf of the appellant that O. 34, R. 14 of the Code of Civil Procedure operates as a bar to the enforcement of the security in execution.

Rule 14 of O. 34 provides as follows:

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he should not be entitled to bring the mortgaged property to a sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit, notwithstanding anything contained in O. 2, R. 2."

The words "claim arising under the mortgage" have been substituted in this rule for the words "any claim whether arising under the mortgage or not" in the repealed S. 99 of the Transfer of Property Act. The effect of this alteration is to confine the prohibition against bringing the mortgaged property for sale except by bringing a suit, to cases where a mortgagee has obtained a personal decree against the mortgagor on the mortgage debt. Obviously the rule in terms does not apply to the present case. The language of the rule makes it clear that the rule does not apply unles the decree obtained by the holder of the mortgage or charge falls within the description of a decree for payment of money in satisfaction of a claim arising under the mortgage or charge. The mortgage or charge mentioned must obviously be a mortgage or charge existing prior to the decree and not one created by the decree [see *Indramani Dasi* v. *Surendra Nath Mandal* (2)] or one created by the act of parties subsequent to the decree.

Having regard to the important change introduced by O. 34, R. 14, it has been held in *Sowbagia Ammal* v. *Manicka Mudaliar* (1), *Indramani Dasi* v. *Surendra Nath Mandal* (2) and *Brajasunder Dbe* v. *Sarat Kumari* (13) that where a maintenance decree provided that the allowance in the decree should be charged on certain immovable properties such properties could be sold in execution of the decree and that there was no necessity to bring a separate suit for sale. The decision in *Subramanian Chettiar* v *Rajah of Ramnad* (10) is an instance of a case where the security was given by the judgment-debtor after a decree. In that case immovable property was given by a judgment-debtor as security for the due performance of the decree in compliance with an order made under "O. 41, R. 5 (3)" and the question was raised whether such property can be realised by the decree-holder in execution or can only be realised by a separate suit. In view of the alteration of the language contained

(13) [1916] 2 Pat. L. J. 55=3 Pat. L. W. 202=(1917) P. H. C. C. 67.

in O. 34, R. 14, it was held that the provision contained in that rule did not operate as a bar and that the decree-holder can realise the property in execution. The learned Judges observe :

" There is no need in such a case that there should be anything in the nature of a mortgage suit for sale under S. 67 of the Transfer of Property Act with all the expense and delay which would be thereby involved. It would be a most mischievous state of law if such a thing were necessary and it would fetter the discretion of the Court in accepting immovable property as security for the execution of the decree. "

In the order of reference to the Full Bench in *Baij Nath Goenka* v. *Mohant Sia Ram Das* (11) the learned Judges while discussing the principle underlying the provisions of S. 545 Cl. (c) of the old Code of Civil Procedure point out that the provisions embodied in the law for the protection of the decree-holder must be interpreted to operate to his advantage and express their inclination to accept the view that the properties covered by the security bond executed pursuant to an order under that section could be realized in execution of the decree without instituting a separate suit. On this question the view of the Madras High Court in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) has been followed in the recent case in Calcutta reported in *Joti Prakash Nandi* v. *Mukti Prakash Nandi* (12).

In my view the principle underlying the decision in *Subramanian Chettiar* v. *Rajah of Ramnad* (10) which relates to the realization in execution of properties covered by the security bond executed after a decree may well be applied to the decision of the present case though the security bond here has been executed not under O. 41, R. 5, but only under O. 20, R. 11, Cl. (2). It has been argued that an order passed under O. 20, R. 11, Cl. (2) is incapable of execution. Whether this is so, or not, is largely a question of the construction of the order and of the intention of the parties as may be gathered from the circumstances relating to the making of the order. I have already pointed out at the commencement of my judgment that there can be no doubt that the parties in this case intended that in the event of non-payment by the judgment-debtor the properties covered by the bond should be realised in execution. Execution being postponed by the order made under O. 21, R. 11, Cl. (2) which provided also for the taking of a security bond to meet the possible contingency of non-payment by the judgment-debtor, I fail to see when such contingency arises how the Court can refuse execution unless there be some legal impediment compelling the Court to disallow it.

All the cases discussed above show that if O. 34, R. 14 does not operate as a bar, then the decree-holder can proceed against the secured properties by execution. But it is urged by Mr. Krishnaswami Aiyar that even then, in this case, the properties charged cannot be sold in execution because the minor sons of the judgment-debt or who were not parties to the suit have joined in the execution of the security bond, their father representing them as guardian. There is no force in this contention. The new parties are not strangers but only the sons of the judgment-debtor In view of the fact that the judgment-creditor is not seeking to sell under the security bond any interest which he could not otherwise have sold, I think this objection must be overruled.

Before I pass on to consider the second argument, I may state that it is unnecessary to discuss the decisions in *Mukta Prasad* v. *Mahadeo Prasad* (3), *Amir* v. *Mahadeo Prasad* (4) and *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (7) quoted by the appellant's learned vakil in connexion with his argument regarding the bar created by O. 34, R. 14, as all these cases dealt with securities given by third parties under S. 145 of the Code of Civil Procedure.

The second question for decision arises in connexion with the argument based on S. 52 of the Provincial Insolvency Act. According to that section, where execution of a decree has issued against any property of a debtor which is saleable in execution and before it has been actually sold, notice is given to the executing Court that an insolvency petition by or against the debtor has been admitted then the executing Court is bound, on application to that effect, to direct the property if in the possession of the Court to be delivered to the receiver. It is argued by Mr. Krishnaswami Aiyar that the decree which is sought to be enforced in this case being a money decree S. 52 of the Act applies, and that, notwithstanding the fact that a security has been executed in

favour of the decree-holder subsequent to the decree, his client is entitled to apply to the executing Court to deliver over the property in question to him. Although a secured creditor is not expressly excluded from the operation of this section, it seems to me that the section does not affect him. The Provincial Insolvency Act takes special care to preserve the power of secured creditors to realize or otherwise deal with their securities, as may be seen from Ss. 28 (6) and 51 (2). The exemption from the operation of the section which must be understood to have been thus given to secured creditors must, in my opinion, be extended to money decree-holders who have obtained securities in the course of execution, as in the present case. It is conceded that S. 52 does not apply to mortgage decree-holders. In my opinion nothing in that section affects the rights of money decree-holders who have obtained securities in respect of the property covered by such securities. They must also be treated as secured creditors for purposes of the section [see also S. 2 (a) and (e) of the Act]. The argument based on S. 52 must therefore be overruled.

In the result I agree with my learned brother that the order appealed against must be upheld and the appeal must be dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 201

WALLACE AND MADHAVAN NAIR, JJ.

Ramaswami Chettiar—Petitioner.

v.

Venkatarama Aiyar and *others*—Respondents.

Civil Revision Petitions Nos. 205 and 216 of 1923, Decided on 5th December 1924, against the order of the Dist. Munsif of Mayavaram, D/- 22nd January 1923, in I. A. No. 284 of 1921.

* (a) *Arbitration—Arbitrators authorized to sell can make rules for their guidance but cannot then go beyond the rules.*

A power to sell conferred on arbitrators naturally carries with it the power to make rules for the conduct of the sale, and such rules subscribed to by the bidders would, in the case of such parties to the reference as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or any power to decide in a case of controversy whether or not these rules had been complied with. [P 202 C 1 and 2]

* (b) *Civil P. C., S. 115—Award—Decree in terms of award going beyond matters referred—Revision lies.*

A party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more so because he has no right of appeal. [P 204 C 1]

(c) *Civil P. C., Schdule, 2, Para. 14—Award on matters not referred is without jurisdiction—Court should remit it to arbitrators.*

Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that, is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is beyond their jurisdiction and therefore made without jurisdiction, then obviously the decree which embodies it is also made without jurisdiction. The duty of the Court, when an award sent to it is beyond the jurisdiction of the arbitrators, is not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of para. 14 of Sch. 2. [P 204 C 1]

T. R. Ramachandra Aiyar, V. Sambandam Chetty, S. Ramaswami Dikshit and *K. Bhashyam Aiyangar*—for Petitioners.

S. Venkatachariar, K. V. Krishnaswmi Aiyar and *S. Krishnamachariar*—for Respondents.

Judgment.—The two civil revision petitions are presented against the order of the District Munsif of Mayavaram confirming an award in the matters in dispute in O. S. No. 505 of 1919 on his file, dismissing petitioners' objections and granting the respondents a decree in accordance therewith. The petitioners challenge the order on various grounds, the chief contention being that the arbitrators decided two matters beyond the scope of the reference and therefore beyond their jurisdiction and therefore the lower Court, in accepting their decision on these points and incorporating it in its decree, has exceeded its jurisdiction. The arbitration was in the matter of the dissolution of partnership between the six plaintiffs in the suit and the defendants, who were jointly working a mill concern. The reference to arbitration, Ex. A, gave the arbitrators authority, inter alia, to sell the property, moveable and immovable by public auction to the highest bidder, whether he be a partner or a stranger, to collect the sale proceeds and to distribute them among the partners according to the interests they had in the concern. The arbitrators were also to sell book-debts and outstandings; but among the partners only. The final amounts due to the various partners were

then to be settled and adjusted with reference to any liability incurred by any partner who may have been a successful bidder at any of the sales.

The arbitrators held a public sale of the mill itself and its machinery on 30th May 1920, and they were knocked down to the fourth plaintiff, one of the petitioners, for Rs. 28,000. One of the conditions of the sale [see Exhibit D-1] was that the bidders should deposit Rs. 1,000 as soon as the sale was knocked down. The fourth plaintiff was able to deposit only Rs. 500. Under a further condition, any bidder, who thus made default in paying his deposit, had to run the risk of a resale, his own sale being cancelled and he being responsible for any loss arising out of the resale. Accordingly, a resale was held on the same terms on 19th July, 1920, at which the highest bidder was one M. K. V. Kandasami Pillai for Rs. 20,000. [see Exhibit U.] He had deposited Rs. 100 before bidding and before the sale was closed was asked to pay up the balance of Rs. 900 to make up the initial deposit of Rs. 1,000. This was prima facie a clear breach of the rules. He went away saying that he had no money. The property was therefore not knocked down to him but was again put up to auction, and this time one Ramasami Reddi bought it for Rs. 14,950. The arbitrators in their award have taken Rs. 14,950 as the "sale proceeds" and, in their adjustment, have debited plaintiffs 4 to 6, the present petitioners, with the difference between that figure and Rupees 28,000, the amount for which the property was knocked down to 4th plaintiff at the first sale.

Three points are hereon raised by the petitioners : first, that the arbitrators had no jurisdiction to break their own rules of sale and postpone knocking down the second sale to Kandasami Pillai until he had paid up the full Rs. 1,000 and thus make petitioners responsible for a deficit of Rs. 28,000—Rs. 14,950 instead of Rs. 28,000—Rs. 20,000. Secondly, that the arbitrators had no jurisdiction to adjust this deficit in calculating the amounts due to each partner, and thirdly that, in any case they had no jurisdiction to debit the shares of plaintiffs 5 and 6 with any portion of this deficit. We are of opinion that all these points are valid. The reference, Exhibit A, empowers the arbitrators to sell and carry over to the general adjustment the sale proceeds. The power to sell would no doubt naturally carry with it the power to make rules for the conduct of the sale, and such rules, embodied in Ex. D and subscribed to by the bidders would, in the case of such parties to the reference, as subscribed to these rules, extend to the arbitrators authority to sell according to these rules, but would not extend to them any power to act outside these rules, or—and this is the important point—any power to decide in a case of controversy whether or not these rules had been complied with. Neither the terms of the reference nor the terms of the sale imply any consent by the parties to submit to the decision of the arbitrators on any controversy regarding the arbitrators' own conduct of the sales or resales, and such consent cannot be considered to be inherent in a consent to have the sale or resale conducted according to rules laid down by the arbitrators. One would require a very definite and specific term in the reference before concluding that the parties to it agreed to be bound, in a matter of the arbitrators' own conduct of the sale, by the arbitrators' own decision. We are clear that the arbitrators, in deciding that there had been no sale to Kandasami Pillai and that therefore the petitioners were liable for the difference between Rs. 28,000 and Rs. 14,950, were acting outside the scope of their reference.

As to the second point, the reference itself contains no provision for adjusting the deficit on a resale against a partner. If it is within the scope of the arbitrators' jurisdiction, it can only be so under the rules of sale consented to by the bidders and would only bind the subscribers to it. Now the 6th defendant did not subscribe to Ex. D at all, and so it cannot bind him. The 4th and 5th defendants subscribed to a condition in Ex. D that "for the loss arising from the resale we will be responsible," and again that "in case the plaintiff in the said suit buys at the auction, we agree to pay the remaining amount out of the remaining sum that ought to be paid excluding the share amount that is due for the balance according to the terms of the agreement." But neither of these conditions implies, to our minds, any surrender, by the partner-subscribers, of the right possessed by them, as much as by stranger-subscribers, to have the opportunity of challenging the arbitrators' conduct in the matter of

resale and contending that the amount fixed by them as a deficit on the resale was not owing at all or was owing only in part. None of the documents concerned with the reference and the sale draws any distinction in this matter of a possible deficit on a resale, between the position of the partner and that of the stranger-purchaser, and therefore the arbitrators have no greater power of dealing with such deficit in the case of a partner than they have in the case of a stranger. On this point we have the admission of one of the arbitrators himself, R. W. 3, that "it does not appear from the reference petition that we can award damages, but we thought we had such power. The parties did not tell us to award damages against this or that person. We did what we thought proper. If any stranger was the last bidder in the first sale of the Mill and he had made default, we would have written in the award that the sale bidder was liable to pay damages and that the parties should file a suit against him to recover that amount." It seems clear from that statement that the arbitrators themselves recognized the true position and that they had exceeded their jurisdiction in thus awarding damages.

As to the third point, namely, debiting the shares of plaintiffs 5 and 6 with a portion of this deficit, their lack of jurisdiction seems to be still more obvious. As the arbitrators cannot enforce in these proceedings the collection of the deficit from the purchaser—the fourth plaintiff—still less can they enforce it against plaintiffs 5 and 6 who were not purchasers at all. The only reason put forward by them is that plaintiffs 4 to 6 held one share in the business among themselves, and that, in objecting to the resale, plaintiffs 5 and 6 associated themselves with the fourth plaintiff. (see Ex. J.) One of the arbitrators examined as R. W. 6 before the District Munsif on this point said : "None of the parties requested us to collect the damages from Ramaswami Chettiar and his brother and nephew, plaintiffs 4 to 6. We did not question Ramaswami Chettiar and his people why damages should not be allowed against them. There was no enquiry about the matter. As Ramaswami, Kesava and Govindan (that is, plaintiffs 4 to 6) are members of the same family and as they were doing everything about the mill together we decreed damages against the last two also. We did not enquire whether they were divided," which amounts merely to saying that the arbitrators believed among themselves that the fourth plaintiff was bidding also for Plaintiffs 5 and 6 ; but as to the grounds for their belief their statements are particularly vague. Even if the reference permitted, which we doubt, the arbitrators to make a roving enquiry as to who was the real purchaser in the final sale, it certainly does not authorize them to make such an enquiry as to who was the real purchaser at a sale subsequently cancelled and therefore not a sale at which "sale proceeds" available for distribution by the arbitrators were realized. It is also quite clear that at the time of the sale the arbitrators did not treat Plaintiffs 5 and 6 as the purchasers. The property was not knocked down to them nor were their signatures taken as the highest bidders nor did the arbitrators give any notice to Plaintiffs 5 and 6 in the terms of the notice, Ex. G, which they sent to the fourth plaintiff. On this point no subsequent evidence or statements in the nature of admissions by the fifth plaintiff in his evidence before the District Munsif can be relevant to validate a decision in the award which was invalid at the time of the award. It is quite clear that at the time of the sale the person accepted by the arbitators as the purchaser was the fourth plaintiff and the fourth plaintiff alone. We are satisfied, therefore, that, in fastening the damages of the deficit at the resale on Plaintiffs 5 and 6 also, the arbitrators were clearly exceeding the terms of their reference.

It is not necessary to go into the other points raised on some of which the Lower Court has dilated at great length. It is obvious that, if the arbitrators have decided matters outside the scope of their reference, the Judge was not entitled to include such matters in his decree. It is no part of a Judge's business to decide whether the plaintiff's objection to the arbitrators' conduct in the resale and the allocation of the deficit is justified or not by the facts proved in evidence before him. The only point that he has to consider is whether the disposal of such objections was within the scope of the reference or not ; and if it was not, then he has nothing himself to do with it at all. The Judge has treated the case far too much as if it was an appeal against the arbitrators' findings. That is not a

proper point of view at all. He seems to regard the case, at its worst, as raising merely questions of misconduct of the arbitrators, on which, of course, if there is no question of lack of jurisdiction or material irregularity in the exercise of it, his finding is final and cannot be attacked either by way of appeal or revision. see *Ghulam Khan* v. *Muhammad Hassan* (1), *Kali Charan Sirdar* v. *Sarat Chunder Chowdhry* (2) and *Batcha Sahib* v. *Abdul Gunny* (3)]. But a party is entitled to be protected by the law against a decision by arbitrators on points not referred to therein at all and against a decree of Court based on such a decision, all the more because he has no right of appeal. [see *Merali Visram* v. *Sheriff Dewji* (4)]. The real point at issue, here is the question of lack of jurisdiction for the arbitrators. It is in fact contended by the respondents that all that has been urged by the petitioners is mere misconduct on the part of the arbitrators and not want of jurisdiction. The distinction has no doubt to be kept in mind but there is no doubt in our minds in this case about the answer. Misconduct must be misconduct in carrying out the terms of the reference and within the scope of it. Anything beyond that is action without jurisdiction whether or not it may amount also to misconduct. If the arbitrators' award is then beyond their jurisdiction and therefore was made without jurisdiction, then obviously the decree which embodied it is also made without jurisdiction. The duty of the lower Court, when an award sent to it is beyond the jurisdiction of the arbitrators, was not to pass a decree in accordance therewith but to remit it back to the arbitrators under the terms of S. 14 of Sch. II of the Civil Procedure Code.

The order of the lower Court cannot, therefore, be supported. We must hold that it is without jurisdiction and we must set it aside. No other grounds of attack on the lower Court's jurisdiction have been urged before us. In the circumstances we set aside the lower Court's order and direct it to pass an order in accordance with law.

Plaintiffs 4, 5 and 6 will have their costs (one set). Past and future costs of the lower Court will abide the event.

Order set aside.

(1) [1901] 29 Cal. 167=29 I. A. 51=6 C.W.N. 226=12 M. L. J. 77=4 Bom. L. R. 161=8 Sar 154 (P. C.).
(2) [1903] 30 Cal. 397=7 C. W. N. 545.
(3) [1913] 38 Mad. 256=25 M. L. J. 507=14 M. L. T. 314=(1914) M. W. N. 142.
(4) [1911] 36 Bom. 105=13 Bom. L. R. 1017.

A. I. R. 1926 Madras 204

JACKSON, J.

Kota Subramaniam Chetty — Plaintiff—Petitioner.

v.

The Chairman, Municipal Council, Gudiyatham—Defendant—Respondent.

Civil Misc. Petition No. 3483 of 1925, Decided on 5th October 1925, from the order of the Dist. J., North Arcot, Vellore, D/- 28th September 1925.

(a) *Jurisdiction — Civil Court — Special tribunal acting in good faith—Civil Court cannot interfere.*

So long as the special tribunals, like Municipal Boards, act in good faith and fairly listen to both sides, there is no civil cause of action against their decisions.

Where the petitioner's name was not entered in the electoral roll for 1925-26 on the ground that he had not paid the taxes due by him under the Act for the preceding year.

Held : that the decision of the Revising Board was neither illusory nor unsubstantial and the civil Court had no jurisdiction to interfere. [P 205, C 1, 2]

(b) *Taxation—For taxes to be due no notice is necessary though distraint cannot be without notice.*

It has never been held as a rudimentary principle that no tax is due before notice, though the principle is that there shall be no distrain without notice. [P 206 C 1]

A. Krishnaswami Aiyar and *S. Jagadisa Aiyar*—for Petitioner.

L. A. Govindaraghava Aiyar — for Respondent.

Judgment.—Petitioner is suing in the District Munsif's Court of Tirupathur for a declaration that his name should be inserted in the electoral roll of Gudiyatham Municipality, and for an injunction restraining the Chairman from holding an election for Councillors until the petitioner by means of this suit has established his right to stand as a candidate. The District Munsif granted a temporary injunction ; the District Judge reversed that order and petitioner seeks to revise the order of the District Judge and to obtain an interim order of injunction.

It has not been suggested that the learned District Judge in his carefully reasoned order either exercised a jurisdiction not vested in him by law or failed to exercise a jurisdiction so vested or acted in the exercise of his jurisdiction illegally or with material irregularity, except in so far as it must be held, following *Achayya* v. *Sri Seetharamachandra Rao* (1), that, if an appellate Court erroneously decides the question whether or not the original Court had jurisdiction, it either exercises a jurisdiction not vested in itself or acts illegally. The District Judge has held that the District Munsif had jurisdiction and the sole point for determination is whether that finding is correct. If it is correct, there is no cause for revision.

The petitioner's name was not entered in the electoral roll for 1925-26 on the ground that he had not paid the taxes due by him under the Act for the preceding year. The revising authority found that the petitioner owned a cart for which he had paid no tax in 1924-25 and, therefore, his name had been rightly excluded. This decision is final, and cannot be questioned in a civil Court unless it has been passed without any enquiry at all or based upon entirely irrelevant conclusions, *Nataraja Mudaliar* v. *Municipal Council of Mayavaram* (2). The ruling in *Ganesh Mahadev* v. *The Secretary of State* (3), is largely founded upon *Board of Education* v. *Rice* (4), and the quotations from that case on pages 282 and 283 of the Bombay ruling are of cardinal importance as laying down how these special tribunals are expected to perform their functions. So long as they act in good faith and fairly listen to both sides, there will be no civil cause of action against their decisions.

The learned District Munsif has cited these rulings and should have been fully aware of the correct law when he came to his findings of fact. He finds prima facie ground for holding that the decision of the Revising Board was unreal and unsubstantial, and sees an analogy between that decision and the case in *Leslie Williams* v. *Haines Thomas Giddy* (5), where a Government servant was remunerated by the Public Service Board at a rate of one penny a year and the Privy Council held such award to be illusory, and tantamount to a refusal to exercise the discretion conferred on the Board by Parliament.

Here the District Munsif is clearly wrong. Whatever may be said of a the decision of the Revising Board, it is neither illusory nor unsubstantial, and there is no real analogy between the two cases. The District Munsif then finds that there was no judicial functioning by the Board because it has given no considered decision on a point which he considers rudimentary and fundamental, the point whether the cart-tax could be said to be due before any demand had been served on the owner of the cart.

In this connexion the observations of of Lord Shaw in *Ganesh Mahadev* v. *The Secretary of State* (3), are important :

" If it (the Board) is left without express guidance it must still act honestly and by honest means. In regard to these certain ways and methods of judicial procedure may very likely be imitated ; and lawyer-like methods may find especially favour from lawyers. But that the judiciary should presume to impose its own methods on administrative or executive officers is a usurpation. And the assumption that the methods of natural justice are *ex-necessitate* those of Courts of Justice is wholly unfounded. This is expressly applicable to steps of procedure or forms of pleading. "

Apparently, the District Munsif holds that the Board has not functioned judicially because it has not framed an issue on this question of demand and has not found upon that issue.

In the light of the above quotation there was no necessity for the Board to have done so. If it were clearly laid down in the Municipal Act that no tax is due unless a demand notice has been served, there might be some warrant for complaining that the circumstance had been overlooked, though even a fair bona fide mistake would not attract the jurisdiction of the civil Court. But as the learned Judge has pointed out, the whole tenor of the Act is to the contrary, and the very clause which the Munsif quotes

(1) [1916] 39 Mad. 195=24 M. L. J. 112=13 M. L. T. 60 (F. B.).
(2) [1911] 36 Mad. 120=21 M. L. J. 878=10 M. L. T. 219=(1911) 2 M. W. N. 233.
(3) [1919] 43 Bom. 221=21 B. L. R. 27.
(4) [1911] A. C. 179=80 L. J., K. B. 796=104 L. T. 689=75 J. P 393=9 L.J.R. 652=55 S. J. 440=27 T. L. R. 378.
(5) [1911] 15 C. W. N. 669=21 M. L. J. 641=10 M. L. T. 288 (P. C.)

should have appraised him of the fact. Clause 29, Sch. II, is to the effect that when any tax is due from any person the Chairman shall serve upon such person a bill before he proceeds to distrain. And this embodies the only rudimentary principle in the matter, that there shall be no distraint without notice. It has never been held as a rudimentary principle that no tax is due before notice.

The District Munsif also misdirects himself when he finds that there has been no judicial functioning so as to oust the jurisdiction of the Court. As pointed out in *Bhai Shankar* v. *The Municipal Corporation of Bombay* (6), there is no ouster of the jurisdiction of the ordinary Courts for they never had any. The District Munsif's idea that this Court might decide the petitioner's claim were it not for the creation of this special tribunal, and that this special tribunal could only oust this jurisdiction by strict judicial functioning is quite erroneous. His remarks at the end of the ninth paragraph are covered by the observations of Lord Shaw quoted above. The District Munsif has not assumed jurisdiction on the ground that there is prima facie reason to presume malice, and the District Judge gives good reasons in his 8th, 9th and 10th paragraphs for holding that the plaint warrants no such presumption.

Therefore, I do not find that the learned Judge has erred on the question of jurisdiction and there is no valid ground for revision.

Civil Miscellaneous Petition No. 3483 of 1925 is dismissed with costs. The Civil Revision petition is not admitted and is dismissed.

Petitions dismissed.

(6) [1907] 31 Bom. 604=9 Bom. L. R. 417.

** A. I. R. 1926 Madras 206

COUTTS-TROTTER, C. J., AND VISVANATHA SASTRI, J.

V. Gopal Naidu—Debtor—Appellant.

v.

Mohanlal Kanyalal and *others*—Respondents.

Original Suit Appeal No. 70 of 1924, Decided on 24th August 1925, from the judgment and order of Ramesam, J., D/- 23rd September 1924.

** *Presidency Towns Insolvency Act (3 of 1909), S. 9 (d) (iii)— Partnership business — One partner closing down business—Other partners cannot necessarily be said to commit an act of insolvency.*

In order that a man may be declared an insolvent, the act of insolvency relied upon must be some act which can be definitely brought home to him. It is imposible to say that there can be no case in which the act of an agent or partner in closing down the business and absconding from the creditors could be treated as an act of the principal or the other partners. There might be cases in which a Court would be justified in certain circumstances in holding that the act of the agent for partner in violation of the section might and should be treated as the act of the principal or the other partners. 23 *Cal.* 26 (*P.C.*) *Rel. on.*

[P. 208, C. 1]

V. Varadaraja Mudaliar—for Appellant.

O. Thanikachellam Chettiar and *K. S. Krishnaswami Aiyangar*—for Respondents.

Coutts-Trotter, C. J.—This case raises a point of some interest. Two persons traded together in partnership. A man called Anantha Mudali, about whom no question arises in these proceedings, and the appellant, Gopal Naidu, had carried on a produce business in Madras and the facts seem to be that Anantha Mudali was managing the business in Madras, whereas Gopal Naidu resided ordinarily at Wallajabad, but the evidence which is given in the case—and that is the evidence that was relied upon by the adjudicating creditors themselves—establishes two things. The first is that when anybody, after the difficulties arose—and in this concern they did arise—wanted to see Gopal Naidu when he went to Wallajabad, he found Gopal Naidu without difficulty and was able to put whatever he wanted to put before him. The other fact that emerges is that although Gopal Naidu ordinarily resided at Wallajabad, he did from time to time come to Madras and look into the accounts and see how the business was progressing. What is before us is an appeal by Gopal Naidu against his adjudication. The circumstances which led to it are these : The business got into difficulties when the debts due to the petitioning creditors amounted to something over Rs. 10,000 and the difficulties came to ahead—we will take it as proved, for it is not disputed—when Anantha Mudali closed the business and went away in order to get out of the clutches of his creditors, thereby committing an act of insolvency, so far as he is concerned under S. 9 (d) (iii)

of the Presidency Towns Insolvency Act. That is a perfectly good foundation for the insolvency petition and the adjudication consequent upon it as against Anantha Mudali, but it has been sought in this case to use that act of Anantha Mudali in order to lay the foundation not merely of the petition against Anantha Mudali himself but of the petition against the appellant Gopal Naidu.

We had a very interesting argument practically giving us the whole of the history of the law on this matter both in England and in India. There is no doubt that the English cases, of which I may take as an instance, *Mills* v. *Bennett* (1), is one of the earlier and *Ex parte Blain, In re Sawers* (2) and *Cooke* v. *Charles A. Vogeler Company* (3) are some of the later, clearly lay down the principle that, in order that a man may be made a bankrupt the act of bankruptcy relied upon in English Law must be some act which can be definitely brought home to him, and the learned Judges point out that the act of an agent cannot ordinarily found a petition in bankruptcy. The chief pronouncement which has been approved of in many subsequent cases is contained in the judgment of Brett, L. J. in *Exparte Blain* (2). He says :—

"It was said that a person may commit an act of bankruptcy by his agent, and that the partner in England was the agent of these foreign partners, and therefore they committed an act of bankruptcy by their agent in England, that is, by allowing the execution to go witnout satisfying the judgment, and that, this having been done by their agent in England, they ought to be adjudged bankrupts. That assumes that a man can commit an act of bankruptcy by his agent, whether he has authorised the particular act or not, and that assumption seems to me to be equally wrong. I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he has had no cognizance."

That is what Brett, L.J. said in *Ex parte Blain*(2), and, in my opinion that is good law to-day in England and with a certain modification is probably good law in India. Meanwhile, the matter had arisen on several occasions in Calcutta as to whether a man could be adjudicated a bankrupt, because of the act of some person whom he left in charge of his business, namely, a munib gumastha or a quasi partner with the authority of an agent to act for his fellow-partners ; and, so far as the High Court of Calcutta is concerned, the matter came to ahead in the case of *In re Dhunput Singh* (4) which was decided in the year 1893 by a Bench consisting of Sir Comer Petheram, Chief Justice, Mr. Justice Prinsep and Mr. Justice Pigot. In that case there was a pronouncement of Mr. Justice Trevelyan, which lends colour to the suggestion that the act of an agent in departing with intent to defeat creditors was always, as a matter of course, to be treated as a departure by the principal on the ordinary principles of agency, and that view was definitely rejected by the Court very largely on the authority of the English cases. The learned Judge who deals most clearly with the matter is Mr. Justice Pigot. At page 795 of the Calcutta Reports, he says :—

"I think the general proposition laid down by Lord Justice Brett in *Ex parte Blain, In re Sawers* (2) only affirms, and is intended to affirm, the rule stated before by Lord Tenterden. 'I think a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorized, and of which act he had no cognizance.

This general rule is, I apprehend, applicable in cases outside those of the class with which we are here concerned and it seems to me absolutely to govern this case. There are, therefore, two reasons why the acts of Punna Lal in this case, assuming them to amount, so far as he personally was concerned to a departure, etc., with intent, etc., cannot be acts of insolvency committed by his master, Dhunput Singh. The first is that the nature of the acts themselves, as described in the section, is incompatible with the possibility of their being committed by anyone but the debtor himself, the departure must be his departure and the intent proved must be his intent. The second is that a man cannot commit any act of bankruptcy by an act of his agent which he has not authorized, and of which act he had no cognizance."

He then goes on to say that, in accordance with the principles stated above,

(1) 2 M. and S. 556=2 Rose 269.
(2) [1879] 12 Ch. D. 522=41 L. T. 46=28 W. R. 334.
(3) [1905] A. C. 102=70 L. J. K. B. 181=84 L. T. 10=8 Manson 130=17 T. L. R. 153.
(4) [1893] 20 Cal. 771.

which he accepts as correct, he thinks he must pronounce that the earlier case in the Calcutta High Court of *In re Hurruck Chund Golicha* (5) decided by Broughton, J., sitting in insolvency was wrongly decided. This very case of *Dhunput Singh* came up before the Privy Council and was dealt with in *Kastur Chand Rai Bahadur* v. *Dhanpat Singh Bahadur* (6) in a judgment which was delivered by Lord Hobhouse. Their Lordships adopted what I may call a middle course. They thought that Mr. Justice Pigot had put the supposed rule much too broadly and they thought that it was impossible to say that there can be no case in which the act of an agent in closing down the business and absconding from the creditors could be treated as an act of the principal and they proceeded to say that there might be cases, of which by the way the one before them they clearly considered not to be one, in which a Court would be justified in certain circumstances in holding that the act of the agent in violation of the section of the bankruptcy might and should be treated as the act of the principal and in the light of that the expression of opinion by Mr. Justice Pigot required modification and a much more flexible rule should be laid down. I am reading from page 35 in which, after setting out the view taken by Mr. Justice Pigot and the High Court, their Lordships go on to observe as follows :—

"So understood, their Lordships cannot assent to the principle laid down by the High Court [in *Dhunput Singh's* case (4)]. The position of a gumastha differs in different cases. In some cases he may be little more, or no more, than an ordinary manager. In others he may represent the business so entirely that the beneficial owners have no practical control over it and are quite unknown to the customers. Mr. Justice Pigot states the possible position of a gumastha with even more force than does Mr. Justice Broughton [I think in *Hurruck Chand's* case (5)]. He says : 'It often happens that a large business is carried on for years by a munib gumastha or by a succession of them, in the name of principals, who never are seen, or personally known, in connexion with the business at all; sometimes in the name of family firms the members of which are constantly fluctuating from generation to generation; and of which firms it is or may be difficult to determine who are, at any given time, actually members."

Then their Lordships go on as follows :—

"Their Lordships think otherwise. They cannot hold that the creditors of firms exclusively managed by gumasthas have no remedy by way of insolvency, whatever the gumasthas may do ; though he may make fraudulent conveyances, promote fraudulent executions, or as in *Hurruck's* case (5) 'leaving the creditors to find him or his master if they could.' And yet that consequence must follow if the principle laid down by the High Court in this case be the true one."

And then they go on to say :—

"It is a question in each case whether the gumastha occupies such a position that the owner must stand or fall by his acts, so that his fraud or his flight shall by imputation be the fraud or flight of the owner or multitude of owners, for the purpose of bringing their case within the Statute of Insolvency. Their Lordships agree with the Judges who have held that the statute admits of application to such cases, and that to exclude it may lead to injustice and confusion in many cases. They are by no means prepared to say that *Hurruck's* case (5) was wrongly decided ; though the position of the gumastha there is not stated so fully as they would think desirable if the case were before them for decision. On the other hand they have no hesitation in agreeing with the High Court that Punna did not occupy such a position as to make the respondent liable to be declared insolvent on the ground of his personal conduct. The respondent appears to have been an active and responsible owner. His residence and head koti at Azimgunge were well known. He occasionally came to Calcutta and to the koti. When difficulties arose, Punna applied to him to meet them ; and when payment was suspended, Punna openly, by himself or by his servants, told the creditors that his principal was coming, and that they must wait for his action. Under such circumstances, even if Punna himself had committed the acts alleged by the appellant, it would, in their Lordships' opinion, be wrong to hold that his acts were those of the respondent."

(5) [1880] 5 Cal. 605=6 C. L. R. 382.
(6) [1895] 23 Cal. 26=22 I. A. 162=5 M. L. J. 269=6 Sar. 617 (P. C.).

In that case a hint had been thrown out by Mr. Justice Pigot in the High Court and then by way of encouragement of the suggestion by Lord Hobhouse in the Judicial Committee that the case was one which might aptly be met by further legislation, and I suppose that it was that suggestion which brought about finally the Presidency Towns Insolvency Act of 1909 long after. We have the desired legislative machinery in the explanation to S. 9. That explanation runs as follows :—

"For the purpose of this section, the act of an agent may be the act of the principal, even though the agent may have no specific authority to commit the act."

I take that section to be an attempt by the draftsman to carry out broadly and in spirit the effect of the observations of their Lordships of the Judicial Committee in *Dhunput Singh's* case (4) and I am content to deal with it on that footing.

Unfortunately in this country misinterpretation, as we feel constrained to regard it, has been put upon that section, and, for this purpose, I wish to refer to two cases. One is the case reported in *In the matter of Brijmohun Dobay* (7), a decision of Mr. Justice Sale sitting alone in insolvency. What Mr. Justice Sale says on this point is very brief and I will read his exact words. He deals first with a different point with which we are not concerned and then he goes on to say this :—

"If I had taken another view of this point, the question would still remain as to whether the departure of the gumastha under the circumstances and under the instructions of the debtor did not constitute an act of insolvency."

Why indeed should it not ? For as is clearly expressed in the learned Judge's words, the departure of the gumastha was under the express instructions of the master. We are here concerned with a case where the departure of the agent is ex hypothesi an act done by himself without express authority of the principal. Then he goes on to say :—

"The difficulties which arose in *Dhunput Singh's* case (4) are absent from this. (We do not know what those difficulties are but one of them was clearly the absence of express instructions of the principal), and I am inclined to think that the departure of the gumastha did, under the circumstances, amount to an act of insolvency on the part of the debtor."

This is really a decision on the facts of that case, and we entirely agree with the learned Judge that the facts of that particular case were such that certainly under the section of the Presidency Towns Insolvency Act, and also previously to it under the guidance of the judgment of the Privy Council in *Kastur Chand Rai Bahadur* v. *Dhanput Singh Bahadur* (6) his was a perfectly correct determination of the matter before him.

The judgment of Sale, J., came before a Division Bench of this Court consisting of Spencer and Phillips, JJ. There is no doubt, looking at the report, the one I have before me is *Kalianji Singji Bhai* v. *Bank of Madras* (8), that those learned Judges regarded this decision of Mr. Justice Sale as laying down the sweeping principle that in all circumstances the act of an agent in closing down the principal's place of business must be treated to be the act of the principal and they treated that as being the existing law. They refer to English cases and they go on in these words :—

"In India it has been expressly enacted as an explanation to S. 4 of the Provincial Insolvency Act (that is the same in words as S. 9 of the Presidency Towns Insolvency Act) that for the purpose of that section, which deals with acts of insolvency committed by a debtor, the act of an agent might be the act of the principal. It was accordingly held in *In the matter of Brijmohun Dobay* (7) that the departure of an agent from the place of business did constitute an act of insolvency on the part of the principal."

It did on the particular facts of that case, but unfortunately the learned Judges of the Madras High Court have taken to be a hard and fast rule of law what in truth and in fact was a decision on the particular facts of that particular case and the same fallacy undoubtedly vitiates the reasoning of Mr. Justice Ramesam when he tried this case. He took the decision of the *C. W. N.* case and he took the decision of the Madras High Court as laying down a hard and fast rule which he was bound to respect ; and without reference to the particular circumstances of the case, he thought he was in law bound to treat the act of the agent as

(7) [1897] 2 C. W. N. 306.

(8) [1915] 34 Mad. 693=29 M. L. J. 788=3 L. W. 13=(1916) M. W. N. 12.

inevitably the act of the principal, which is clearly incorrect.

In the light of these principles Mr. Thanikachalam Chetty very wisely does not seek to uphold the decision of the learned Judge on this point. When we look at the affidavits it is clear that the facts of the case, which are put by the creditors themselves before the Court, constitute just the kind of facts which would enable the Court in its discretion to say in a particular case : " This is not the sort of case where we will do what the Act allows us to do, namely, treat the unauthorized act of the agent in closing down the business as in law being the act of the principal." Mr. Thanikachalam Chetty does not, therefore, press us to remit the case back. On a further consideration in the light of these principles, he is content that the adjudication of Gopal Naidu should be quashed on the ground that circumstances exist here which do not permit of the Court saying that the act of Anantha Mudali, in closing down the business, could be treated on the material before the Court as being necessarily in law the act also of Gopal Naidu. That is the sole ground on which we decide this case.

It was argued before the learned Judge on behalf of Gopal Naidu that he was in no circumstances accountable for the debts of the business which were relied upon by the petitioning creditors because it was said that he had, before these debts were incurred, executed a dissolution of partnership and ceased to be a partner. That question has not been gone into before us, The learned Judge found against Gopal Naidu on that and Mr. Krishnaswami Aiyangar has not, in view of the other point on which he felt he was likely to succeed, touched that question. If, therefore, the matter ever comes before the Court in any other form, the whole subject is open and it is competent to Mr. Krishnaswami Aiyangar to contend that the learned Judge was wrong in forming the conclusion that the supposed deed of partnership was a sham. It is open to Mr. Thanikachalam Chetty, on a proper view of the documents and the circumstances which were not put forward before, to say that the learned Judge is right and it was a sham. In the view we have taken it is not necessary for us to deal with that point at all and we are content to decide on the ground that has been argued before us.

The result will be that the appeal is allowed. Costs of the appeal of both sides on the O. S. scale will come out of the estate.

Appeal allowed.

A. I. R. 1926 Madras 210

SRINIVASA AIYANGAR, J.

(*Vaithi*) *Matharan* and *others*—Petitioners.

v.

Narayanaswami Aiyar—Respondent.

Criminal Revision Case No. 219 of 1924 and Criminal Revision Petition No. 188 of 1924, Decided on 11th December 1924, from the order of the S. J., West Tanjore Division, Tanjore, D/- 20th December 1923.

Possession—Leasing out a common tank by temple trustees is not evidence of ownership—Fishing by a villager in such tank is not theft.

The mere fact that the fishery in a common village poramboke village tank was leased out by the temple trustees would not go to establish the ownership of the temple in the tank, and where one of the villagers in the exercise of his right to the common tank fishes in the tank, it is a bona fide assertion of a civil right, and not a theft.

[P 210 C 2]

V. L. Ethiraj and *K. P. Raman Menon*—for Petitioners.

Nugent Grant and *K. V. Srinivasa Aiyar*—for Respondent.

J. C. Adam—for the Crown.

Order.—The order of the Sessions Judge directing a re trial of the accused in this case for the offence with regard to which they were discharged by the Magistrate is wrong. There was really no evidence on the record with regard to the ownership of the tank. It appears from the evidence of the karnam that it was poramboke and it was a poramboke tank. So long as the villagers agree, it is well known that the temple authorities or the headman of the village lease out the yield from such common resources and utilise the same for common purposes. The mere fact therefore that the fishery in this tank was leased out in previous years by the temple trustees would not, in view of the nature of the common practice, go to establish the ownership in the tank. Unless the ownership in the tank is established, there is no question of possession of the

fish and there is a fortiori no question of any theft of any fish. After all, I am not at all satisfied that the accused in this case did, what they did, dishonestly, and that they did not catch the fish asserting a bona fide right thereto. I think the criticism of the Sessions Judge that the word "bona fide" did not appear in the judgment of the Magistrate is somewhat meticulous. There is no doubt whatever as to what the Magistrate really meant to do. The order of the Sessions Judge is therefore set aside.

Order set aside.

A I. R. 1926 Madras 211

SPENCER AND MADHAVAN NAIR, JJ.

S. R. Subramania Aiyar—Appellant.

v.

L. A. Krishna Aiyar—Respondent.

Appeal No. 86 of 1925 and Civil Revision Petition No. 147 of 1925, Decided on 8th September 1925, from the order of the Sub.-J., Coimbatore, D/- 29th November 1924, in E. A. No. 722 of 1924.

Civil P. C., O. 21, R. 90—Attachment ceasing owing to decree-holder's default—Sale held without fresh attachment—Application to set aside lies to executing Court under R. 90.

Decree-holder's first application for execution was dismissed for default. He applied for sale of the property without applying for fresh attachment. Judgment debtor applied for stopping the sale which was dismissed. He appealed. In the meantime the property was sold.

Held : that judgment-debtor's remedy lay under R. 90 to apply to the executing Court for setting aside the sale. [P. 211, C. 2]

Per Madhavan Nair, J.—Absence of attachment does not affect the jurisdiction of the executing Court to sell the property and the sale on that account is not null and void. [P. 214, C. 2]

T. R. Venkatarama Sastri and *M. Krisha Bharati*—for Appellant.

T. R. Ramachandra Iyer and *P. R. Ramakrishna Iyer*—for Respondent.

Spencer, J.—The respondent having attached the appellant's immovable properties before judgment obtained a decree for Rs. 2,224-12-0 against him and his mother on 28th January 1919. Afterwards he applied through E. P. No. 35 of 1924 for sale of the properties which were attached before judgment. In the interval two petitions for executing the same decree had been rejected owing to the execution petitioner's fault. The appellant filed C. M. P. No. 722 of 1924 on November 18, 1924, asking : (1) that the auction sale fixed for November 24, 1924 should be stopped ; (2) that the whole proceedings in the pending E. P. R. 35 should be vacated ; and (3) that E. P. R. 35 should be dismissed. The Subordinate Judge of Coimbatore refused these reliefs and dismissed the C. M. P. From that order the appellant has filed an appeal and a revision petition in the High Court on March 2, 1925. The sale took place on February 9, 1925 and awaits the lower Court's order of confirmation under O. 21, R. 92, Civil P. C. The appellant's vakil contends that the attachment of the property ceased by virtue of O. 21, R. 57 upon the dismissal for default of the prior execution petitions, the attachment before judgment being good only until the first execution petition after the passing of the decree was dismissed [vide *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1,)] and that the sale of the property without a previous subsisting attachment was illegal.

In my opinion there is a short answer to this appeal and the accompanying revision petition. The sale having already taken place the judgment-debtor's remedy lies in applying under R. 90 of O. 21 to have it set aside, and from the order to be passed by the executing Court he will have a right of appeal to this Court under O. 43 (1) (J), Civil P. C.

It is too late to stop the sale after it has taken place, and at the same time it would be premature on the part of this Court to set aside the sale, the power to do so being vested in the first instance in the executing Court. The appellant did not obtain an order from the High Court to stay the sale before it was concluded. We should not make a declaration or pronouncement of opinion as to the validity of a sale while proceedings for confirming or setting it aside are pending in the Court below and there is no room for our interfering otherwise with the course of the E. P. which will be finally disposed of only when final orders are passed under R. 92 and when it is known to what extent the decree has been satisfied. The fact that there is no right of appeal provided in the Code of Civil Procedure against orders under O. 21, Rr. 64 and 66 for sale of property

(1) A. I. R. 1924 Mad. 494 (F. B.).

indicates that such orders are of an interlocutory nature. The appealability of an order for the sale was raised in *Namuna Bibi* v. *Rosha Miah* (2), but not argued with assurance (vide page 486). The learned Judges considered that an appeal lay under S. 47, Civil P.C., as it was a question between the parties in execution. This Court has applied S. 47 to applications to set aside a sale that has been illegally held, apart from irregularities in publishing or conducting it (vide *Ananthaarama Iyer* v. *Kuttimalu Kovilamma* (3) and *Muthiah Chettiar* v. *Bava Sahib* (4). But the petition of November 18th, out of which this appeal and revision petition have arisen was not a petition to set aside a sale, as no sale had been held when it was presented. The order of the Subordinate Judge dismissing it was passed before any sale was held, and thus it cannot be treated as an order upon an application under S. 47 to set aside an illegal sale. The grounds upon which the judgment-debtor tried to stop the sale were that the previous execution petitions were dismissed and that their dismissal put an end to the attachment. He did not then raise the contention which he has raised here, viz., that the attachment before judgment only enures for the first execution application after decree.

If the judgment-debtor had put forward this objection before the sale took place, the decree-holder might have overcome the difficulty by applying for a fresh attachment of the lands. After the sale had been held, it does not appear that he made an attempt to have the sale set aside by the Sub-Judge under S. 47 as illegal for want of a fresh attachment upon this ground, which has not been considered in the Judge's order of November 29, 1924, and the present appeal cannot be treated as an appeal against an order which the Sub-Judge might have made if such a contention had been put forward at the proper time. For these reasons, I consider that the only order we can make is to dismiss this appeal with costs. The revision petition being only an alternative remedy to the appeal is dismissed without costs.

(2) [1911] 38 Cal. 482=15 C. W. N. 428=13 C. L. J. 621.
(3) [1916] 31 M. L. J, 133=(1916) 2 M. W. N. 236.
(4) [1914] 27 M. L. J. 605=1 L. W. 969,

C. M. A. No. 86 of 1925.

Madhavan Nair, J.—This appeal arises from an application made by the appellant judgment-debtor objecting to the sale of certain properties in execution of the decree in O. S. No. 117 of 1918, Sub-Court, Coimbatore, on the ground that the properties in question had not been attached prior to the order of sale. The decree-holder, the respondent before us, had obtained a decree for money against the appellant and had attached the said properties before judgment. After the decree he filed two successive applications for execution which were returned by the Court for making some corrections and for the production of some papers. As the directions of the Court were not complied with these petitions were eventually dismissed. The decree-holder afterwards filed E. P. No. 35 of 1922 for the execution of his decree by sale of the properties and the sale was fixed for the 24th November 1924. When the appellant became aware of the said execution petition he applied to the Sub-Court in E. A. No. 722 of 1924 praying "to stop the sale fixed for 24-11-1924 and to vacate the whole proceedings in E. P. R. No. 35 of 1924 and to dismiss the petition and to pass such other and further orders as may be just and necessary." The Subordinate Judge held that since the two petitions which were dismissed for non-compliance with the Court's order could not be considered as execution petitions in accordance with law their rejection could not operate to vacate the existing attachment under O. 21, R. 57, Civil P. C., and that therefore no re-attachment was necessary to bring the properties to sale. In this view he held that there was no need to stop the sale or to dismiss the execution petition (E. P. R. No. 35 of 1924) and that the respondent had rightly brought the attached properties to sale. The properties have since been sold and purchased by the decree-holder. It is argued by the appellant that the petitions which were dismissed were execution petitions in accordance with law ; that since they were dismissed for the default of the decree-holder the attachment of the properties has ceased under O. 21, R. 57, Civil P. C., and that as no further attachment was made the order of the Subordinate Judge to proceed with the sale of the properties should be set aside. Besides supporting the order of the learned Judge

on the reasons contained in it the respondent in this Court has put forward an additional ground in further support of the order namely, that even if the attachment has ceased under O. 21, R. 57, Civil P. C., the failure to re-attach the properties prior to the sale is only an irregularity and not an illegality vitiating the sale; and that unless the Court is satisfied that the petitioner sustained substantial injury by reason of such irregularity the Court should not set aside the order. He has also argued that no appeal lies against the order passed by the Subordinate Judge under S. 47 of the Code of Civil Procedure.

The questions for our consideration arising upon the above contentions of the respective parties are: (1) Are the petitions dismissed for default by the Subordinate Judge for non-compliance with his directions in accordance with law? (2) Does O. 21, R. 57, Civil P. C. apply to the facts of this case? (3) If questions 1 and 2 are decided in favour of the appellant, is the sale of the properties without an attachment void ab initio or is absence of attachment prior to sale only an irregularity? (4) Does an appeal lie against the order?

As regards Question 1: I have no doubt the opinion of the Subordinate Judge is clearly wrong. The respondent's learned vakil himself has only very faintly attempted to support it. I have carefully examined the second petition dismissed for default by the Subordinate Judge. I am satisfied that it has complied with all the requirements demanded by the Code and that it is an application in accordance with law under O. 21, R. 17, Civil P. C. The paper that was called for, but not produced for want of time, viz., copy of the attachment list prepared by the amin, was not, as was seen subsequently, absolutely necessary for proceeding with the execution of the decree in this case, and it was found, when requisition for the same paper was made in E. P. No. 35 of 1924 also, and on which sale of the properties was afterwards ordered that the document called for had been destroyed. In fact the order for sale of the properties now objected to was passed in E. P. No. 35 in the absence of this document. In these circumstances I am satisfied that the applications for execution were really in accordance with law and the Court could have passed orders on them to effectively carry out execution.

In the view that the applications dismissed for default are applications in accordance with law, the next question for us to consider is whether O. 21, R. 57, Civil P. C., applies to the facts of this case. According to that rule, when any property has been attached in execution of a decree and the application filed for execution has been dismissed by reason of the decree-holder's default, such dismissal will have the effect of vacating the attachment. In this case, as already mentioned, the properties had been attached before judgment. O. 38, R. 11, Civil P. C., states that when a decree is subsequently passed it shall not be necessary upon an application for execution of such decree to apply for re-attachment of the property. It has been held in *Meyyappa Chettiar* v. *Chidambaram Chettiar* (1) that O. 31, R. 57, Civil P. C., applies to cases where property had been attached before judgment, and that if an execution application filed after the passing of the decree has been dismissed on account of the decree-holder's default then the attachment ceases. Applications for executions in this case having been dismissed by reason of the decree-holder's default, it follows from the authority of this ruling that the attachment existing on the properties ceased and these when ordered to be sold were not under attachment. This conclusion renders it necessary to decide the third question raised by the parties namely, whether a sale of properties in execution without an attachment is void ab initio.

In *Sharoda Moyee Burnnee* v. *Moyee Burmonee* (5) it was held by Jackson, J., that an attachment was not an essential preliminary in an execution sale. The reason for this view is thus stated by the learned Judge: "Attachment is a measure resorted to by the decree-holder for his own protection and the protection of purchasers of the property to be sold: and it consists in the case of immovable property merely in a prohibition by the Court by which the judgment-debtor is restrained from alienating the property previous to the sale. This, therefore, being merely a measure for the protection of the decree-holder and the purchasers of the property, the absence of it is not, it appears to me, an objection which the judgment-debtor is competent to raise." In *Baboo Luchmuput*

5) 8 W. R. 9.

v. *Baboo Lakhraj Roy* (6) the same Court held that a sale without attachment was irregular; but, as pointed out in *Kishory Mohan Roy* v. *Mahmud Mujaffar Hussain* (7): "as that was a case of sale of moveable property and the suit was one for damages the Court was not called upon to decide whether the sale would be regarded as a nullity." Though the decision in 8 *W. R.* 9 was under the Civil Procedure Code of 1859 which did not contain a provision corresponding to O. 21, R. 64 of the present Civil Procedure Code, yet the reasoning of the learned Judge has been accepted and applied in deciding cases both under the Act of 1882 and under the present Code by our High Court. In *Muniappa Naik* v. *Subramania Aiyar* (8) on the ground that "the object of attachment is to take the property out of the disposition of the judgment-debtors" the learned Judges Muthusawmy Iyer and Best, JJ., held that the omission to attach under S. 274 of Act XIV of 1882 was only an irregularity. In *Ramasawmy Naick* v. *Ramasawmy Chetti* (9) it was held for the same reason that the sale in execution of a decree is not invalid although there has been no attachment before sale as required by the Code. These decisions and the decisions in 18 *Cal.* 188 and *Sheodhyan* v. *Bholanath* (10) were followed by Sankaran Nair and Sadasiva-Iyer, JJ., in *Velayutha Mooppan* v. *Subramania Chetty* (11), where they held that a sale of immovable property in execution of a decree, without the preliminary attachment is not null and void. This was a decision under the new Code. The latest reported decision of this Court is to be found in *Sivakolundu Pillai* v. *Ganapathi Iyer* (12), where the learned Judges held that "attachment is only a step to be taken by the executing Court in bringing to sale the properties of a judgment-debtor. If such a step is omitted the sale can be set aside only if it has resulted in substantial loss, and the absence of attachment does not affect the jurisdiction of the executing Court to sell the immovable property. Our High Court has thus held in a series of decisions both under the old Code and the present one that the absence of attachment does not affect the jurisdiction of the executing Court to sell the property and that the sale on that account is not null and void. In 21 *All.* 311 the learned Judges of the Allahabad High Court after an elaborate consideration of the object of attachment, have also arrived at the same conclusion.

As against these decisions which, if accepted, would entail the dismissal of this appeal, the learned Advocate-General relies upon a recent decision of the Calcutta High Court in *Panchanan Das* v. *Kunja Behari* (13) to the effect that a Court has no jurisdiction to sell a property in execution which had not been duly attached. The learned Judges base their conclusion upon a decision in *Sorabji Coovarji* v. *K. Raghunath* (14), some observations of the Privy Council in *Thakur Bramha* v. *Jiban Ram Marwari* (15) and upon the terms of O 21, R. 64, Civil P. C. It is to be noticed that the learned Judges do not in their judgment refer to the earlier decisions of their Court in 18 *All.* 188 and *Hard Charan Singh* v. *Chandra Kumar Dey* (16) which held that a sale is not to be considered as a nullity merely by reason of the absence of any attachment.

The observations of Scott, C. J., in 36 *Bom.* 156 that "property can only be brought to sale after it has been duly attached and if the attachment came to an end upon the payment into Court on the 22nd September 1909 property was not duly attached at the time of the sale in January 1910" no doubt support the contentions of the appellant. We do not find in the course of the judgment any discussion of the case-law bearing on the question nor an answer to the reasoning on which the view of the Madras and Allahabad High Courts is based namely, that an attachment is a measure resorted to for the protection of the decree holder and the purchaser against intermediate alienations and is only a step to be taken by the executing

(6) 8 W.R. 415.
(7) [1891] 18 Cal. 188.
(8) [1895] 18 Mad. 437=5 M.L.J. 60.
(9) [1907] 30 Mad. 255=2 M.L.T. 167=17 M. L.J. 201.
(10) [1899] 21 All. 311=(1899) A.W.N. 84.
(11) [1913] 24 M.L.J. 70=13 M.L.T. 207=(1913) M.W.N. 136.
(12) [1917] M.W.N. 89.
(13) [1917] 42 I. C. 259.
(14) [1912] 36 Bom. 156=13 Bom. L.R. 1193.
(15) [1914] 41 Cal. 590=41 I.A. 38=18 C.W.N. 313=15 M.L.T. 137=12 A.L.J. 156=19 C. L.J. 161=26 M.L.J. 89=(1914) M.W.N. 118 =16 Bom. L.R. 156 (P.C.).
(16) [1907] 34 Cal. 787=11 C. W .N. 745.

Court in bringing to sale the properties of a judgment-debtor.

It is conceded in the judgment that the decision of the Privy Council is not exactly in point but the following remarks of Lord Moulton are referred to as indicating the view of their Lordships that the property can only be sold when it has been duly attached : " Their Lordships are of opinion that this is a very plain case. That which is sold in a judicial sale of this kind can be nothing but the property attached and that property is conclusively described in and by the schedule to which the attachment refers." The facts of the case and their Lordships' decision will clearly show that these observations only mean that a certificate of sale cannot be granted in which the property described is different from the property attached and specified in the proclamation of sale. In that case the judgment-debtor owned 16 annas share of a mahal of which 10 annas share was mortgaged, while the remaining 6 annas were free from any mortgage. The proclamation of sale described the property to be sold as 6 annas share included in the mortgage. This was the property that was attached and sold in auction. An application was made on behalf of the auction-purchasers to obtain a sale certificate for the 6 annas share purchased by them at the auction. In making this application they alleged that a mistake has been made in the schedule of the property to be sold in that the word 'not' had been omitted from the description of the 6 annas in question and that the property should have been described as being 6 annas not mortgaged. They claimed that their certificate should be made out as being a certificate of the purchase by them of the 6 unencumbered annas instead of as described in the schedule " 6 annas subject to the existing mortgage." The Subordinate Judge granted them a certificate in the form in which they desired. This order upheld by the High Court was set aside by the Privy Council. After the extract from the judgment already referred to, their Lordships state : " In the present case the property was 6 annas subject to an existing mortgage. The effect of the certificate of sale granted by the order of the Subordinate Judge is to make the sale that of a property not attached namely, the 6 unencumbered annas, a property which could not be sold in such proceedings inasmuch as it was not the property attached." Later on their Lordships say : " In this case we have to deal with identity and not description." Their Lordships conclude thus : " It was beyond the powers of the Court to make such an order inasmuch as there was no power to sell in these judicial proceedings the property thus certified to have been purchased." It will thus appear that the extract quoted from their Lordships' judgment in 42 *I. C.* 259 was only meant to indicate that the Court has no power to include in the sale certificate properties not attached and sold. Their Lordships were not called upon to consider directly the question whether the prior attachment will deprive a Court of its jurisdiction to sell the properties in execution of a decree. Thus understood, it appears to me that the dictum of the Privy Council cannot be relied upon in support of the appellant's arguments.

The terms of O. 91, R. 64, Civil P. C., no doubt show that attachment would ordinarily precede a sale of the properties in execution. But, for the reasons mentioned, the decisions above referred to have held that absence of such attachment would not vitiate a sale.

In *Macnaghten* v. *Mahabir Prasad Singh* (17) the question whether the notice of attachment not having been properly published would affect the sale or be an irregularity in conducting the sale was raised before the Privy Council but was not gone into inasmuch as that point was given up by the applicant at the trial before the Judge. In the absence of a definite pronouncement by their Lordships of the Privy Council I am not inclined to follow the decisions in 42 *I. C.* 259 and 36 *Bom.* 156 in preference to the long course of decisions of this Court. Following these decisions the sale in this case can be set aside only if the Court is satisfied that the appellant has sustained substantial injury by reason of the irregularity complained of namely, the absence of attachment. It has not been argued before us that he has sustained any such substantial injury and he has also not asked us to adjourn

(17) [1883] 9 Cal. 656=10 I. A. 25=11 C. L.R. 494=4 Sar. 417 (P. C.).

the hearing of this case till the disposal of the application filed by him in the lower Court. It therefore follows that his appeal will have to be dismissed.

As I have decided to dismiss the appeal on the merits, I do not express any opinion as regards the 'appealability' of the order passed by the Subordinate Judge.

In the result this Miscellaneous Appeal is dismissed with costs. The connected Civil Revision Petition is also dismissed but without costs. No orders are necessary on the stay petition.

Appeal dismissed.

A. I. R. 1926 Madras 216

JACKSON, J.

R. M. N. Muthuraman Chettiar and *another*—Petitioners.

v.

Uppaluru Seetharamayya and *others*—Respondents.

Civil Revision Petition No. 207 of 1925, Decided on 20th August 1925, from the order of the Sub-J., Bezwada, D/- 17th March 1925, in C. M. P. No. 492 of 1925.

Civil P. C. O. 21, R. 58—Claim petition asking to sell properties subject to mortgage and to stop sale pending the petition—Refusal to stop sale does not relieve Court from proceeding under proviso to Sub-R.(1).

A mortgagee preferred a claim petition under O. 21, R. 58, in order to declare the mortgage right over the properties and to have them sold subject to the mortgage amount and to stop the sale pending disposal of the petition and the lower Court ordered that "the mortgage is registered and in the ordinary course should have found a place in the encumbrance certificate. Decree-holder, however, opposes this petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it."

Held : that the order was simply a refusal to stop the sale and it did not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso : 41 *Mad.* 985 (*F. B.*), *Dist.* [P. 216, C. 1,2]

N. Sivaramakrishna Aiyar and *M. Venkatasubbiah*—for Petitioners.

G. Lakshmanna—for Respondents.

Judgment.—The petitioners seek to revise an order passed by the Subordinate Judge of Bezwada on a claim petition preferred by them under O. 21, R. 58, Civil Procedure Code. This petition contains two specific prayers.

"(a) To declare the mortgage right of the petitioners over the properties set out in the schedule annexed hereto and to have them sold subject to the mortgage amount; and (b) to stop the sale pending disposal of this petition."

The learned Subordinate Judge passed the following order :—

"Counterfiled. The mortgage is registered, and in the ordinary course should have found a place in the encumbrance certificate. Decree-holder, however, opposes this petition as it is filed too late. Sale to take place with notice of this mortgage and that decree-holder disputes it."

The petitioners complain that the Court below failed to exercise its jurisdiction and state that it should either have investigated their claim or it should have refused to make such investigation after finding that their claim was designedly or unnecessarily delayed. Of course the present order is no investigation of the claim and there is no finding that the claim was filed with designed or unnecessary delay. The claim is so far admitted that the sale is ordered to take place with notice of this mortgage which to some extent might be taken as allowing prayer (a) and the sale is not stopped which is a denial of prayer (b). I should take the order as being simply a refusal to stop the sale and it does not relieve the Court of the necessity of either investigating the claim or of refusing an investigation under the proviso. It may be described as an interim order and no final decision. However, the counter-petitioners strenuously contend that this order must be construed as an order under the proviso in the light of the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma* (1). The principal question agitated in that case was whether a refusal to investigate under the proviso of O. 21, R. 58, could be taken as an order against the party within the mischief of O. 21, R 63, Civil Procedure Code, and Art. 11 of the Limitation Act. But incidentally the Court held that the order in the case amounted to an order under the proviso to R. 58, and the counter-petitioners contend that that order is on all fours with the one in question in the present case. As a matter of fact the order, as printed in *Venkata-*

(1) [1918] 41 Mad. 985=24 M. L. T. 197 =(1918) M. W. N. 599=8 L. W. 292=35 M. L. J. 335 (F. B.).

ratnam v. *Ranganaykamma* (1) is rather deceptive because it gives the impression, that the whole order has been transcribed whereas only one sentence has been extracted. This was first noticed by Sir Walter Salis Schwabe, C. J., in *Abdul Kadir* v. *Somasundaram Chettiar* (2) and he recalled the original order to which I also have referred. It runs from the second paragraph :—

"As this (the zamindarini's) petition was filed late this claim was ordered to be notified to the intending bidders. The zamindarini has not obtained a decree against judgment-debtor for the cist, nor has she apparently filed a suit within (sic) in this Court or before the Revenue Court, nor has any suit been filed about the land not being saleable. The fact (sic) fresh petition has been filed for an inquiry being made as to the claim of the land not being saleable nor was an enquiry sought on the strength of that petition, though nearly ten months have elapsed since then. Decree-holder's prayer is that the sale should be held subject to this claim for cist which has not yet been proved inadmissible. The allegations of the zamindarini will be notified to the bidders with the remark that the zamindarini did not take steps for her claim being enquired into during the last ten months "

As Sir Walter Salis Schwabe, C. J., observes the Full Bench treated that order as a refusal of the application on the ground that there had been laches or delay which brought the matter under the proviso to O. 21, R. 58. The order in the present case is very different. The Subordinate Judge begins by finding that the mortgage is registered and one which in the ordinary course should have found a place in the encumbrance certificate. He evidently thinks that the encumbrance certificate is in error; for he proceeds to order that the sale shall take place with notice of this mortgage. He does not find, as is now suggested on behalf of the counter-petitioners, that the mortgage was in respect of property not affected by the sale. He mentions that the decree-holder opposes the petition as it is filed too late, but he gives no opinion himself as to whether there has been any delay. I cannot hold that such an order is one where, in the words of Napier, J., in the reference to the Full Bench in *Venkataratnam* v. *Ranganayakamma* (1), a Court purports to make an order under the proviso to O. 21, R. 58 ; that is to say, an order refusing to investigate. The learned Subordinate Judge has not refused to investigate and has not suggested any reasons why he should refuse to investigate. I find that so far all that he has done has been to refuse to stop the sale, and to give to the bidders notice of this mortgage and of the decree-holder's objection, and I direct that he shall proceed to dispose of the petition according to law. Until he does so it cannot be treated as decided. Accordingly the petition is allowed with costs. Pending the decision of this petition the sale, which was stayed by an interim order of this Court, is stayed. I observe that this Court has already deprecated the practice of selling property with notice of the unascertained claims : vide *Venkataratnam* v. *Ranganayakamma* (1) and *Saharabi* v. *Puthia Puryil* (3).

Case remanded.

(2) A. I. R. 1923 Mad. 76.

(3) A. I. R. 1923 Mad. 295.

A. I. R. 1926 Madras 217

DEVADOSS AND WALLER, JJ.

(*Muhammad*) *Mohideen Maracayar*—Petitioner—Appellant.

v.

Ramanadhan Chettiar and *another*—Respondents.

Appeal No. 415 of 1922, Decided on 6th October 1925, against the order of the Sub-J., Mayavaram, D/- 22nd August 1922 in E. A. No. 210 of 1922.

Civil P. C., O. 21, R. 90—Application by judgment-debtor under R. 90 cannot be rejected on the ground that his interest has ceased prior to sale.

Where properties are sold as the properties of the judgment-debtor in execution of a decree against him, his application under O. 21, R. 90, cannot be rejected on the ground that prior to the execution sale he had sold the properties to a stranger and had ceased thereby to have any interest in them. [P. 218, C. 1.]

K. Rajah Aiyer—for Appellant.

A. Krishnaswami Aiyar and *M. Patanjali Sastri*—for Respondents.

Judgment.— This is an appeal against the order of the Subordinate Judge of Mayavaram dismissing the appellant's petition for setting aside a sale under O. 21, R. 90. The Subordinate Judge

dismissed the application on the ground that the judgment-debtor had no interest in the properties, he having sold them to Velu Pillai before the date of auction sale. The properties were sold as those belonging to the appellant. If the properties did not belong to him, the decree-holder could not have brought them to sale in execution of his decree and the Court could not have sold the properties as those belonging to the appellant. It cannot therefore be said that, when he applies under R. 90 of O. 21 to have the sale set aside on the ground of irregularity in publishing and conducting the sale, his interests are not affected. R. 90 is wide in its terms. It says :

"The decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it."

Here the property was sold as the property of the appellant and we fail to see how they ceased to be his properties before the date of sale. If he had any interest at the time when the properties were sold, it cannot be said that his interest in them had ceased by virtue of the sale which would prevent his applying under R. 90. We think the order is bad in lawand we set it aside and direct the Subordinate Judge to restore the application to file and dispose of it on the merits. Costs of the appeal will be provided for by the lower Court when it disposes of the application.

Order set aside.

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* A. I. R. 1926 Madras 218

SRINIVASA AIYANGAR, J.

Khoday Gangadara Sah—Plaintiff.

v.

A. Swaminadha Mudali and *others*—Defendants.

Civil Suit No. 757 of 1922, Decided on 17th February 1925.

* (a) *Civil P. C., S. 100—Foreign law is a question of fact.*

What a foreign law is on a particular point, is a question of fact and has to be proved by the parties setting it up. [P. 219, C. 2]

(b) *License—Entering into partnership by licensee in respect of business for which license is granted is not necessarily selling or transferring the license.*

The mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business for the carrying on of which he has obtained a license does not necessarily involve either a sale, transfer or sub-letting of the license. [P. 220, C. 2]

(c) *Contract Act, S. 23—Partnership by Abkari licensee according to Mysore Law is not illegal.*

According to the law of the Mysore State a partnership agreement with reference to an Abkari license is not an agreement the consideration or object of which is unlawful. [P. 221, C. 1]

* (d) *Interpretation of statutes—Agreement held not illegal by particular statutory enactment in a State cannot be held illegal, because British Indian Courts have held it to be illegal in like circumstances.*

If there is a particular statutory enactment or a provision or rule having the force of law in a particular State and the highest Court in that State has decided that having regard to the terms of such enactment or rule, a partnership agreement in those circumstances is not illegal,it cannot be held that such an agreement is illegal because the British Indian Courts have held them to be illegal in very similar circumstances. [P. 222, C. 1]

(e) *Contract Act, S. 23—Written contract challenged on the ground of its being forbidden by law as it operates as a transfer—Such transfer must appear in the terms of the contract.*

When the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed, but must appear in the document if not in terms at least as necessarily involved. [P. 222, C. 1]

(f) *Contract Act, S. 23—Partnership by lincensee is not illegal in all cases.*

A partnership agreement with a licensee is not necessarily in all cases and under all circumstances illegal. 20 *M. L. J.* 337, *Foll.* [P. 222, C. 2]

K. Krishnaswami Aiyangar—for Plaintiff.

N. Rajagopalan—for Defendants.

Judgment.—The only point that arises for determination in this suit is quite simple and though not frequently arising is of considerable importance. The plaintiff's suit is for the taking of the accounts of a partnership between himself and the three defendants. That a partnership agreement was made between these parties it is not disputed. The terms of the partnership have been reduced to writing and are to be found in the admitted copy filed as Ex. A. Defendants 2 and 3 have not contested the claim of the plaintiff and are apparently themselves anxious that the accounts of the partnership should be taken and the profits or losses ascertained and distributed.

The contest in the case which raises the only point for determination has been put up only by the 1st defendant and has reference merely to the validity of the contract sought to be enforced. The point as put by the learned counsel for the 1st defendant is this: the partnership contract was made in the Mysore State within the territories of His Highness the Maharaja and had reference to a business in arrack carried on by the plaintiff under a license obtained by him from the Mysore Government. Under the terms of the license granted to the plaintiff he was not entitled, without the previous permission of the Deputy Commissioner, to do what he purported to do, namely, take into his business as partners the Defendants 1, 2 and 3. No such permission was obtained by the plaintiff and, therefore, his act of entering into the partnership agreement was an act forbidden by the law and, therefore, void and therefore, unenforcible. If this contention should be upheld, it follows that the plaintiff's suit must fail. And on the other hand, if this contention should fail, the plaintiff would be entitled to a preliminary decree for the taking of the accounts of the partnership and the matter will have to be referred to the Official Referee for the taking of the usual accounts.

To begin with, I regret to state that neither the learned counsel for the 1st defendant nor the learned vakil for the plaintiff seemed to have paid any consideration to an important aspect in this case, namely, that whereas the contract was made and was apparently intended to be performed entirely within the Mysore State, this suit has been instituted in this Court. And in fact both sides argued the case before me as if there were no such complication and it was a simple case of the contract being or not being illegal according to the law of the Mysore State. The law of that State, however, it was recognized had as being the law of a Foreign State to be proved as a matter of fact by the expert witness, an advocate at Bangalore, who has been called for the purpose. The question, therefore, has not been properly argued before me on the footing of a contract sought to be enforced in a British Court, but made and intended to be performed in a Foreign State and that a Protected State under the protection of the British Government and subject to its suzerainty. The 1st question that has to be determined in such cases is: What is the law applicable to the particular contract in question? that is to say, by the application of which law should it be determined whether the contract in question is void for illegality as urged. Fortunately there is no serious difficulty in this case with regard to the law applicable, because whether we take the law applicable generally in the first instance as the law which the parties intended that the contract should be governed by or as the law of the place where the contract was made or as the law of the place where the contract was intended to be performed, it is in every case the same law, the law of the Mysore State. No evidence has been adduced before me and no argument addressed to show that the intention of the parties was that the contract should be governed by any law other than the law of the Mysore State. We may also presume that as the contract was apparently intended to be performed in its entirety within the Mysore State the parties intended that the contract should be governed by the law of that very State. This being settled, the questions that next arise for consideration are: (a) whether according to the law of the Mysore State this contract of partnership was forbidden; (b) whether if so forbidden, the provision of law forbidding was only a fiscal or taxing enactment or a provision of law based on the public policy of only a particular State or whether the prohibition is founded on natural justice or some moral principle which, if it is not, ought to be, recognized in international jurisprudence.

As regards the first question whether under the law of the Mysore State the suit contract of partneship was illegal and void, it must be observed, to begin with, that the question "What a foreign law is on a particular point" is a question of fact and has to be proved by the parties setting it up. No evidence has been adduced before me as to what the law of contracts is with regard to the illegality and unenforcibilty of contracts which are entered into in violation of rules of law or against public policy. I have reason to believe that the law of contracts in that State is the same as the Indian Contract Act, But this was, however, bound to be established and not be left merely to

inference. The 1st defendant on whom the burden of proof lay to establish satisfactorily all matters necessary for enabling the Court to come to the conclusion regarding the illegality of the contract did not give any evidence with regard to it. I may, however, observe in passing that from Ex. III it does appear as if the Indian Contract Act has been bodily adopted by the Mysore State. But while it is true that most of the Indian Statutory law has been adopted in the Mysore State, it also appears that in some cases changes have been made in the enactments so adopted, and I am, therefore, not in a position, in the absence of satisfactory evidence, on the point to say what the law of the Mysore State is with regard to the illegality of contracts.

In these circumstances, all that I can do is to proceed on the assumption that, as indicated by Ex. III, the Contract Act in force in the Mysore State is the same as the Indian Contract Act. S. 23 of that Act provides, amongst other things, that the consideration or object of an agreement is lawful unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or the Court regards it as immoral or opposed to public policy. It further provides that every agreement of which the object or consideration is unlawful is void.

The question then is whether the partnership agreement is one of which the consideration or object is unlawful within the meaning of S. 23 of the Contract Act. This would depend obviously on the terms and conditions of the licenses granted to and obtained by the plaintiff. But neither he nor the 1st defendant has produced the original license or even a copy. The Court has virtually been asked by both parties to assume that the terms and conditions of the licenses were in the common form as appearing in Ex. 1(b). Cl. 16 of the general conditions of retail vend licenses is as follows :

"No privilege of supply or vend shall be sold, transferred or sub-rented without the Deputy Commissioner's previous permission, which will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty. Nor, if the Deputy Commissioner so orders, shall any agent be appointed for the management of any such privilege without his previous approval."

On behalf of the 1st defendant my attention has been drawn to a case decided by the Mysore High Court and reported in the Mysore Law Journal Reports, Vol. 1. p. 90, proved by the expert witness called for the 1st defendant and marked as Ex. III in the case. That case, however, refers only to a case of sub-letting actually covered by the terms of Cl. 16 of the conditions. Generally speaking, it cannot possibly be contended that the mere fact that a licensee enters into a partnership with others or another in respect of profits or losses of the business for the carrying on of which he has obtained a license necessarily involves either a sale, transfer or sub-letting of the license. There may no doubt be partnership agreements which involve or include a transfer of the interest in the license itself. There is, therefore, no warrant for supposing that every partnership agreement must necessarily violate such a condition as set out in that clause.

Mr. N. Narasimha Aiyangar, Advocate at Bangalore, has also referred in the course of cross-examination to a case reported in the 9th Vol. of the Mysore Chief Courts Reports, p. 316, where it was held in that State that a partnership entered into by a licensee in such circumstances was not illegal, and he also told me that that decision is regarded as good law upto date and has not been overruled. The partnership agreement in this case, Ex. A, does not contain any words of sale, transfer or sub-letting. No doubt in terms, as also necessarily as the result of a partnership agreement, the partners are constituted agents or managers of the concern. But the last sentence in Cl. 16 of the general conditions indicates that if it was intended to prevent any agent bing appointed for the management of any such privilege without the previous permission of the Deputy Commissioner, a special order of the Deputy Commissioner should be made, that is to say, in other words, generally speaking the appointment of a manager for the management of the privilege may be made without any previous permission, and if the Government should deem fit to prevent any such thing being done a special condition or order is required to be made by the Deputy Commissioner. No such special order or condition has been proved in this case. The effect

of a partnership agreement is only to constitute the partners the agents of each other, and it, therefore, follows that the terms of Cl. 16, far from forbidding the appointment of such agents for management, impliedly allows such appointments except in cases where it is specially forbidden. Having regard, therefore, to the terms of Cl. 16 and also the judgment of the Chief Court already referred to, I cannot but hold that according to the law of the Mysore State, as recognized and acted upon by the subjects of that State, a partnership agreement with reference to a license of the kind in question is not an agreement the consideration or object of which is unlawful. In this view which I have arrived at with regard to the question in issue, I am, therefore, bound to hold that the suit contract was not unlawful or void. This would be sufficient for the purpose of disposing of the issue. But the learned counsel for the 1st defendant has referred me to various judgments of the High Courts in India for the purpose of showing that under clauses similarly worded in Abkari licenses issued by the British Government, the Courts have held that a partnership agreement is an agreement forbidden by law and therefore unlawful. It seems, however unnecessary to refer te the decisions of the British Indian Courts in the matter. If there is a particular statutory enactment or a provision or rule having the force of law in a particular State and the highest Court in that state has decided that having regard to the terms of such enactment or rule, a partnership agreement in those circumstances is not illegal, I cannot hold that such an agreement is illegal because the British Indian Courts have held them to be illegal in very similar circumstances.

In my view, therefore, any detailed examination of the decisions of the British High Courts in India is unnecessary. I may, however, briefly refer to them because after a careful examination of those cases, I have come to the conclusion that even on the principles decided in those cases the partnership agreement in this case could not be held to have been unlawful.

The case of *Marudamuthu Pillai* v. *Rangasami Mooppan* (1). was one of the cases referred to and relied upon for the first defendant. The decision in that case proceeded upon a clause which is entirely different in its terms and scope from the clause in the present case. There are, no doubt, observations in the judgment of the learned Judges in that case regarding the principle underlying the provisions of the Abkari Act and also with regard to the partnership agreements entered into by or with the licensee being illegal. Those observations were not necessary for the decision of the case and were merely obiter dicta. With all respect, therefore, the learned Judges that decided the case I cannot regard it as a binding decision more especially when that I have to consider is not a British Indian license but a license issued by the Mysore State, which in some important respects materially differs from the terms that the learned Judges were considering. Further I may also in this connexion observe that the learned Judges who came to the conclusion in that case that the rules under the Abkari Act were not merely for the protection of the revenue but also to regulate liquor traffic in the interests of the public were not confronted in the license with any such condition as that the previous permission by the Deputy Commissioner for the sale, transfer or sub-renting of the privilege of supply or vend will only be given if the applicant is prepared to forfeit his deposit already made except in cases where the Deputy Commissioner sees reason not to enforce the penalty. Further in the case of the license the learned Judges were considering, there does not appear to have been any such clause as the following.

" Nor, if the Deputy Commissioner so orders shall any agent be appointed for the management of any such privilege without his previous approval."

The case of *Nalain Padmanabham* v. *Sait Badrinadh Sarda* (2) was under the Opium Act and proceeded on the narrow ground that the terms of the Act prescribed that no one shall sell opium except as permitted by the Act and were different from the corresponding provisions in the Abkari Act. Further the learned Judges also relied for their decision on the terms of the partnership agreement with regard to which they observed as follows :

" It is contended for the appellant that the admission of the plaintiff to partner-

(1) [1901] 24 Mad. 401.

(2) [1911] 35 Mad. 582=21 M. L. J. 425=9 M. L. T. 459=(1911) 1 M. W. N. 371.

ship with the defendant is not a transfer. We are of the opinion that it is. It is no doubt true that every contract of partnership is not necessarily a transfer but it is equally clear that such a contract may in many cases involve a transfer. Thus if two persons agree to start a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if one person carrying on a trade and possessing stock and capital admits another into partnership with himself making the stock and capital the joint property of both, it is impossible to contend that there is not a transfer in such a case."

The Tamil document filed in this case is far from clear and while there is no doubt that all the profits and losses were agreed to be divided amongst the four partners in equal shares I have been unable to find in the document any words of transfer even though I have no doubt whatever that a transfer must have been intended by the parties. But if, as stated in the case of *Marudamuthu Pillai* v. *Rangasami Mooppan* (1), the object of the rules framed for the purpose of preventing sale, transfer or sub-renting is that the Government should not lose its control over the license, it is impossible to see, how, by the mere fact that a license admits certain persons into partnership with him, the control that the Government has over the license is in any manner or decree lost. Moreover, when the terms of a contract are reduced to writing and the question is whether the contract is illegal by reason of its seeking to do what is forbidden by law and the contention is that the agreement operates as a transfer, such a transfer should not merely be presumed but must appear in the document if not in terms at least as necesarily involved. There is no transfer so far as I can see either of the business or of the stock in trade or of any interest in the license ; and I think what the parties really intended was only that the profits and losses of the concern should be shared by them.

The next case cited to me by the learned counsel for the first defendant was *Brahmayya* v. *Ramiah* (3). With all respect it seems to me that the correctness of that decision is open to doubt. The clause in the license which the learned Judges were construing was as follows ;

" The privilege of supplying and vending shall not without the permission of the Collector previously obtained, be sold exchanged or sub-leased, nor if the Collector has ordered can an agent be appointed, without his permission previously obtained, for exercise of any such privilege."

Construing this clause, this is what the learned Judges say :

" The clause prohibits sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect, ordinarily of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor."

I cannot possibly understand how the learned Judges came to the conclusion on a construction of the clause that apart from any special order of the Collector which is not referred to in the decision, the appointment of an agent was regarded as forbidden. The clause states that no agent can be appointed only if the Collector has so ordered. This would ordinarily mean and imply that in cases where the Collector has not so ordered the appointment of an agent would not be illegal. Therefore, unless it be that in that case it was admitted by both parties that the Collector had made an order forbidding the appointment of an agent, it is impossible to understand the judgment or regard it as properly decided. Further the observation of the learned Judges that in their opinion the taking of a partner with him has the effect ordinarily of selling a portion of the business to him, is too general and sweeping to be accurate ; and in that respect I have no hesitation in stating that the law with regard to it is much more accurately stated by Benson and Sundara Ayyar, JJ., who decided the case of *Nalain Padmanabham* v. *Sait Badrinadh Sarda* (2).

On the other hand the case of *Natla Bapiraju* v. *Atchuta Rajaju* (4), decided by Miller and Krishnaswami Aiyar, JJ. is an authority for a decision that a partnership agreement with a licensee is not in all cases and under all circumstances illegal.

These are the Madras cases that were cited to me.

(3) [1920] 43 Mad. 141=10 L. W. 476=38 M. L. J. 123.

(4) [1910] 20 M. L. J. 337=7 M, L. T. 176=(1910) M. W. N. 549,

In the case of *Karsan* v. *Gatlu Shivaji* (5) Sir Basil Scot, C. J., and Chandavarkar, J., held that the Indian Legislature was by no means blind to the possibility of partnerships being entered into by licensees in which other persons may become interested in the sale of liquor and that the object of granting the license is to have control over the person who is authorized to sell the liquor and in order that the sale of the liquor may not pass out of his control to unauthorized persons. Proceeding on this reasoning, those learned Judges held that a partnership was not prohibited by the terms of a license which merely forbade selling transferring or sub-letting.

In the case of *Champsey Dossa* v. *Gorddhandas Kessowji* (6), Mr. Justice Macleod, sitting singly on the Original Side, held with reference to the terms of the license granted for manufacture of salt that the admission of partners to share in the profits cannot be considered as a sub-letting or alienation of a part of the privilege unless there has been a document directly transferring to the partners a part of the right to manufacture or vend. He accordingly held that a partnership agreement was not illegal which was entered into by a licensee who under the terms of the license was forbidden to sub-let, mortgage or otherwise alienate the whole or any part of the privilege granted by the licensee of manufacturing salt on the land.

In the case of *Gauri Shankar* v. *Mumtaz Ali Khan* (7) Oldfield, J., who was one of the Full Bench of that Court held apparently with the concurrence of the Chief Justice and Mr. Justice Spankie that a partnership contract was not contrary to the conditions of a lease of a ferry under which a transfer or sub-lease by the lessee was forbidden.

In none of the cases decided in the Calcutta High Court, and to which reference was made, was this question regarding partnership raised or considered.

In these circumstances having regard to the state of the case-law not only in Madras but in British India generally the weight of considered judicial opinion is against regarding a mere partnership agreement as being against a provision of law which merely prohibited sale, transfer, or sub-letting. As Mr. Justice Macleod of the Bombay High Court points out, and as Mr. Justice Miller and Mr. Justice Krishnaswami Ayyar, JJ., and Benson and Sundara Ayyar, JJ., have held, a partnership agreement does not necessarily involve any transfer by the licensee to the persons he admits as partners. No doubt a partnership agreement might also effect a transfer forbidden by law in which case it would be bad, not because it was a partnership agreement, but because it was a deed of transfer. In the present case, in the agreement filed before me, no words have been relied upon for the purpose of showing that they are words of transfer or operate to effect any transfer of property the transfer of which is forbidden by law. As I read the document the arrangement entered into by the partners was quite consistent with the licensee remaining as the legal owner but bound in equity to account for all the profits and losses to his other partners.

In any case, as I have already stated, what I have to consider is not whether, apart altogether from the law of the Mysore State, such a contract would or should be upheld by this Court, but only whether according to the law of the Mysore State the contract was void in its inception. If according to that law, as deposed to by the expert witness entering into a partnership with regard to the rights of a licensee is perfectly legal, this Court is bound to hold that, according to the law to which the contract is subject, the contract is not void or unenforcible, and I am glad to think that the rules of international law do not oblige the Courts of a foreign country to regard as against the law or as opposed to public policy and, therefore, void, any contract which the High Court of the very State in which the contract was intended to be performed, and by the law of which it was intended to be governed, would not so regard it.

Some difficulty no doubt might have arisen if, according to the state of the Mysore Law the contract would be illegal and the ground of illegality should appear to be not any fundamental principle of morality or ethics or public policy but some regulation, which, as in this case, has for its chief purpose the realization of revenue, and such a State happened also to be, as in this case, a Protected Indian

(5) [1913] 37 Bom. 320=15 Bom. L.R. 227.
(6) [1917] 19 Bom. L. R. 381.
(7) [1878-80] 2 All. 411.

State. It is possible that even in those circumstances British Indian Courts might feel compelled to give effect to the law of the Protected Indian State as it may be found to be. But in the present case no such question arises.

I have, therefore, come to the conclusion that the defence of illegality set up by the 1st defendant regarding the plaintiff's claim to enforce the contractual obligation has not been made out. There would, therefore, be a preliminary decree in the suit declaring the partnership between the plaintiff and Defendants 1, 2 and 3 each being entitled to equal shares of profits and losses of the partnership and directing the usual accounts of the partnership to be taken from the 1st day of July, 1919 as provided in the partnership agreement. The 1st defendant who was chiefly responsible for protracting this litigation so long, will pay the plaintiff the taxed costs of the suit up to date. The costs to be incurred before the Official Referee will be dealt with at the time of passing the final decree in the suit.

Suit decreed.

A. I. R. 1926 Madras 224

ODGERS, J.

Govinda Nadan—Appellant.

v.

A. Y. R. M. R. M. Ramaswamy Chettiar—Respondent.

Second Appeal No. 95 of 1923, Decided on 6th October 1925, against the decree of the Dist. J., East Tanjore, Negapatam, in Appeal Suit No. 252 of 1919.

Accounts—Mutual, open and current accounts—Test—Mere shifting of accounts from one side to the other is not enough to constitute mutual obligations.

In order that an account may be mutual, there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations. A mere shifting of the account from one side to the other is not enough to constitute mutual obligations : 6 *Mad. H. C. R.* 142. *Foll.*

[P. 224, C. 2 ; P. 225, C. 1]

A. Balakrishnan and *N. Gopala Menon*—for Appellant.

V. Ramaswami Iyer—for Respondent.

Judgment.—I postponed judgment on the 15th September in order to give the appellant's vakil an opportunity of satisfying me that the District Judge went into the question of the nature of the accounts in the case in spite of its not being raised by the parties as it is not in the grounds of appeal to the lower appellate Court. The learned vakil now states that he is unable to get information on the point.

The suit is brought by the plaintiff for a sum of Rs. 795 odd, which is said to be due to him from the defendant, a money-lender. The course of business between the parties was apparently that the plaintiff should draw money whenever he wanted it and should also deposit money with the defendant. The plaintiff has not produced any accounts of his own. He relies on a copy of the defendant's accounts, Exhibit A. The District Munsif found that the plaintiff had proved his case as he held that a settlement had taken place on either the 14th or the 17th of December 1913. The District Judge, to whom appeal was taken, discredited the evidence with regard to this settlement and that is a finding of fact by which I am bound in second appeal. But the learned Judge goes on to consider whether the transaction is in the nature of a mutual, open and current account and would therefore save limitation if such was the case, and the argument before me has been that the account in Exhibit A is such an account. Now, in order to see what the requisites are for such an account, we should look at the case of highest authority as far as I know in this Court, i. e., the judgment of Holloway, J. in *Hirada Basappa* v. *Gadigi Muddappa* (1). In order that an account may be mutual "there must be transactions on each side creating independent obligations on the other and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations." That statement has been repeated in many judgments ever since the year 1871 and it has over and over again been taken as a correct statement of the law. It may be that in the account before me the balance shifted from one side to the other from time to time : See *Shivi Gowda* v. *Fernandes* (2), and *Kunhi Kutti Ali* v. *Kunhamad* (3). But the account,

(1) [1871] 6 M. H. C. 142.
(2) [1911] 34 Mad. 513=21 M. L. J. 391=8 M. L. T. 412=(1911) 1 M. W. N. 1.
(3) A. I. R. 1923 Mad. 280.

as far as I have been able to see, resembles exactly a bank pass book where deposits of monies are made and withdrawals of monies take place from time to time, the balance being in favour either of the customer or of the bank as the case may be at any given moment. I therefore agree with the learned District Judge that there do not appear to be independent obligations on both sides and that a mere shifting of the account from one side to the other is not enough to constitute mutual obligations.

The second appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 225

PHILLIPS AND RAMESAM, JJ.

(*Tiruvangalath Nellyoton*) *Paidal Nayar* and *others*—In Re

Stamp Register No. 14383 of 1924, Decided on 18th August 1925, against the decree of the Dist. J., North Malabar, in A. S. No. 135 of 1923.

(*a*) *Court-fee—Suit for redemption—Decree for recovery of possession subject to the amount and value of improvements—Appeal against value of improvements only—Court-fee must be determined according to the value of improvements.*

In a suit for redemption of a kanom the plaintiff obtained a decre for recovery of possession of property, subject to payment of the kanom amount and the value of improvements. Plaintiff appealed only against the value allowed for improvements.

Held : the proper Court-fee payable on the memorandum of appeal must be determined in accordance with the value of improvements which the party seeks to avoid. 23 *Mad.* 84 *Foll.*

[P. 225, C. 2, P. 226, C. 2]

(*b*) *Court-fees Act—Appeal—Value of appeal is not the value of suit, but the value of relief granted by decree.*

The principle of the Court-fees Act is tha the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks. The value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which the party wishes to get rid of. [P. 225, C. 2, P. 226, C. 2]

(*c*) *Court-fees Act, S. 7—"Suits" does not include appeals.*

The word "suits" in S. 7 does not include appeals. (*Case-law considered.*) [P. 226, C. 1]

L. P. Ramakrishna Aiyar—for Appellant.

C. V. Anantakrishna Aiyar—for the Government.

Phillips, J.—This is a reference under S. 5 of the Court-fees Act. The plaintiff filed a suit for redemption of a kanom. He obtained a decree for recovery of possession of property, subject to payment of the kanam amount and the value of improvements. In appeal, there is no dispute as to plaintiff's right to redeem, but he appeals against the value allowed for improvements. The question is : What is the proper Court-fee payable on the memorandum of appeal.

The reference has been made because, as a matter of practice, the Taxing Officer has been following the decision in *Reference under Court Fees Act, S.* 5 (1), where it was held that the claim for improvements being merely incidental to the decree for possession, the Court-fees payable was that prescribed by S. 7, Cl. (9) of the Court-fees Act, viz., on the principal amount of the mortgage. It appears, on a reference to the papers in that case, which was an ejectment suit that the right to eject was in dispute in appeal as well as the claim for improvements ; but in answering the reference, this Court held that even where the question raised is as to the value of the improvements, the appellant should not be called upon to pay any fee other than that payable in a suit for possession of land. This dictum is obiter and has not been followed in later cases. We have now to determine whether the practice in accordance with this dictum is correct. The payment of compensation for improvements under the Malabar Tenants Compensation Act is similar in nature to the payment of money due under a mortgage; for until such a payment is made, the landlord or mortgagor, as the case may be, cannot recover possession. This case, therefore, is similar to a redemption suit where the amount of mortgage money payable is in dispute. The principle of the Court-fees Act is that the plaintiff should pay a Court-fee in proportion to the value of the relief he seeks. That value, if possible, is determined in money, but, where there is no money value or the money value is uncertain, the Act provides rules according to which the valuation shall be made. S. 7 deals with the valuation of suits only, except in Cl. (4), where the valuation of an appeal is also provided for; that clause deals with cases where the

(1) [1900] 23 Mad. 84.

money value of the relief cannot be ascertained.

The general provision in respect of appeals is Art. 1, Sch. 1, which provides that the fee shall be paid in accordance with the amount or value of the subject-matter in dispute and it is clear from the language that the words "in dispute" must relate to the dispute in appeal and not in the original suit. It would thus appear that the word "suits" mentioned in S. 7 does not include appeals and this was pointed out in *Reference under Court-fees Act*, 1870 (2), where a case similar to the present one was considered. It was there held that, when an appeal in a redemption suit related only to the amount of mortgage money payable, the fee must be calculated with reference to the amount in dispute in appeal. This case exactly covers the present reference and it is not quite clear why it has been followed by the Taxing Officer. It purports to follow a case in *Nepal Rai* v. *Debi Prasad* (3) and dissents from a contrary decision in *Pirbhu Narain Singh* v. *Sita Ram* (4). The view in *Nepal Rai* v. *Debi Prasad* (3) was also followed in *Baji Lal* v. *Gobardhan Singh* (5) and *Raghubir Prasad* v. *Shankar Baksh Singh* (6). There are cases in this Court which seem to support *Reference under Court Fees Act, S.* 5 (1), *Zamorin of Calicut* v. *Narayana* (7), *Reference under Court-fees Act, S.* 5 (8) and *Zamindar of Venkatagiri* v. *Suryaprakasam* (9).

In all these cases, as well as in *Reference under Court-fees Act, S.* 5 (1) the question of the right to redeem or the right to eject was in issue. The decision in *Zamorin of Calicut* v. *Narayana* (7) has reference to a suit and not to an appeal and consequently S. 7, Cl. (9) is directly applicable. In *Reference under Court fees Act, S.* 5 (8) the reference was made in connexion with an appeal but the judgment deals only with the question of suits. In *Zemindar of Venkatagiri* v. *Suryaprakasam* (9) the right to redeem was in issue and it was held that, where the only question raised in appeal is as to the amount payable, the memorandum of appeal would come under Art. 1 of Sch. I for the purpose of computing the Court-fee. In *Seethayamma, In re* (10) the right to recover land was in issue in the suit, but the learned Judge in his judgment recognized that the current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed, but the value of the relief granted by the decree which the party wishes to get rid of. That this is the correct view is clear from the frame of the Court-fees Act which provides means for determining the value of the relief sought; such value cannot always be accurately determined by the plaintiff, when he files the suit, but can in many cases be definitely fixed in appeal, after the decree has been passed, the value being the difference between the amount stated in the decree and the amount sought by the plaintiff. It is only in very rare cases that an appeal cannot be definitely valued and such cases are provided for in S. 7, Cl. (4). There may be other instances and then, one would naturally look to the provisions of the Act relating to suits in order to ascertain the value of the appeal.

The principle laid down in *Reference under Court-fees Act*, 1870 (2), has been adopted in *In re Porkodi Achi* (11). and also by the Allahabad High Court as mentioned above, and by the Lahore High Court in *Lekh Ram* v. *Ramji Das* (12).

We, therefore, accept the ruling in *Reference under Court-fees Act*, 1870 (2), and find that the Court-fee payable in the present instance must be determined in accordance with the value of improvements which the appellant seeks to avoid. Time for paying the additional Court-fee is extended to 28th August 1925.

Ramesam, J.—I agree.

Order accordingly.

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(2) [1906] 29 Mad. 367=6 M. L. J. 287.
(3) [1905] 27 All. 447=2 A. L. J. 105=(1905) A. W. N. 40.
(4) [1890] 13 All. 94=(1890) A. W. N. 231.
(5) [1909] 31 All. 265=6 A. L. J. 155.
(6) [1914] 36 All. 40=11 A. L. J. 1016 (F. B.).
(7) [1882] 5 Mad. 284 (F. B.).
(8) [1891] 14 Mad. 480.
(9) [1910] 20 M. L. J. 120=8 M. L. T. 121.
(10) A. I. R. 1925 Mad. 323.
(11) A. I. R. 1922 Mad. 211.
(12) [1920] 1 Lah. 234.

A. I. R. 1926 Madras 227

JACKSON, J.

Karnam Venkatasubba Rao—Plaintiff—Appellant.

v.

Adinarayana Rao and *others*—Defendants—Respondents.

Second Appeal No. 1496 of 1922, Decided on 29th July 1925, against the decree of the Dist. J., Anantapur, in A. S. No. 97 of 1921.

Grant—Service inam—Enfranchisement in the name of Hindu widow—Widow takes absolute estate.

A service inam enfranchised in the name of a Hindu widow and confirmed to her in freehold confers absolute property and not merely a widows estate although some other persons are joined with her as grantees. [P 227 C 2]

B. Somayya—for Appellant.

V. S. Narasimhachari—for Respondents.

Judgment.—This is an appeal from the decree of the District Judge of Anantapur in A. S. No. 97 of 1921, on appeal from that of the District Munsif of Anantapur in O. S. No. 20 of 1920. The plaintiff sued for a declaration that he and Defendants 1, 2 and 3 are the nearest reversioners to inherit the property of the late Ramappa and to recover possession of a quarter of the immovable property described in the schedule attached to the plaint. Both the lower Courts dismissed his suit.

The first point for consideration is that taken by the learned Judge in his fourth paragraph, whether the property shown in the title-deed Ex. G. 1 is the absolute property of Savitramma or whether she only enjoyed a Hindu widow's estate in that property. The title-deed Ex. G. 1 is perfectly clear. The inam is now confirmed to you in freehold : in other words the inam will be your own absolute property. 'You' and 'Your' referring to the 6 persons in the register, Ex. D. 2 and the first of these 6 persons is Savitramma. It can only be held that 'absolute property' in this document means, with reference to Savitramma, a widow's estate on two assumptions (1) that the property dealt with is as a matter of fact the property of the joint Hindu family and (2) that when Government makes a grant to persons comprising a widow and her relations, Government must always be taken to imply that a widow's estate is intended. The first assumption, as the learned District Judge points out, has been rendered impossible by the Privy Council case in *Venkata Jagannadha* v. *Veerabhadrayya* (1). The ruling is to be found on page 655. (44 *Mad*)

"Their Lordships are of opinion that the Full Bench was in error i. e., *Pingala Lakshmipathi* v. *Bammireddipalli Chalamayya* (2), that the case of a karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata* v. *Rama* (3), by the Full Court."

Briefly, the effect of *Venkata* v. *Rama* (3) is that a service inam does not enure to the benefit of the joint family of the holder but only of the holder himself. See page 271. (8 *Mad.*)

"I think it may be taken that such lands were enfranchised in favour not of the family generally, but of the office holder for the time being."

And again at page 259 :

"When the emoluments consisted of land, the land did not become the family property of the persons appointed to the office whether in virtue of an hereditary claim to the office or otherwise. It was an appenage of the office inalienable by the office-holder and designed to be the emoluments of the officers into whose hands soever the office might pass."

And so in *Venkata Jagannadha* v. *Veerabhadrayya* (1), the Judicial Committe has laid down that when an inam title deed is granted confirming lands to the holder of the office, his representatives and assigns, the lands are his separate property and are not subject to any claim to partition by other members of the family. This clearly excludes all conception of the joint family in such transactions. In granting an absolute property in the enfranchised inam, Government might have made out the title deed to any person or, as in the present case, to 6 persons, but there is no reason to suppose that they contemplated the joint family which, as shown above, had no interest in the property. For the second assumption, the appellant relies strongly upon a remark in *Abdukuri Venkataramadas* v. *Pachigolla Gavarraju* (4) :

(1) A. I. R. 1922 P. C. 96=44 Mad. 643.
(2) [1907] 30 Mad. 432=17 M. L. J. 101=2 M. L. T. 101 (F.B.).
(3) [1885] 8 Mad 249(F. B.).
(4) A. I. R. 1922 Mad. 173.

"In that case the title deed was made out jointly in favour of the widow and the next reversioner which might be taken as an indication that the reversioner should take the estate on the widow's death and not the widow's heirs. Their Lordships do not go so far as to say it must be taken as an indication and it is difficult to see why any such assumption should be made unless it is to be held that Government think in the terms of Hindu Law when Government state unequivocably this property shall be your absolute freehold."

The meaning is unmistakable and the fact that the document happens to have been issued in India does not import the provisions or the ideas of Hindu Law. I therefore see no reason to traverse the decision of the learned District Judge on this point.

The only other question raised is whether the District Judge erred in law in his 5th paragraph in finding that the diglott register only raised some presumption that Savitramma's portion in the property was family property inherited from her husband and in refusing to find it conclusively proved in the absence of further evidence. I consider the learned Judge's appreciation of this evidence perfectly correct and he was under no necessity in law to accept it as conclusive.

No other point was raised. The appeal accordingly fails on all grounds and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 228

ODGERS AND VENKATASUBBA RAO, JJ.

R. S. A. C. Kasi Iyer and *others*—Appellants.

v.

Official Receiver, Tanjore and *others*—Respondents.

Appeal No. 298 of 1924, Decided on 24th April 1925, against the order of the Dist. J., West Tanjore, in O. P. No. 142-A of 1923.

Provincial Insolvency Act (5 *of* 1920), *S.* 11—*Insolvent residing in different places—Application to the Court in which his ancestral property is situated—Presentation is not wrong.*

In order that proceedings may be vitiated on the ground of presentation to the wrong Court, two matters must co-exist; the objection must be taken at the earliest possible opportunity and there must be a consequent failure of justice. The presentation of the petition is not to the wrong Court where the insolvent has been residing in different places and his ancestral house and lands are within the territorial jurisdiction of the Court in which the petition is presented. [P 229 C 1, 2]

K. V. Krishnaswamy Aiyar—for Appellant.

K. Kunjithapadam—for Respondents.

Odgers, J.—This is an appeal against the order of the District Judge of West Tanjore dismissing a petition of the appellants asking that the adjudication in insolvency of one Sivaswamy Iyer may be annulled. Sivaswamy Iyer was adjudicated on 9—1—1923, and this petition was presented 9 months afterwards, viz, on 22—10—23. In the affidavit filed for the petitioners in the lower Court it is alleged that: (1) the insolvent does not carry on any business within the jurisdiction of the Court of West Tanjore but resides at Madras and carries on business at Madras, Nagapatam and Rangoon; (2) that the petitioners only came to know of the adjudication on 9—10—23; (3) that the petitioning creditor was in collusion with the insolvent; (4) that no notice had been served on the petitioners though they were the largest creditors.

The petitioning creditor in his affidavit alleges various acts of insolvency, e. g., that 1st respondent (insolvent) was secreting his assets and had made various fraudulent alienations among which is a security bond dated 20—9—21 in favour of the appellants for Rs. 10,000. It is alleged that these alienations are either wholly sham or at least are by way of fraudulent preference. The affidavit further alleged that the respondent (insolvent) has his ancestral house at Kottur in the Kumbakonam taluk, that the properties in question are in the Tanjore Court's jurisdiction and that the various acts of insolvency have been committed therein.

The learned Judge on the petition for annulment observes that the ancestral house of the insolvent was in his jurisdiction, that his lands were there and were the chief or only property of the insolvent; further that the object of the petitioners was to get the adjudication cancelled because there was an application pending to set aside the charge created in their favour. I need hardly observe that if this appeal succeeds the alleged fraudulent alienations including the charge will stand good. The petition for annulment

was under S. 35 of the Provincial Insolvency Act i. e., that Court must be of opinion that the debtor ought not to have been adjudged insolvent.

With regard to the allegations in the affidavit filed in the lower Court, it may be observed that the insolvent in his deposition admitted that between September 1921 and March 1922 he was staying at various places according to the exigencies of his business; further that it is not necessary to serve notice on the petitioners. Under S. 19 (1) the Court after admitting an insolvency petition is to make an order fixing date of hearing. Notice of this order is to be given to creditors in such manner as may be prescribed S. 19 (2). This is prescribed by R. 21 which lays down that such notice shall be published in the Fort Saint George Gazette in English and in the District Gazette in English and in the language of the Court and in such other manner if any as the Court may direct, and copies of the notices in English and in the language of the Court shall be affixed to the notice board of the Court. It is not suggested that this was not done. The petitioners have therefore no grievance on that score. Their only point and the only one dealt with by the Court below is territorial jurisdiction and this is a matter governed by S. 11 the proviso to which runs as follows: "Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice." Two matters must coexist; the objection must be taken at the earliest possible opportunity and there must be a consequent failure of justice. With regard to the first, as already pointed out the petition was presented by petitioner after the adjudication and it is difficult to believe that a business man in Madras having large outstandings with the insolvent would have to wait to be informed by the insolvent himself of his adjudication. However assuming in their favour that they took this objection at the earliest possible moment, has there been any consequent failure of justice which would enable us to uphold the petition? We have heard a long argument on this. It is said that the proviso cannot apply to a question unless we are satisfied that some failure of justice has resulted from the presentation of the petition to the wrong court *Periya Karuppan Chettiar* v. *Angappa Chettiar* (1). I am not satisfied that the presentation was in fact to the wrong court; the insolvent has been residing in different places; his ancestral house and lands are within the territorial jurisdiction of the Court in which the petition was presented. I think the District Judge was right in dismissing the petition on that ground alone. Hence there can have been no consequent failure of justice as required by the proviso from such presentation.

The appeal must be dismissed with costs of 3rd and 5th respondents.

Venkatasubba Rao, J.—This appeal raises an important question as regards the scope of proviso to S. 11 of the Provincial Insolvency Act, Act V of 1920.

On a creditor's petition, a debtor was adjudicated insolvent. Some time later, the appellant, another creditor, applied to the insolvency Court to annul the adjudication on the ground that it had no jurisdiction to entertain the insolvency petition. The District Judge dismissed the application. In this appeal the correctness of his order is impeached.

In September 1921, it is alleged that the insolvent entered into certain transactions voidable under the Insolvency Law. On the 14th December 1921, the insolvency petition was filed and the acts of insolvency relied on were the transactions of September 1921. In October 1922, the insolvent was served and on the 9th of January 1923 he was adjudicated insolvent. The appellant filed the application in question for annulling the adjudication on the 22nd of October 1923.

Section 11 of the Insolvency Act deals with jurisdiction of insolvency Courts and runs thus:—

"Every insolvency petition shall be presented to a Court having jurisdiction under this Act in any local area in which the debtor ordinarily resides or carries on business, or personally works for gain, or if he has been arrested or imprisoned where he is in custody.

Provided that no objection as to the place of presentment shall be allowed by any Court in the exercise of appellate or revisional jurisdiction unless such objection was taken in the Court by

(1) A. I. R. 1925 Mad. 483.

which the petition was heard at the earliest possible opportunity, and unless there has been a consequent failure of justice."

The insolvency petition was filed in the Court of the District Judge of West Tanjore and the appellant contends that the insolvent ordinarily resided at Madras and carried on business at Negapatam, Rangoon and Madras and that the Court of West Tanjore had therefore no jurisdiction to entertain the insolvency petition.

I shall assume that the facts as alleged by the appellant are correct. The question is: Is the adjudication liable to be annulled on the ground taken? The proviso says that no objection as to the place of presentment shall be allowed by a Court exercising appellate or revisional jurisdiction unless (1) such objection was taken in the lower Court at the earliest possible opportunity and (2) unless there has been a failure of justice consequent on the petition having been presented to the wrong Court. (The words "a consequent failure of justice" are somewhat obscure, but there has been no doubt that I have correctly stated their effect.)

It is alleged that the appellant became aware of the insolvency proceedings only on the 9th of October 1923 and immediately thereafter on the 22nd he applied that the adjudication should be annulled on the ground of want of jurisdiction. The District Judge has not decided the question of fact whether the objection was taken at the earliest possible opportunity, but I am prepared to assume that it was.

Then remains the question. Has there been "a consequent failure of Justice". Mr. K. V. Krishnaswami Iyer the learned vakil for the appellant contends that when a decision is given adverse to the party raising the point of jurisdiction and he immediately before any further proceedings are taken files an appeal or a revision petition and attacks the order, it is impossible in the very nature of things to decide whether there has or has not been a failure of justice. It follows from this, he contends, that in such a case the Court cannot advert to considerations pertaining to failure of justice.

The truth is that this proviso is very badly and imperfectly drafted. The same defect exists in S. 21, Civil P. C., which deals with territorial jurisdiction of Courts and I reproduce it below :—

"No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been a consequent failure of justice."

To elucidate the point of the appellant's contention, I shall give a few instances—instances of suits and not insolvency proceedings in order to avoid all complications.

Illustration 1.—A sues B. The latter objects under S. 21 on his being served with summons. The trial Court disallows the objection. The case is proceeded with and finally judgment is given against B.

He appeals and repeats his objection to jurisdiction. In this case objection was taken in the trial Court at the earliest possible opportunity, but the appellate Court can decide whether there has been or not a failure of justice; if there has been no failure of justice the appellate Court will not interfere.

Illustration 2.—In the preceding illustration if B, the moment the point of jurisdiction is decided against him, comes up to the High Court asking that the trial Court's order should be revised, what happens? Whether there has been or not a failure of justice cannot, in the very nature of things, be decided because the very words used in the section presuppose the existence of some facts from which a conclusion either way is possible. Unless after the disallowing of the plea of jurisdiction some matters happened in the Court there would be no material from which the appellate Court could answer whether any injustice has resulted.

Ex-hypothesi no such matters transpired and the test laid down in the section becomes inappropriate. Neither of these two illustrations covers the present case. I have assumed for the purpose of argument that the appellant objected at the earliest possible opportunity. The objection doubtless was not taken at an early stage of the proceedings; but from the point of view of the appellant he could not have possibly objected earlier than he did. But before the objection was taken proceedings reached an advanced stage, the debtor had been adjudicated and several acts were done although the appeal was filed immediately after an adjudication order was made and before

any further proceedings were taken, still there is material sufficient to enable the appellate Court to decide whether there has or has not been a failure of justice. The Court can examine the proceedings so far had and determine this question. By reason of the petition having been presented to a wrong Court has any injustice been occasioned? Has there been, for instance, any failure of justice by reason of an adjudication order having been made by the wrong Court? It is thus possible to decide whether there has or has not been a failure of justice.

I shall take one more parallel instance of a suit. I shall call this Illustration 3. An action to set aside, say half a dozen alienations, is instituted. After various adjournments, it is discovered that B impleaded as one of the alienees, had previous to the suit transferred the property to C. Thereupon the latter is added as a party defendant. He objects to the jurisdiction of the Court under S. 21, Civil P. C. The point is decided against him by the trial Court. He forthwith comes up to the High Court asking that the order should be revised. In this case, so far as C is concerned, he has taken the objection at the earliest possible opportunity and before any further proceedings are taken he has applied to the High Court to revise the order; but still there is sufficient material from which that Court can infer whether there has or has not been a failure of justice. This case is analogous to the case with which we are concerned.

As contended for by by Mr. Varadachari we are now clearly in a position to determine whether there has or has not been a failure of justice. A further point arises: What is the failure of justice that the appellant must show? In my opinion the other parties having submitted to the jurisdiction and having thus waived the plea, the appellant cannot be permitted to show that failure of justice has been occasioned to those parties. Otherwise, what they themselves would be prevented from showing appellant could indirectly rely upon. This would be clearly wrong: the only failure of justice that the appellant can point to, is failure of justice so far as his own interests are concerned. If he can show by reason of any proceedings that have already taken place in the wrong Court his interests have been prejudiced in that case the appellate Court will interfere on his behalf.

Looking at the case from this standpoint I find that there has been no miscarriage of justice, and on this ground the appellant is bound to fail.

The reason for the appellant's intervention at this stage in the lower Court is obvious. One of the transactions impeached as fraudulent in the insolvency petition is an alienation in favour of the appellant.

The Official Receiver was about to apply to the Court to set aside this alienation. To forestall him, the appellant applied to have the adjudication annulled on the ground of want of jurisdiction. Here I may indicate a difficulty. What would be the legal position if the appellant waited till this proceeding (the one to set aside this alienation) was actually heard and in the event of this being decided against him he filed an appeal from the final decision? Then the Court would be in a position to judge whether subsequent to the adjudication on the question of jurisdiction there had or had not been a failure of justice. But it will be noticed that in that case the appellant would not ask that the adjudication should be annulled, but only that the final order against himself should be set aside on the ground of want of jurisdiction. It is not necessary for the present purpose to go into this question.

I must now notice a second contention raised on behalf of the appellants. It is said that the petitioning creditor was guilty of an abuse of the process of the Court in filing the insolvency petition in question. The suggestion made is that the petition is the result of collusion between the petitioning creditor and the insolvent. I have carefully gone through the record and I find that there is not the slightest warrant for this charge. Most of the properties, if not all, of the insolvent are within the jurisdiction of the Tanjore Court. The place where the alleged transactions were entered into is also within the jurisdiction of that Court. The appellant's name was mentioned and the alienation in his favour was referred to in the insolvency petition. The debtor could not be served in the ordinary way and substituted service of the notice was effected upon him more than a year from the date of the petition. The insolvent, on the appellant's own showing, traded at

Negapatam, a place not very distant from Tanjore. The insolvent owned an ancestral house in a village in the Tanjore district and he admitted in a deposition that some months previous to the presentation of the petition he had stayed at that village. The question as to which Court had jurisdiction was at best doubtful, and it cannot be said that any mala fides have been shown on the part of the petitioning creditor. The suggestion, therefore, that the Tanjore Court was deliberately chosen with an improper motive is utterly futile.

In the circumstances the appeal fails and I agree with my learned brother that it must be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 232

PHILLIPS, J.

Muthu Pillai—Plaintiff—Appellant.

v.

Alagirisami Pillai and *others*—Defendants—Respondents.

Second Appeal No. 1708 of 1922, Decided on 14th July 1925.

(a) *Limitation Act, Art.* 11-*A—Mortgage decree—Wrong Court-sale of more than mortgagor's share—Error in the sale certificate also—Dismissal of auction-purchaser's application for possession—His subsequent suit is not barred.*

Where under a mortgage decree the share of the mortgagor alone was made liable, but by some mistake or other, the sale proclamation proclaimed the whole property for sale and the sale certificate certified that the whole property had been sold and in accordance with the sale certificate the purchaser applied for delivery of possession but as there was some obstruction his petition was dismissed and the purchaser brought a suit not to recover the whole property but to recover the half-share of his mortgagor after effecting a partition.

Held : that the suit was not for the same relief and that it was not barred by Art. 11 *A.* 12 *M. L. W.* 408 (*P.C.*), *Dist.* [P. 232, C 1 and 2]

(b) *Civil P.C., S.* 47—*Court cannot grant partition merely on execution petition by auction purchaser.*

A Court cannot, on a mere application for execution by a Court auction purchaser, enforce his right by an order for partition. [P. 233, C. 1]

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for Appellant.

P. S. Narayanaswamy Aiyar—for Respondents.

Judgment.—The plaintiff in this suit obtained a mortgage decree and in execution, certain property was sold. Under the decree, the share of the 1st defendant alone was made liable; but by some mistake or other, the sale proclamation proclaimed the whole property for sale and the sale certificate certified that the whole property has been sold. In accordance with the sale certificate, the plaintiff applied for delivery of possession. As there was some obstruction, his petition was dismissed. A subsequent petition to remove the obstruction was also dismissed as being out of time. Plaintiff now brings this suit not to recover the whole property but to recover the half-share of his mortgagor after effecting a partition.

The lower Courts have dismissed the suit on the ground that it is in effect a suit to obtain the same relief as that asked for by him in execution and as the relief was refused and he has not brought the suit within one year of the date of refusal, the suit is barred under Art. 11 (a) of the Limitation Act. Both the Courts rely on the decision of the Privy Council, in *Baldeo* v. *Kanhaiyalal* (1), holding that the present suit is in effect for the same relief as that asked for in the execution petition. Although there was a mistake in the sale proclamation and the sale certificate, the sale had the legal effect of passing only the 1st defendant's share in the property and plaintiff was not entitled to obtain delivery of the whole property. When, therefore, his application for such delivery was refused, he knew that his application had been rightly refused and there was no necessity for him to get that order set aside provided that he could obtain the remedy to which he was legally entitled, namely, recovery of a half-share in the property. In this view, it seems rather absurd to require the plaintiff to get an order set aside, which he recognized to be a valid order and against which he can adduce no valid objection in order that he may obtain rights to which he is otherwise entitled, and I think that on this ground the decision in *Baldeo* v. *Kanhaiyalal* (1) is not applicable. In that case the plaintiff in effect asked for the same relief in his suit as he had asked for in his application for execution. I do not, therefore, think that the lower Courts were right in holding that the plaintiff is bound to set aside the order within one year and, not having done so, his suit to obtain his relief is barred by limitation.

A further objection is taken for the respondent that this suit relates to purely

(1) [1920] 16 N.L.R. 103=24 C.W.N. 1001=(1920) M.W.N. 545=12 L.W. 408 (P.C.).

a question of execution and no suit will lie. So far as I am concerned, I am bound by the authority of the case reported in *Yelumalai Chetti* v. *Srinivasa Chetti* (2), in which it was held that a Court cannot, on a mere application for execution by a Court auction-purchaser, enforce his right by an order for partition. It is argued that this case has been wrongly decided and reliance is placed on two cases, one reported in *Bhimappa* v. *Irappa* (3) and the other in *Ganapat Rai* v. *Husaini Begam* (4).

The latter case no doubt is directly opposed to *Yelumalai Chetti* v. *Srinivasa Chetti* (2) ; but not only am I bound by *Yelumalai Chetti* v. *Srinivasa Chetti* (2), but with respect, I prefer to adopt that decision rather than that reported in an unauthorised report of the Allahabad High Court.

In *Bhimappa* v. *Irappa* (3) it would appear that although prima facie the decision is opposed to that of *Yelumalai Chetti* v. *Srinivasa Chetti* (2) yet on the facts it may be differentiated. Reference is made in the judgment to the decision reported in *Bhaguji* v. *Aniaba* (5) a decision which is not dissented from and from that fact it would appear that the Bombay High Court has not adopted a different principle to this Court. In any event, the decision of a Bench of this Court is binding upon me.

The decree of the District Judge must, therefore, be set aside and the suit remanded for fresh disposal.

I may add now that the respondent has taken further objection that the facts mentioned above on which the lower Courts' judgments are based are incorrect. He now contends that his client, the 2nd defendant has lost all his right, title and interest in the property by virtue of the auction sale which purported to sell the whole of the property and not merely the 1st defendant's half-share. His argument is that his client was aware of the sale, was a party to the decree in execution of which the sale was held and took no objection to the sale and therefore the sale is binding on his share as well as on the 1st defendant's half share. This point has not been raised before and we have no evidence as to whether these facts are all correct, namely, whether the 2nd defendant had notice of the sale and acquiesced in it and consequently has lost his rights. It will be open to the 2nd defendant to put forward this plea at the retrial of the suit.

The stamp fee on the appeal memorandum will be refunded. Costs in this Court will abide the result.

Appeal allowed.

(2) [1906] 29 Mad. 294.
(3) [1902] 26 Bom. 146=3 Bom. L.R. 594.
(4) [1921] 19 A.L.J. 53.
(5) [1880] 5 Bom. 25.

A. I. R. 1926 Madras 233

JACKSON, J.

Shiva Aithala—Defendant—Appellant.

v.

Rangappaya Aithala—Plaintiff—Respondent.

Second Appeal No. 288 of 1923, Decided on 31st July 1925, against the decree of Sub-J., South Kanara, in A. S. Nos. 34 and 35 of 1922.

Hindu Law—Widow — Maintenance—Widow maintained by two nephews by contributing half and half—Family divided—They must pay for her funeral in like proportion.

The relation who performs the funeral ceremony under Hindu Law need not necessarily pay for it.

Where a widow who was a member of a divided Hindu family and had no self acquired property of her husband and who was being maintained by her husband's nephew and great-nephew each of whom contributed half.

Held : it would be equitable and logical that they should pay for her funeral expenses in like proporation. [P. 233 C. 2]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondent.

Judgment.—The short point in the second appeal is, who is to defray the funeral expenses when a widow dies being a member of a divided Hindu family, and not being in enjoyment of any self-acquired property by her husband the widow being maintained by her husband's nephew and great-nephew each of whom contributed half. The lower Courts have ruled that they should pay for her funeral in like proportion and this seems logical and equitable. If the family were not divided they would pay at this rate. There is no direct authority on the point, but Sir E. J. Trevelyan has deduced a similar rule from such authority as exists. See Hindu Law, 2nd Edition, page 88. I see no force in the contention that the relation who performs the ce remony under Hindu Law must necessarily pay for it.

In a joint family the son does not pay for the funeral of his father. Accordingly I confirm the decree of the lower appellate Court and dismiss this appeal with costs.

The respondent files a memorandum of objections and wishes an issue to be tried which was not previously framed and finds no place in the pleadings : whether under the partition of 1875 defendant was bound to pay the amount claimed irrespective of the receipts upon which until now his claim has been based. I consider that this new point cannot be raised at this late stage. The memorandum of objections is dismissed with costs.

Appeal dismissed.

✻ A. I. R. 1926 Madras 234

PHILLIPS, J.

(*Ravipati*) *Ramaiah*—Plaintiff—Appellant.

v.

Raipati Lakshmi Narayan and *another* —Defendants—Respondents.

Second Appeal No. 43 of 1923, Decided on 10th August 1925, from the decree of the Dist. J., Guntur, in A. S. No. 262 of 1921.

✻ (*a*) *Civil P. C., S.* 11, *Expl.* 4—*Plaintiff suing to recover property from defendants alleging his reversionary right to the last male holder—Another suit against same defendants regarding the same property as reversioner of the female holder in possession is barred.*

The plaintiff brought a suit to recover certain property alleging that he was the reversionary heir of one V. The property had been in the possession of N, a female relation of V. Plaintiff's suit to recover the property from the defendants who were in possession was brought after N's death. The suit was dismissed. Again a suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of N who had been in possession of the property.

Held : that the second suit was barred under S. 11, Expl. 4, as the plaintiff might and ought ot have put forward both his titles in the previous suit. [P. 234, C. 1 ;2]

(*b*) *Civil P. C., O.* 2, *R.* 1—"*Subjects in dispute*" *also means the right of one party against the other.*

The expression "subjects in dispute" means the right which one party claims as against the other and not only the cause of action. [P 235,C.1]

Ch. Raghava Rao—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—The plaintiff appellant brought a suit to recover certain property alleging that he was the reversionary heir of one Venkatta. The property had been in the possession of Narasamma a female relation of Venkanna, and, according to the plaintiff, her possession was under license from him. He, therefore, sued to recover the property from the defendants who were in possession after Narasamma's death. The suit was dismissed. The present suit was brought to recover the same property from the same defendants on the ground that the plaintiff was the heir of Narasamma who had been in possession of the property. The lower Courts have found that this suit is barred under S. 11, Expl. IV, of the Civil P. C., and the Court of first instance relies on the decision in *Govinda Menokki* v. *Govinda Kurup* (1) for its decision. That case appears to be very much in point, as also a very recent case reported in *Muhammad Rowther* v. *Abdul Rehman Rowther* (2). There are also cases [*Masilamani Pillai* v. *Thiruvengadam Pillai* (3) and *Rangasami Partudu* v. *Appalasami* (4)] which all support the lower Court's decision, and there is also a very recent pronouncement of the Privy Council reported in *Fateh Singh* v. *Jagannath Baksh Singh* (5) which is authority to the same effect.

The learned vakil for the appellant is constrained to rely mainly on cases which were decided under the Civil P. C., of 1859, viz., *Musammat Nousha Begam* v. *Musammat Umrao Begum* (6), and the dissenting judgment of Garth, C. J., in *Denobundhoo Chowdhry* v. *Krishtomonee Dossee* (7). Those judgments, however, whether they were under the then existing Code correct or not, appear to be in conflict with the very early case of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee* (8). It seems to me here that the plaintiff at the time of bringing his first suit possessed, as he alleges, title as reversioner to Venkanna and also as heir to Narasamma. He sued on his title as absolute owner alleging that the defendants had trespassed upon the property. His cause of auction was his absolute right to the property which had been infringed

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(1) [1919] 10 L. W. 170=(1919) M. W. N. 677.
(2) A. I. R. 1923 Mad. 257.
(3) [1908] 31 Mad. 385.
(4) [1916] 1 M. W. N. 286.
(5) A. I. R. 1925 P. C. 55.
(6) [1875] 7 N. W. P. H. C. 60.
(7) [1876] 2 Cal. 152 (F. B.).
(8) [1872] 11 B. L. R. 158=18 W. R. 163 (P.C.).

by the trespass of the defendants. Whether his title came to him in one way or in another it appears to me to be immeterial, for it would give him no different right as against the defendants or in respect of the alleged act of trespass, and I think that, under S. 11, Expl. IV, he certainly might have put forward both his titles to the property and I think that he also ought to have done so. In deciding whether he ought to have done so, the provisions of O. 2, R. 1 are relevant. That rule says :—

" Every suit shall, as far as practicable, be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them."

Therefore, when the plaintiff brought his first suit, he should have framed it as far as practicable so as to afford ground for final decision in order to prevent further litigation. There is no inconsistency between the two pleas set up by him and it would not have been inconvenient to try them together. Since, therefore, R. 1 says that every suit shall be framed so as to afford ground for final decision, I think under Expl. IV the suit ought to be so framed if possible and the plaintiff ought to have framed his first suit so as to include both the titles which he has now set up in separate suits. Reliance is placed by the appellant on *Ramaswami Aiyar* v. *Vythianatha Aiyar* (9), but, so far as the facts of the case are concerned, they do not help him, for they relate to a case where two different mortgages were sued on, but certain observations are relied on which I do not think really help the appellant. It is suggested that the words " subjects in dispute " in O. 2, R. 1, really mean cause of action and cause of action alone, but the observation in *Ramaswami Aiyar* v. *Vythianatha Aiyar* (9) is as follows :—

" The expression " subjects in dispute " means the cause of action or the subject-matter of litigation, that is, the right which one party claims as against the other."

Here the only right claimed by the plaintiff as against the defendants is the right to possession as owner, and, consequently, the " subject in dispute " is the same in both the suits. Again a quotation from Scotland, C. J.'s judgment in *Chinniya Mudali* v. *Venkatachala Pillai* (10) appears at page 322 :—

" I take it to be also clear, as a general rule, both on principle and authority, that when a question of right or title has been adjudicated on in a suit, the bar of judgment cannot be avoided by suing on a new form of claim or on a ground of relief which might have been, but was not raised or determined in the former suit."

That appears to be applicable to the facts of the present case. The plaintiff brought his first suit on title. He brought the second suit on the same title, merely alleging different facts as the basis of that title : in fact, this second suit is simply a new form of his claim as against the defendants. I do not think it is necessary to refer at length to the cases in this Court cited by appellant—*Allunni* v. *Kunjusha* (11) and *Mangalathammal* v. *Veerappa Goundan* (12)—which can be distinguished on their facts. Following *Muhammad Rowther* v. *Abdul Rehman Rowther* (2) I must hold that the lower appellate Court was right and dismiss the second appeal with costs.

Appeal dismissed.

(9) [1903] 26 Mad. 760=13 M. L. J. 448.

(10) [1867] 3 M. H. C. 320.
(11) [1883] 7 Mad. 264.
(12) [1919] M. W. N. 287.

A. I. R. 1926 Madras 235

PHILLIPS, J.

Municipal Council, Cochin—1st Defendant—Appellant.

v.

Paratath Bavu Devussi and *another*—Plaintiff and 2nd Defendant — Respondents.

Second Appeal No. 846 of 1922, Decided on 26th March 1925, against the decree of the Dist. J., South Malabar, in A. S. No 129 of 1921.

(*a*) *Madras District Municipalities Act* (1884), *S.* 261.

Notice was sent by the Municipality informing the plaintiff that he had no right to a certain property and that he should establish his right by a suit. Plaintiff filed a suit for declaration of his title.

Held : that it is not a case which can come under S. 261 of the Act, for which notice of suit is necessary. [P. 236, C. 1]

(*b*) *Madras Survey and Boundaries Act* (1897) *S.* 13—*Applicability.*

S. 13 applies only when there is a dispute as to any boundary and it is settled by a competent officer. [P. 236, C. 1 2]

(c) *Adverse possession—Occasional sweeping is not adverse possesson.*

The act of sweeping the land occasionally by the Municipality cannot be said to be adverse possession as against the real owner. [P 236 C 2]

A. V. K. Krishna Menon—for Appellant.

T. A. Ananta Aiyar—for Respondents.

Judgment.—This is an appeal against a decree declaring plaintiff's right to certain land in Cochin Municipality. The District Judge has found that the land is used as a right of way, that it belongs to the plaintiff and that recently the Municipality interfered with his possession and that consequently he is entitled to the declaration sued for.

The main objection taken is that no notice of this suit was given to the Municipality under S. 261 of the District Municipalities Act of 1884, but in-asmuch as this is a suit for declaration of title to immovable property, it is difficult to see how it can be treated as a suit "on account of any act done by the Municipal Council." No doubt, in the plaint, the cause of action is stated to be the putting and beating of gravel on the plaint site; but if one looks into the facts, it appears that the plaint has not been accurately drafted and that the real cause of action is the notice sent by the defendant informing the plaintiff that he had no right to the property and that he should establish his right by a suit. In that view I do not think this is a case which can come under S. 261 of the District Municipalities Act. In this connexion, I may refer to *President of the Taluk Board, Sivaganga* v. *V. Narayanan* (1) and also *Syed Ameer Sahib* v. *Venkatarama* (2) and *Govinda Pillai* v. *The Taluk Board, Kumbakonam* (3).

The next objection is that the suit is barred by limitation, by reason of the provisions of S. 13 of the Survey and Boundaries Act. In order to apply the provisions of this section, it is necessary to show that there was a dispute before the boundary was settled, or an appeal preferred from the settlement of the boundary. In fact, it means that, unless there has been a dispute between the parties as to a certain boundary line and that dispute has been settled by a competent officer, that decision is binding and can only be set aside by taking appropriate steps within a certain time. In the present case, there does not appear to have been any dispute at all. In fact, the District Judge finds that notice of the settlement of the boundary is not proved to have been served upon the plaintiff. This objection must also fail.

The District Judge has found that the property belongs to the plaintiff and that the only act of adverse possession by the Municipal Council has been the act of sweeping the land occasionally and that cannot be said to be adverse possession as against the real owner. There is no other reason for not accepting his findings in accordance with which his decree is right.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) [1893] 16 Mad. 317.
(2) [1893] 16 Mad. 296.
(3) [1909] 32 Mad. 371=4 M.L.T. 209=19 M.L.J. 333 (F.B.).

A. I. R. 1926 Madras 236

PHILLIPS AND RAMESAM, JJ.

Sankaranarayana Reddi and *others*—Plaintiffs—Appellants.

v.

Koppaya Reddi alias *Gopal Reddi* and *others*—Defendants—Respondents.

Appeal No. 113 of 1924, Decided on 8th September 1925.

Deed—Construction—Settler's general expression cannot control unambiguous words conveying absolute estate.

The settler's general expression of intention cannot control or qualify the very unambiguous words in which he conveys an absolute estate, and where the settler uses words which have the legal effect of granting the absolute estate and there are no consistent words of such a nature as to make it clear that the testator did not mean those words to have their ordinary legal meaning, the words used must bear their proper meaning.

Where in a deed it was stated "I hereby make the provisions, so that my properties, etc., may not pass to the control of others after my lifetime and that they may go to my lawful heirs . . . . properties in Sch. 1 hereof are to be enjoyed by myself and my wife during our lifetime; my daughter and her husband are to enjoy the aforesaid properties with absolute rights. The properties mentioned in Sch. 2 hereof are to be enjoyed by my daughter and my son-in-law from this date with absolute rights and with heritable rights in favour of son, grandson, etc."

Held: that the terms conveyed the absolute estate both in Sch. 1 and in Sch. 2 to the daughter and her husband as tenants in common. 24 *Cal.* 834 *App.*; 22 *Mad.* 357 *Dist.*

[P 237 C 1 2; P 238 C 1]

C. V. Ananthakrishna Aiyar and *N. R. Govindachariar*—for Appellants.

T. R. V. Sastri (Adv. Gen.), V. Ramaswamy Aiyar and *K. Rajah Aiyar*—for Respondents.

Phillips, J.—The sole question that arises in this appeal is the interpretation of the deed of settlement executed by Alagiri Reddi on the 3rd November 1884. This document contains the following provisions:

"I have no male issue: I have only a daughter named Avudai Ammal alias Mukkayi Ammal and my wife Avudai Ammal. As I am now, on account of old age, very weak in body, I hereby make the provisions, mentioned below so that my properties, etc., may not pass to the control of others after my lifetime and that they may go to my lawful heirs . . . The punja land and house site etc., mentioned in Schedule 1 hereof are to be enjoyed by myself and my wife Avudai Ammal during our lifetime; my daughter Avudaiyammal and her husband Ramalinga Reddiar who is also my sister's son are to perform my funeral, etc., ceremonies and enjoy the aforesaid properties with absolute rights. The properties mentioned in Schedule 2 hereof are to be enjoyed by my daughter Avudaiyammal and my son-in-law Ramalinga Reddiar from this date with absolute rights and with heritable rights in favour of son, grandson, etc."

The actual words of gift in this document seem undoubtedly to confer an absolute estate, the words used being with reference to Schedule 2: "with absolute rights and with heritable rights in favour of son, grandson, etc." In considering this gift the Subordinate Judge has formed his opinion with reference to the preliminary sentence in which the settler stated that his intention was "that my properties may not pass to the control of others after my lifetime and that they may go to my lawful heirs." This intention he has held to govern the whole of the document and consequently to modify the words which purport to confer absolute rights, and he has held that the gift to the daughter was one merely to be enjoyed by her for her lifetime so that it might pass to her son after her death. This is the contention put forward by the learned Advocate-General for the respondent, for although the testator does express an intention that the property should go to his lawful heirs he does not specify what particular heirs he actually had in his mind. There are really no words that raise the presumption that he meant his daughter's son and his daughter's son only, for a grandson would not be his only lawful heir.

Several cases have been cited in support of the proposition that the absolute gift is controlled by this expression of opinion. I may refer to two cases: *Nanda Gopal* v. *Purchmoni Debi* (1) and *Surendra Nath Chatterji* v. *Sarojbandu Bhuttacharji* (2), cited for respondent, but in both these cases after the words which in a technical sense imply the gift of an absolute estate there are very stringent limitations imposed to restrain alienation and in the latter case to regulate the conduct of the donee and in these particular circumstances it was held that these restrictions were such that the testator cannot have intended to use the technical words in their technical sense, but only intended to convey a life estate. Here we have no restrictions after the words of gift, the words used being *sarvaswathanthram puthra pouthra paramparyam*. We do not think that they can be controlled by the somewhat vague expression of the settler as to his intention, occurring in the earlier portion of the document. In this connexion we may refer to *Salit Mohun Singh Roy* v. *Chukkun Lal Roy* (3) where it was observed at page 846.

"There are two cardinal principles in the construction of Wills, deeds and other documents which their Lordships think are applicable to the decision of this case. The first is that clear and unambiguous dispositive words are not to be controlled or qualified by any general expression of intention. The second is that technical word or words of known legal import must have their legal effect even though the testator uses consistent words, unless these consistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense."

(1) [1910] 6 I. C. 354.
(2) [1921] 26 C. W. N. 893.
(3) [1897] 24 Cal. 834=24 I. A. 26=1 C. W. N. 387 (P. C.).

Applying these principles it is clear that the settler's general expression of intention cannot control or qualify the very unambiguous words in which he conveys an absolute estate. In this case the settler used words which have the legal effect of granting the absolute estate and there are no consistent words of such a nature as to make it clear that the testator did not mean those words to have their ordinary legal meaning. We must hold therefore that the words used must bear their proper meaning.

Another case relied on for the respondents is *Seshayya* v. *Narasamma* (4). The decision in that case was apparently based largely on the then prevailing opinion that the estate granted to the widow must ordinarily be construed as a life estate unless the words of gift put it beyond all doubt that the estate intended to be conveyed was absolute. Apart from hat, that decision must, we think, be confined to the facts of that case which are not fully before us; for it appears that although there was a gift to the widow and her son jointly the effect of the decision in that case was to deprive the widow not only of the absolute estate claimed by her but even of the life estate which, it would appear, had been granted. Unless there were facts in that case which showed that the life estate was relinquished, the decision hardly seems to be in accordance with the language of the document which purported to give some estate to the widow.

For all these reasons we think that the view taken by the Subordinate Judge is wrong and hold that Ex. 1 conveyed the absolute estate both in Sch. 1 and in Sch. 2 to the daughter Avudaiyammal and her husband Ramalinga Reddiar which they would hold as tenants-in-common. As a result of the decision the decree will have to be set aside and the suit remanded for disposal on the other points which arise.

Costs in this suit will abide the result and the stamp duty on the appeal memorandum will be refunded.

Case remanded.

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(4) [1899] 22 Mad. 357.

* A. I. R. 1926 Madras 238

DEVADOSS AND WALLER, JJ.

(*Thokala*) *Seshamma* and *others* — Respondents—Appellants.

v.

Yellaturi Venkamma — Petitioner — Respondent.

Criminal Appeal No. 296 of 1925, Decided on 1st September 1925, against the order of the Dist. J., Kurnool, D/- 5th February 1925.

* *Criminal P. C., (amended* 1923), *S.* 476 — *Complaint under, need not immediately follow the judgment—All reasons given in judgment need not be stated in a complaint—Reasonable probability of conviction need not exist.*

Although under the old S. 476, it may be necessary that the proceeding under S. 476 should be a part of the judgment proceeding before the Court or at least so soon after the termination of the judgment proceeding, as to make the order under S.476 a part of the judgment proceeding, it is no longer necessary in view of the changes made in the said section and the enactment of two new Ss. 476 (A) and 476 (B). It is also unnecessary that all the reasons given in the judgment should be repeated in an order in which the Court comes to the conclusion that a complaint should be laid before the first Class Magistrate. Under the amended Code it is no longer the duty of the Court to see that there is a reasonable probability of the prosecution ending in a conviction, though the Court acting under S. 476 should not act capriciously or without proper grounds. 31 *Mad.* 140 (*F. B.*) and 32 *Mad.* 49 *Dist.*; *A. I. R.* 1925 *Rangoon* 195 *Cons.* [P 240 C 1,2]

A. Venkatarayaliah and *L. Venkatanarasiah*—for Appellants.

A. C. Sampath Aiyangar and *P. C. Parthasarathi Aiyangar* — for Respondent.

Judgment.—This is an appeal under S. 476 (b), against the complaint of the District Judge of Kurnool made under S. 476 of the Code of Criminal Procedure.

Appellants 1 and 2 propounded a Will of one Sami Reddi in answer to a suit brought by the plaintiff for recovery of the properties of Sami Reddi who died on 15th January 1922. The 3rd appellant is the writer and Appellants 4 and 8 are the attestors of the Will. The Subordinate Judge came to the conclusion, after a full consideration of the evidence, that the Will was a forgery. On appeal, the District Judge agreed with the Subordinate Judge in his conclusion that the Will was a forgery. The plaintiff's widow applied to the District Judge to take action under S. 477, of the Code of Criminal

Procedure. The learned Judge has laid a complaint before the Sub-Divisional 1st Class Magistrate of Kurnool against the appellants, for offences under Ss. 467, 193 and 196, of the Indian Penal Code.

The first point raised by Mr. Venkatarayaliah is that the District Judge acted without jurisdiction in laying a complaint about 4 months after he disposed of the appeal. He relies upon the Full Bench decision in *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2), and contends that the order of the District Judge should from part of the judicial proceedings in which the offence or offences are said to have been committed. The District Judge disposed of the appeal on 30th September 1924. The plaintiff's widow moved the District Court on 8th November 1924, for action under S. 476. The District Judge passed the order appealed against on 5th February 1925. The decisions in *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2), and the decisions following them have no application to a complaint under S. 476 of the present Criminal Procedure Code. Those decisions were passed under the old Criminal Procedure Code of 1898. The present S. 476 empowers a civil, criminal or revenue Court, if it considers expedient in the interests of justice that an enquiry should be made into any offence referred to in S. 195, Cls. (b) and (c) which appears to have been committed in or in relation to a proceeding in that Court, to hold such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing. S. 476, therefore, contemplates only a complaint and not an order for proceeding against any person who, it thinks, has committed an offence. The wording of S. 476 of the old Code was different from the wording of the present S. 476. S. 476 of the old Code was as follows :

"When any civil, criminal or revenue Court is of opinion that there is ground for inquiring into any offence referred to in S. 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary enquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class.

Under the present Criminal Procedure Code it is not only the Court in which the offence is committed, but also the Court which hears an appeal from that Court, is entitled to proceed under S. 476, and the present section contemplates a party moving the Court by an application to take action under S. 476. In *Rahimadulla Sahib* v. *Emperor* (1), the learned Chief Justice observes :

"I think there is considerable force in the observation of the Chief Justice that if months after the trial the Court may act under S. 476, it is difficult to appreciate the necessity of S. 195. As regards the general policy of the law, I agree with the views expressed by Geidt, J. "I do not think" "the learned Judge observes" "that it was ever intended that when the proceedings had terminated and passed beyond the ken of the Court, the attention of the Court should be subsequently re-drawn by some private person to the fact that in those proceedings, there had been committed some offence in contempt of the Court's authority or against public justice which deserved punishment. The commission of the offence and the desirability of a prosecution should be so patent as to move the Court at the time to take action without the stimulus of an application by some interested person."

The two reasons given by the learned Chief Justice are absent now. Under S.195 of the old Code, sanction was granted to a party for prosecution, but the present S. 195 has done away with the sanction. The second reason that the Court should act suo motu without the stimulus of an application cannot apply to the present section, for it does contemplate an application being made by a party for institution of proceedings. The words, 'whether on application made to it in this behalf or otherwise' have been introduced into the present section. In *Aiyakannu Pillai* v. *Emperor* (2), Sankaran Nair, J., holds that a proceeding under S. 476 does specifically authorise a Court proceeding under that section to make a complaint in writing signed by the presiding officer of the Court to a Magistrate of the first class. Another reason assigned by Sankaran Nair, J., is that there is no appeal against an order under S. 476. The present S. 476 (b) does provide an appeal

(1) [1908] 31 Mad. 140=17 M.L.J. 584=3 M.L.T. 79=7 Cr.L.J. 54 (F. B.).

(2) [1909] 32 Mad. 49=9 Cr. L.J. 41=19 M.L. J. 42=4 M.L.T. 404.

both against a complaint made under S. 476 as well as against an order refusing to lay a complaint before a Magistrate. It is clear from the wording of the present S. 476 that all the arguments which weighed with the learned Judges who decided *Rahimadulla Sahib* v. *Emperor* (1) and *Aiyakannu Pillai* v. *Emperor* (2) for coming to the conclusion that the proceeding under S. 476 should be a part of the judgment proceeding before it or at least so soon after the termination of the judgment proceeding, as to make the order under S. 476 a part of the judgment proceeding, are met by the changes made in the said section and by the enactment of two new Ss. 476 (A) and 476 (B). It is unnecessary to consider the other cases on the point, as we hold that the changes made in the Code have met the arguments advanced by the learned Judges for coming to the conclusion that the Court acted without jurisdiction, if it passed an order under S. 476, some time after the termination of the proceeding in which the offence complained of was said to have been committed. The case in *Maung Shive Phe* v. *Ma Me Hmoke* (3) does not help the appellant. No doubt, if the Court after the lapse of considerable time, makes a complaint under S. 476 such complaint is open to the objection that it was made after an undue delay. Each case would depend upon its circumstances. No hard and fast rule can be laid down as to within what time a complaint should be made under S. 476. If a Court disposes of a case on the last working day of a term and initiates proceedings under S. 476 on the first day of the re-opening of the Court, after the long vacation, can it be said that the Court acts with undue delay ? In this case, the application was made within 40 days of the delivery of the judgment in the appeal. A similar application was made to the Subordinate Judge of Kurnool and as the appeal was then pending, he dismissed the application with the remark " that the petitioner, if advised, may renew his application after the litigation ends. " The application was renewed before the District Judge after the disposal of the appeal and the District Judge gave notice to the counter-petitioner and laid a complaint on 5th February 1925. It cannot be said that, in the circumstances, there has been undue delay in instituting proceedings under S. 476.

The next contention of Mr. Venkatarayaliah is that there should be a finding that the appellants are guilty of an offence. The District Judge in his order dated 5th February 1925, has recorded a finding that the Will is a forgery and it is unnecessary that all the reasons given in the judgment should be repeated in an order in which he comes to the conclusion that a complaint should be laid before the first Class Magistrate.

It is next urged that there should be a reasonable probability of the prosecution ending in a conviction and reliance is placed upon *Muniswamy Mudaliar* v. *Rajaratnam Pillai* (4) and the cases referred to therein. In the case of sanction under the old S. 195, it was the duty of the Court to see that there was a reasonable probability of the prosecution ending in a conviction, and to discharge frivolous and vexatious applications for sanction; in order to prevent a person who gets the sanction from misusing it, the Court had to take care to see that sanction was granted to proper persons. Such considerations do not apply to a complaint made by the Court but the Court acting under S. 476 should not act capriciously or without proper grounds. S.476 (B), by which an appeal is provided, is a sufficient safeguard against frivolous complaints being made. Here, in this case, the District Court has preferred a complaint after due consideration of the evidence and after recording a finding that the Will propounded by appellants 1 and 2 was a forgery. When two Courts have given a concurrent finding that the Will is a forgery, it cannot be said that the Court has not acted with due care and caution and without considering whether there is a probability of the prosecution ending in a conviction. As the appellants are to be tried for the offences with which they are charged, any strong expression of opinion by this Court on the merits of the case might prejudice them in their trial. The concurrent finding of two Courts that the Will is a forgery is a sufficient guarantee for the view that this is a fit case to be enquired into by a Magistrate.

The appeal is dismissed.

Appeal dismissed.

(3) A. I. R. 1925 Rang. 195.

(4) A. I. R. 1923 Mad. 136 (F. B.).

* A. I. R. 1926 Madras 241

PHILLIPS AND RAMESAM, JJ.

3 *Sourimuthu* and *others*—Plaintiffs 1 to and Defendants 3 and 4—Appellants.

v.

Pavadai Pachia Pillai and *another*—Defendants 1 and 2—Respondents.

Second Appeal No. 1704 of 1923, Decided on 24th July 1925, against the decree of the Dist. J., North Arcot, in A. S. No. 316 of 1921.

* *Civil P. C., S. 11—Father alienating some properties, others remaining undisposed of—Son getting decree declaring the sale not binding on him and for recovery of his share after father's death — Alienee subsequently suing for general partition—Matter is res judicata as regards properties sold, but the alienee can get other properties as substitute—Hindu Law—Alienation by father.*

A father sold certain properties and some properties were not disposed of by him. After his death his son alleging that the sales made by his father were not binding on him sued for partition and recovery of his share and obtained a decree. After the termination of the litigation, the sons of the alienee sued for a general partition of the properties of the father alleging that the properties left undisposed of by the father were enough to be allotted to the share which the son is entitled to and that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they prayed for the allotment of other properties as substitute if the Court held that the properties sold to them could not be allotted to them.

Held : that the matter is res judicata so far as the property sold is concerned and so the first part of the prayer must be disallowed, and further that as it was not in the plaintiff's power to ask for a general partition in the former suit, the suit is competent for allotment to the plaintiffs of other properties as substitute : (*Case-law considered.*) [P. 241, C, 2 P. 243, C. 1.]

K. Sankara Sastri—for Appellants.

N. Chandrasekhara Aiyar — for Respondents.

Ramesam, J.—The facts out of which this second appeal arises are not in dispute. One Subbaraya Pillai, father of 1st defendant, died in 1918. He sold the properties mentioned in the plaint Sch. I to the 1st plaintiff's father Roger on the 27th February 1905, the properties mentioned in Sch. II to 4th defendant on 22nd May 1902, and the properties in Sch. III to the predecessors-in-title of the present 3rd defendant on 21st May 1901. The properties mentioned in Sch. IV were not disposed of by him. The present 1st defendant alleging that the sales mentioned above made by his father were not binding on him sued for partition and recovery of his share in O. S. No. 416 of 1916. He obtained a decree. That suit came up to the High Court in second appeal, and the decree in favour of the plaintiff was confirmed with some variations which are not now material. After the termination of the said litigation the present plaintiffs, the sons of the alienee of the properties in Sch. I, have now sued for a general partition of the properties of Subbaraya. They allege that the properties left undisposed of by him were enough to be allotted to the share which the present 1st defendant is entitled to. They pray in the first instance that the whole of the properties sold to them may be allotted to the father's share and through the father to themselves, and in the alternative they pray for the allotment of other properties as substitute, if the Court holds that the properties sold to them and mentioned in Sch. I cannot be allotted to them. The District Munsif agreeing with the plaintiffs' contention gave a decree for the properties sold to them. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit on the ground that the suit as framed is not maintainable. He was of opinion that a suit for general partition by a stranger purchasing specific items of property from one of the members of a joint family should be filed before a suit by a non-alienating coparcener for partition of the alienated item is filed and decreed, and would not be maintainable after the partial partition was decreed. In the result he dismissed the plaintiffs' suit. The plaintiffs appeal.

In second appeal the plaintiffs have urged their right to both the alternative prayers. The right of a purchaser to file a suit for general partition and to work out his rights and equities either by having the properties sold to him allotted to the share of the alienor or by getting other properties in substitution is not in dispute before us, and has been conceded on both sides : vide *Aiyyagari Venkata Ramayya* v. *Aiyyagari Ramayya* (1) The right of a non-alienating co-parcener to file a suit for partial partition and get a decree for his share is equally settled and must now be taken as established law. [Vide *Venkatachella Pillai* v *Chinnayya Mudaliar* (2), *Subramanya*

(1) [1902] 25 Mad. 690 (F. B.).
(2) [1870] 5 M. H. C. 166.

Chettiar v. *Padmanabha Chettiar* (3) and *Iburamsa Rowther* v. *Thiruvenkataswami Naick* (4)]. We must start from the basis that these decisions were correctly decided. If in a suit for partial partition the purchaser does not defend the suit on the ground of his equity, or if his plea is disallowed, the decree must be regarded as final. It is true, as pointed out in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (5), that it is competent for the Court to make the whole or any part of the relief granted in such a suit to the non-alienating coparcener conditional on his assenting to the results of a suit for general partition. In the present case no such equities were urged in the former second appeal. What was urged was that the purchaser was entitled to insist on the son suing for a general partition, not that he himself was entitled to sue for a general partition, and get the property allotted to his share and that the decree in that suit should be made conditional on the result of such a suit. Thus we have got the fact in this case that in the former suit no condition was added to the decree. In *Hanmandas Ramdayal* v. *Vallabhdas* (6), Batchelor and Kemp, JJ., added a reservation staying execution of the decree and giving three months to the defendant to file a suit for general partition. It practically amounted to making the decree conditional. The question that now arises is: What is the effect of the unconditional decree in the former suit? We think that, so far as the particular property is concerned, the former suit is final and makes the matter res judicata and the plaintiffs are not entitled to their first prayer. The result of the decree in the former suit is that the plaintiff in that suit gets his share as his separate property, and does not hold it as joint family property. The learned vakil for the appellants relies on two decisions. The first decision he relies on is *Subba Goundan* v. *Krishnamachari* (7). In that case a non-alienating coparcener sued not for partial partition but for possession of the property alienated on the ground that the sale was void. His suit was decreed. It was held that a suit for general partition by the purchaser was afterwards maintainable. It was pointed out by the learned Judges that it was not in the power of the defendant in the prior suit to convert the suit for possession into a suit for general partition. In so far as the suit for general partition beyond the specific properties sold is concerned, these observations are undoubtedly in favour of the appellants. But this case cannot be regarded as authority in their favour so far as the first prayer is concerned. The first suit in that case was a suit for possession and when the non-alienating coparcener got a decree for the properties, it must be taken that he obtained possession of the properties on behalf of the joint family; it cannot be said that he obtained it as his separate property. In the appeal before us the first suit was a suit for partial partition and, as we already observed, the 1st defendant obtained the property as his separate property. The second case relied on by the learned vakil for the appellants is *Davud Beevi Ammal* v. *Radhakrishna Aiyar* (8). The observations of Wallace, J. particularly are in their favour. These observations seem to be obiter dicta; for, on the facts of that case, the observations were not necessary. The suit for partial partition by the son was pending at the time when the suit for general partition was taken for consideration and decreed. Wallace, J., seems to have been of opinion that, where a non-alienating coparcener obtained a decree in a suit for partial partition, he obtains the property as joint family property. This is indirectly to say that the decision in *Venkatachella Pillai* v. *Chinnayya Mudaliar* (2) and other cases allowing a suit for partial partition are erroneously decided. There is no purpose in a decree for partition if the only object of it is merely to get rid of the sale and not to divide the property by metes and bounds. So long as such a suit is permissible and the decree directs division of the property by metes and bounds, the result of the decree must be that the coparcener gets his share as separate property. And as there is no condition or reservation attached to the former decree as was pointed out

(3) [1896] 19 Mad. 267.
(4) [1910] 34 Mad. 269=20 M. L. J. 743=(1910) M. W. N. 380=8 M. L. T. 269 (F. B.).
(5) [1913] 40 Cal. 966=40 I. A. 213=(1913) M. W.N. 661=14 M. L. T. 163=17 C. W. N. 1189=18 C. L. J. 237=15 Bom. L. R. 867=25 M. L. J. 512=11 A. L. J. 865=10 N. L. R. 1 (P. C.).
(6) [1918] 43 Bom. 17=20 Bom. L. R. 472.
(7) A. I. R. 1922 Mad. 112.
(8) A. I. R. 1923 Mad. 467.

in *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (5), or as was done in *Hanmandas Ramdayal* v. *Vallabhdas* (6), that decree is final and cannot be reopened in another suit. It seems to us, therefore, the matter is res judicata so far as the property sold is concerned and the first part of the appellants' contention must therefore be disallowed.

Coming to the second prayer: it is obvious that all the authorities and the trend of the previous discussion go to show that the suit is maintainable. It was not in the plaintiff's power to ask for a general partition in the former suit as was pointed out in *Subba Goundan* v. *Krishnamachari* (7). The learned vakil for the respondents does not support the District Judge's judgment on this point. The result is that the second appeal must be allowed, and the case remanded for disposal according to law in the light of the above observations. Appellants will have refund of their Court-fee on the appeal memorandum. We may say that we agree with the District Judge in thinking that the position of the 3rd and 4th defendants is the same as that of the plaintiffs and they will be given a similar decree in this case. In the second appeal each party will bear his own costs.

Appeal allowed.

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* A. I. R. 1926 Madras 243

COUTTS-TROTTER, C. J., AND VISVANATHA SASTRI, J.

Palaniappa Chettiar—Plaintiff — Appellant.

v.

B. Raja Rajeswara Sethupathi alias *Muthu Ramalinga Sethupathi Avergal, Raja of Ramnad* and *others*—Defendants —Respondents.

Appeal No. 131 of 1924, Decided on 28th August 1925, against the decree of the Sub.-J., Madura, in O. S. No. 20 of 1923.

* *Civil P. C., O. 22, R. 1 — Malicious prosecution — Claim to recover incidental expenses for defending the prosecution does not survive.*

In a suit for damages for malicious prosecution, the plaintiff, in addition to general damages, claimed also special damages under two heads: (1) the vakil's fees; and (2) travelling and other incidental expenses for securing the attendance of witnesses, in defending the prosecution launched against him. The plaintiff died during the pendency of the suit:

Held: that the cause of action was the tortious act of the defendant and the incurring of the expenses merely go to swell the damages and therefore the claim thereto did not survive to the executor or legal representative.[P 243 C 2, P 244 C 1]

V. Rajagopala Aiyer—for Appellants.

C. V. Anantakrishna Aiyar and *S. Sundararaja Aiyangar* — for Respondents.

Coutts-Trotter, C. J.—This is a point of some little interest. A man called Subramania Chetty started a suit for damages for malicious prosecution and in his plaint, he claimed a sum of money by way of general damages, and he also claimed special damage under two heads, the first was vakil's fees and the second was travelling and other incidental expenses for securing the attendance of witnesses for the purpose of defending the prosecution which was launched against him. We will take it that that prosecution failed and, had this unfortunate man lived, he would have got substantial damages against the defendant, which would have included the special damage alleged to have been incurred by him. As a matter of fact, he died while the suit was pending, and when the suit actually came on for trial before the learned Subordinate Judge, it was proposed to continue the action with his executor or legal representative substituted as the plaintiff. The learned Judge held that that could not be done and we agree with him.

The thing can be put in two ways: (1) on a narrower and (2) on a broader ground. The narrower ground is this: that his cause of action throughout is the tortious act of which he was the victim and not the fact that he incurred out-of-pocket expenses, e.g., for getting himself cured by a doctor in case of personal injuries or getting himself defended by a barrister or a vakil in case of malicious prosecution. That goes to swell the bill against the defendant: but it is not a cause of action. The cause of action is that which was done to him by running him over or by prosecuting him maliciously, as the case may be. When we come to the case of an executor or legal representative, his cause of action on behalf of the estate is quite different. He can only sue for a tangible, measurable, pecuniary loss caused to the estate by reason of the tortious act, so that it would follow on the narrower ground that although both the

plaintiff if living and his legal representative after his death, had a cause of action for the recovery of those out-of-pocket expenses caused by the wrong of the defendant ; nevertheless, they would recover them in different rights and for different reasons. The living plaintiff will recover them as part of the damages for his general cause of action, i.e., malicious prosecution ; while to the executor or administrator, the expenditure would be the sole cause of action : because, to that alone, would he be entitled to a judgment. It may be put, as it was put in the English case of *Pulling* v. *Great Eastern Railway Co.* (1), on the broader ground that these expenses are not losses to the estate of the deceased, within the meaning of the Act of Parliament (the wording of which is practically identical with that of the Indian statute, because they are so submerged and overtopped by the real cause of action which was the tortious injury, here, malicious prosecution), but they must be treated as a mere incident of that cause of action and not as giving rise to a separate head of liability enuring, after death, to the legal representative. On that view, the legal representative could not start an independent action for the expenses of the malicious prosecution, as in the present case. We respectfully agree, but in any event, we think that the learned Judge was quite correct in holding in accordance with the authorities in Calcutta and Madras that the cause of action of the deceased man himself and that, if any, of his executors, are so different that it would be impossible to permit his legal representatives to carry on a suit instituted by him to recover damages. That being so, there is no cause of action and this appeal will be dismissed. One set of costs to be divided.

Appeal dismissed.

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(1) [1882] 9 Q.B.D. 110=51 L.J. Q.B. 453=30 W.R. 798=46 J.P. 617.

A. I. R. 1926 Madras 244

DEVADOSS AND WALLER, JJ.

R. V. Srinivasa Aiyangar and *another* —Petitioners—Appellants.

v.

Ry. Pratapa Simha Rajah Saheb, the Junior Prince of Tanjore—2nd Defendant—Respondent.

Appeal No. 169 of 1925, Decided on 15th September 1925, against the order of the Dist. J., West Tanjore at Tanjore, D/- 21st November 1924, in I. A. No. 335 of 1924.

Civil P. C., O. 22, R. 10—Suit terminated and decree passed—Mortgagee from one of the party cannot be made a party to the suit especially when his claim is challenged on the ground of its being a usurious transaction and of the parties not receiving full consideration—The mortgagee's remedy is to bring a separate suit.

Rule 10 applies only to pending suits, whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party, and that it is to his interest to be brought on record in the suit. But where the suit has come to a termination and a decree has been passed and money has been deposited in Court in pursuance of the decree a mortgagee from one of the parties cannot be impleaded and allowed to claim the amount in Court in part discharge of his mortgage amount especially where his claim is resisted on the ground that the transaction is an usurious transaction and the consideration recited in the mortgage document did not actually pass. The proper remedy of the mortgagee in such a case is in the ordinary course to bring suit against tha party. [P 245 C 1, 2]

A. Krishnaswami Aiyar—for Appellants.

T. V. Muthukrishna Aiyar and *S. V. Narayana Aiyar*—for Respondent.

Judgment.—This appeal is against the order of the District Judge of West Tanjore declining to make the appellants parties to O. S. No. 3 of 1919 on the file of the Court. The appellants applied to the lower Court to be made parties to the suit on the ground that they were mortgagees of the interest of Pratapa Simha Rajah, the 2nd defendant in O. S. No. 3 of 1919. The contention of the appellants is that they have got a mortgage of the interest of the 2nd defendant in the suit and that they are therefore entitled to be made parties to the suit. The learned Judge has considered the petition on the merits and has declined to make them parties. The petitioners have taken a mortgage of the share of the 2nd defendant for Rs. 1,70,000. The suit was

decreed some time ago and the appeal against the decree of the Subordinate Judge was disposed of by this Court in 1923. Pursuant to the decree of the High Court, the properties in suit are being divided, and a sum of Rs. 70,000 is said to be in deposit in the District Court to the credit of the suit. The objection of the 2nd defendant to the petitioners being brought on record is that the transaction evidenced by the mortgage is a usurious transaction and that out of Rs. 1 70,000 not even Rs. 50,000 was spent on behalf of him. The answer of the appellants is that at least Rs. 50,000 is admitted to have been received by the 2nd defendant, and therefore so far as that amount is concerned, the appellants are entitled to be paid by the 2nd defendant. It is unnecessary to consider this question in a matter like this. The suit was disposed of some time ago and the application is made under O. 22, R. 10 of the Code of Civil Procedure. That rule applies only to pending suits, whereby a person who derives title from a party will be entitled to be brought on record if it is shown that he has secured a good title from the party, and that it is to his interest to be brought on record in the suit. In this case the suit has come to a termination and a decree has been passed. The object of the appellants is to secure the amount in Court in part discharge of the mortgage amount. The contention of Mr. Alladi Krishnaswami Aiyar is that he being a mortgagee of immovable property is entitled to be paid the amount in Court. No doubt in cases of ordinary mortgage of a fund or sum of money the mortgagee would be entitled to be paid out of the amount, but where the claim is resisted on the ground that the transaction is a usurious transaction and the consideration recited in the mortgage document did not actually pass, we do not think the Court will be justified in making a person a party to the suit and thereby prevent the person from whom he derived title from disputing his right to receive the amount. By making the appellants parties to the suit very serious complication will arise. They can have their remedy by bringing a suit against the 2nd defendant. It would not be right at this stage to make appellants parties to the suit and thereby prevent the 2nd defendant from putting forward any defence he may have to the claim of the appellants. In this connection we may refer to a recent judgment of the Privy Council reported in *Lajwanti* v. *Safa Chand* (1) where their Lordships observe :—

"It is out of the question that persons, who assert that they have a derivative interest in the stake of a suit, can by getting added as plaintiffs, be associated in a decree, in favour of the person who has the only real title."

In this case there has been no devolution of interest in the sense that all the interest of 2nd defendant has come to the appellants. The appellants have only a mortgage interest and they have to enforce the mortgage right in the ordinary course.

We think the order of the learned Judge is correct and we dismiss the appeal with costs.

Appeal dismissed.

(1) A. I. R. 1925 P. C. 168.

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* A. I. R. 1926 Madras 245

PHILLIPS AND RAMESAM, JJ.

Narayana Mudaliar and *another*—Defendants 7 and 8—Appellants.

v.

Nagappa Mudaliar and *another*—Plaintiff and 6th Defendant—Respondents.

Appeal No. 375 of 1924, Decided on 25th September 1925, against the decree of the Sub-J., Tiruvalur in O. S. No. 27 of 1923.

* (a) *Limitation Act, Art.* 124—*Applicability.*

An hereditary office subject to a temporary incumbency by a person not in the direct line of succession is still an hereditary office. [246 C 1]

(b) *Limitation Act, Art.* 144—*Somebody should be in possession adversely to plaintiff.*

To defeat plaintiff's right to succeed, on the ground of adverse possession, it must be affirmatively proved that the possession was held adversely to plaintiff by somebody for the statutory period. [P 246 C 2]

T. L. Venkatarama Aiyar—for Appellants.

K. Bashyam Aiyangar and *K. S. Desikan* (*amicus curiae*)—for Respondents.

Judgment.—We agree with the construction put upon the Will by the lower Court and find that the plaintiff was appointed co-trustee with Anjalai Achi, the widow of the testator, and that after Anjalai Achi's death, the plaintiff was entitled to the possession of the charity properties as trustee. It is, however,

contended for the appellants that the plaintiff's right to recover the trust properties is barred by limitation on the ground that his is a suit to recover a non-hereditary office to which the trust properties are appurtenant and reliance is placed on the decision in *Kidambi Ragava Chariar* v. *Tirumalai Asari Nallur Ragavachariar* (1), which purports to follow *Jagan Nath Das* v. *Birbhadra Das* (2), and *Tammirazu Ramazogi* v. *Pantina Narasiah* (3). In this case it was held that when a suit was brought for an office, namely, the office of Dharmakartha of a temple to which certain immovable property was attached, the article applicable was Art. 120 and not Art. 144 on the ground that the right to the land was only secondary to and dependent on the right to the office. In the present case the facts seem to be distinguishable. The argument is that the trusteeship is an office within the meaning of this ruling; but assuming that there is such an office as 'trustee' in the present case, the possession of the land is certainly not secondary to the possession of the office; for if the land is not in the possession of the office-holder there is no other duty or responsibility attached to the office which he could perform, and to give possession of the office of trustee without giving possession of the land, of which he is trustee, would be entirely nugatory, for there would be nothing that the trustee could do without the possession of the land. Apart from this, it is very doubtful whether the office in the present case is not hereditary. The testator appointed his wife trustee and the plaintiff as joint trustee and directed that the succession thereafter should be hereditary. The office, therefore, appears to be an hereditary office subject to a temporary incumbency by a person not in the direct line of succession. If it is an hereditary office, the period of limitation would be 12 years and not six as contended for by the appellants. The allegation that the office was held adversely by plaintiff was never put forward in the lower Court, but it appears that the plaintiff's title to possession arose on the death of Anjali Achi in 1911 and this suit was not brought till 1920. Thus it would appear that more than 6 years had elapsed since his right to possession accrued. In order to defeat plaintiff's right it must be proved that somebody held possession of the office adversely to him for 6 years. The only evidence we have is that the charity has been conducted and that for a time the first defendant was in possession and that for a time Defendants 7 and 8 were in possession but there is no definite evidence that any one person has held adversely for a period of 6 years. In the absence of evidence to this effect which it was incumbent on the appellants to produce, we are not able to say that the plaintiff's title is barred by adverse possession, even if the period of limitation is governed by Art. 120.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) [1903] 26 Mad. 113.
(3) [1892] 19 Cal. 775.
(2) 6 M. H. C. R. 301.

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* A. I. R. 1926 Madras 246

DEVADOSS AND WALLER, JJ.

Kanuri Venkata Siva Rao and *others*—Petitioners.

v.

Chittori Rama Krishnayya—Respondent.

Civil Revision Petition No. 482 of 1924, Decided on 5th October 1925, from the order of the Dist. Munsif of Bezwada, in I. A. No. 208 of 1924.

(a) *Jurisdiction—Civil Courts cannot restrain a member of panchayat from entering his duties as panchayatdar.*

A suit to obtain a declaration that the election of the members of the Panchayat Court is void, cannot be entertained by a civil Court, nor can it issue an injunction restraining the members from entering upon their duties as panchayatdars. [P. 247, C. 1]

* (b) *Jurisdiction When a public body is created by statute empowering Government to frame rules for its working, Government can appoint a tribunal to decide disputes as to that body.*

When a public body has been created by a statute and that statute empowers Government to frame rules for its working, it is open to Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the statute and thereby to exclude the jurisdiction of the ordinary civil Courts: *A. I. R.* 1924 *Mad.* 523, *Foll.* [P. 247, C. 1 and 2]

L. A. Govindaraghava Iyer—for Petitioners.

P. Suryanarayana Rao—for Respondent.

Judgment.—This revision petition arises out of a suit filed in the Court of the District Munsif, Bezwada. The object of the suit was to obtain a declaration

that the election of the defendants as members of the Panchayat Court of Bezwada was void. Pending the trial of the suit, the plaintiff applied for a temporary injunction restraining the defendants from entering upon their duties as panchayatdars. The District Munsif decided that he had jurisdiction to entertain the suit and proceeded to grant the injunction applied for. The result, but for the interference of this Court, might have been to deprive the citizens of Bezwada for several years of the service of a Panchayat Court. Rule 64 of the rules framed by Government under the Village Courts Act provides fully for the competency of the proceedings of Panchayat Courts despite defects in their constitution or in the qualifications of their members. So that it was as unnecessary as it was undesirable for the Munsif to have passed the order he did.

Apart from that, we are of opinion that he had no jurisdiction to entertain the suit. Rules have been framed by Government under the Act to regulate the election of panchayatdars. Rule 18 (a) lays down that objections to an election shall be made within 7 days after the election to the Revenue Divisional Officer, who shall enquire, except in certain cases which are to be referred to the Collector, to pass orders. Sub-section (b) declares that the orders of the Revenue Divisional Officer and the Collector respectively shall be final and not liable to be contested by suit or otherwise. It does not appear that the plaintiff made any attempt to comply with these rules. Instead of doing so, he has resorted to a method of contesting the election, which has been expressly excluded by the rules. The law on the subject has been stated in *Kona Thimma Reddi* v. *The Secretary of State* (1), to which decision one of us was a party. It is this: that when a public body has been created by a statute and that statute empowers Government to frame rules for its working, it is open to Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the statute and thereby to exclude the jurisdiction of the ordinary civil Courts. The same principle is laid down in *Bhaishanker Nanabhai* v. *The Municipal Corporation of Bombay* (2): "Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of the Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts, for they never had any." In this case, the jurisdiction of the Courts has been excluded by express words.

It is, of course, argued that the rules framed under S. 78 of the Act are ultra vires. That section empowers the Governor-in-Council to make rules to "regulate the appointments or elections of Presidents and other members of the Panchayat Courts." It is, we think, a necessary part of this power of regulation that Government should appoint a tribunal to enquire into and decide objections to such elections.

The revision petition is allowed with costs throughout.

Petition allowed.

(1) A. I. R. 1924 Mad. 523.

(2) [1907] 31 Bom. 604=9 Bom. L. R. 417.

A. I. R. 1926 Madras 247

SPENCER, J.

Natesa Aiyar and *others*—Appellants.

v.

Panchapagesa Aiyar and *others*—Respondents.

Second Appeal No. 282 of 1923, Decided on 2nd October 1925, against the decree of the Dist. J., East Tanjore, at Negapatam, in A. S. No. 277 of 1921.

Hindu Law—Alienation—Widow—Necessity—Alienation challenged 49 years afterwards—Conduct of the parties who could have objected should be looked to.

In a suit to challenge alienation by a Hindu widow 49 years after its date, it was found that the sister of the last male owner had attested the deed, that two reversioners had attested a sale deed by the alienee, and in a partition among the reversioners they had agreed not to challenge the alienation and during the widow's lifetime the alienation was not challenged by the reversioners.

Held: that these circumstances lead to the inference that the alienation was for necessity: *A. I. R.* 1922 *P. C.* 163 and 43 *Mad.* 541, *Ref.*

[P. 248. C. 1, 2.]

T. R. Ramachandra Aiyar, V. K. Srinivasa Aiyangar and *S. Ramaswami Aiyar*—for Appellants.

R. Sitarama Aiyar—for Respondents.

Judgment.—The plaintiffs brought this suit as reversioners to recover certain property alienated by a widow 49 years before suit, in 1871. The question of fact to be decided was whether the alienation was for necessary purposes binding on the reversioners. There is no recital in the document (Ex.1) as to the purpose for which the land was sold. Owing to the great lapse of time since the alienation took place, no direct evidence was available to prove for what purpose the widow sold the property. The Courts below therefore had to depend upon evidence as to the attendant circumstances and the conduct of the parties; and both Courts finally came to the conclusion that the alienation could not be questioned.

The alienation of 1871 by Dharmi Ammal was in favour of Arunachala Aiyar, grandson of Parasurama Aiyar, the common ancestor. Arunachala Aiyar's four sons sold the same property under Ex. II, in 1887, to the father of Defendants 1 and 2 and the grandfather of the third defendant.

The decision in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1), by the Privy Council, was to the effect that a Court might look to the recitals in a document of alienation as proving necessity in a case where, owing to the lapse of time, it was unreasonable to expect exact evidence as to the nature of the transaction. That case is not directly in point, but the observation at page 198, "The circumstances are sufficient to justify the assumption that proper enquiry would have disclosed that real necessity existed," is an observation which may be applied to the present case. The question here is whether under the circumstances, as we know them at this distance of time, the Courts below were justified in presuming that if the purchasers had made enquiries at the time of their purchase in 1871, they would have found that the widow was alienating the property for necessary purposes. The only circumstances in the present case, which have any bearing on the present question, are the conduct of persons who had a right to object if the widow was alienating the estate or part of it without necessity. First there is the fact that the sister of the last male owner, namely Sitalakshmi, attested Ex. I. Next there is the fact that Kalyanasundaramiah and Ayyasami Ayyan, two of the reversioners, attested Exhibit II, which is a sale deed by the sons of the vendee from the widow. Lastly, there is the fact that in the partition which look place in 1911 the reversioners agreed not to question any of Dharmi Ammal's alienations in favour of any one of them. There are also negative circumstances which lead to the same inference. During the widow's lifetime none of the reversioners brought a suit for a declaration that the alienation was invalid. In *Magniram Sitaram* v. *Kasturbhai Manibhai* (2) Lord Buckmaster observed in the case of a grant by a shebait to a temple:

"At the lapse of 100 years, when every party to the original transaction has passed away, and it becomes completely impossible to ascertain what were the circumstances which caused the original grant to be made, it is only following the policy which the Courts always adopt, of securing as far as possible quiet possession to people who are in apparent lawful holding of an estate, to assume that the grant was lawfully and not unlawfully made."

In another Privy Council decision in *Venkata Reddi* v. *Rani Saheba of Wadhwan* (3) similar observations occur as to the presumptions permissible to fill in details which have been obliterated by time when there is an attempt to impeach a transaction which has taken place a great number of years ago. In the present case, I am of opinion that the Courts below were justified by the conduct of the reversioners in raising the presumption that the alienation made by Dharmi Ammal under Ex. I was for necessary purposes.

Mr. Ramachandaa Aiyar did not press the objection taken in paragraph 2 of the

(1) [1916] 44 Cal. 186=43 I. A. 249=20 M. L. T. 335=31 M. L. J. 563=(1916) 2 M. W. N. 336=4 L. W. 458=18 Bom. L. R. 868=14 A. L. J. 1103=24 C. L. J. 487=1 P. L. W. 1=21 C. W. N. 225=10 Bur. L. T. 177 (P. C.).

(2) A. I. R. 1922 P. C. 163.

(3) [1920] 43 Mad. 541=47 I. A. 6=38 M. L. J. 393=11 L. W. 451=(1920) M. W. N. 315=18 A. L. J. 367=22 Bom. L. R. 541(P. C.).

written statement of Defendants 4, 5 and 6 as to the validity of the registration when Panchapagesa Aiyar, the senior member of the family, had died and his legal representatives refused to endorse the document, and there are no materials to go into the question of the validity of the registration, seeing that it appears from the endorsements on Ex. II that there was an appeal to the District Registrar which resulted in registration being ordered.

In the result the Second Appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 249

PHILLIPS, J.

(*Puthia Madathil*) *Subramaniam Pattar of Engadiyur Amson* and *Desam* and *another*—Plaintiffs—Appellants.

v.

Karnavan Velu Nair and *others* — Defendants—Respondents.

Second Appeal No. 1720 of 1922, Decided on 23rd July 1925, from the decree of the Dist. J., South Malabar, in A. S. No. 465 of 1921.

Promissory Note—Trustees promising to repay in their capacity as trustees—Devaswom property is also liable if necessity for borrowing is proved.

A promissory note was executed by the Uralars of a devaswom promising to pay "in our capacity as Uralars of the devaswom to pay" and that the amount that has been taken in cash is due to you from the devaswom."

Held: that the plaintiff was entitled not only to a personal decree against the Uralars but also against the devaswom provided that there was necessity to borrow on behalf of the devaswom.

[P. 249, C. 1 & 2]

K. P. Ramkrishna Aiyar—for Appellants.

K. P. M. Menon—for Respondents.

Judgment.—This is a suit on a promissory note executed by the defendants who are Uralars of a devaswom. In the promissory note it is recited that the two defendants promise "in our capacity as Uralars of the devaswom to pay" and again we have the recital "the amount that has been taken in cash is due to you from the devaswom." Notwithstanding this specific recital of the liability of the devaswom for the suit debt the lower appellate Court has held, relying on *Saminatha Aiyar* v. *Srinivasa Aiyar* (1), that the plaintiff is entitled only to a personal decree against the Uralars. Since the District Judge delivered his judgment another case of this Court has been reported, namely, *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2), in which the facts are identical with the present case, namely, there was a distinct understanding in the promise made by the Uralars that the money was to be repaid out of devaswom funds, that is to say, not only did they pledge their personal credit, but they entered into a contract with the plaintiff that the devaswom funds should be liable for the repayment of the debt. These facts distinguish the present case from that reported in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1) and also that in *Ammalu Ammal* v. *Namagiri Ammal* (3). In this latter case the learned Judges refused to consider the question of liability of trustees of religious institutions and based their judgment on the liability of secular trustees and adopting the same argument as that adopted in the earlier case, held that there was only a personal liability. This conclusion is based on the principles of English Law relating to trustees, but it is doubtful whether they are applicable in their entirety to persons like heads of mutts or managers of religious institutions who are not in the strict sense of the word trustees. It is suggested for the respondents that because the earliest decision in *Srimath Deivasikhamani Pandara Sannadhi* v. *Noor Mahomad Rowther* (4) is doubted in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1), where it is to a limited extent approved in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2), that there is a divergence of opinion between the two Benches. But Krishnan, J. in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2) merely says that he is inclined to follow *Srimath Deivasikamani Pandara Sannadhi* v. *Noor Mahomad Rowther* (4) "where the debt is not incurred purely on the personal liability of the debtors." This limitation of liability is the cardinal distinction between the present case and that in *Saminatha Aiyar* v. *Srinivasa Aiyar* (1), where the authority of the prior decision was

(1) [1916] 32 M. L. J. 259=21 M. L. T. 91=5 L. W. 323=(1917) M. W. N. 278.

(2) A. I. R. 1922 Mad. 402.

(3) [1917] 33 M. L J. 631=22 M. L. T. 391=(1918) M. W. N. 110=6 L. W. 722.

(4) [1907] 31 Mad. 47=17 M. L. J. 553=3 M. L. T. 95.

questioned. I am bound by the decision in *Sundaresan Chettiar* v. *Viswanatha Pandara Sannadhi* (2) which is exactly in point and I may add that I see no reason to doubt its correctness.

I may here observe that in dealing with the facts of this case I have taken one fact as assumed by both the lower Courts, namely, that there was necessity to borrow on behalf of the devaswom. That point has not been decided by either Court. It will therefore be necessary to remit the case to the District Munsif for decision of this issue and for final disposal in the light of the above remarks. The stamp on the appeal memo will be refunded and the costs of this appeal will abide the result.

Case remanded.

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* A. I. R. 1926 Madras 250

ODGERS, J.

C. Venkatachariar—Plaintiff—Appellant.

v.

Bontham Pachayappa Chetti and *others*—Defendants—Respondents.

Second Appeal No. 1644 of 1922, Decided on 26th February 1925, against the decree of the Dist. J., Salem, in A. S. No. 89 of 1916.

* *Deed—Construction—Gift of income of property is gift of corpus.*

A gift of the income of property without any limitation is a gift of the property itself. *Southmolton (Mayor, etc., of)* v. *The Attorney-General* (1854) 5 *H.L.C.* 1; *Mannox* v. *Greener* (1873) 1 4*Eq.* 456 and 41 *M.L.J.* 20 *Foll.* [P. 251, C. 1]

K. V. Krishnaswami Aiyar and *K. V. Sesha Aiyangar*—for Appellant.

B. Somayya—for Respondents.

Judgment.—This was a suit for partition and delivery with mesne profits of one-third of the permanent leasehold village of Pacharahalli. The suit was decreed by the District Munsif. On appeal to the learned District Judge of Salem it, was held that the plaintiff was not entitled to one-third of the village but only to one-third of the income. On the hearing of the second appeal, Mr. K. V. Krishnaswamy Aiyar appeared for the plaintiff-appellant, and Mr. Somayya for the Respondents 1 to 4 intimated that his clients had no interest and took no part in the argument. I have accordingly heard the appeal as an ex-parte matter. The plaint agreement of the 4th September 1845 has apparently disappeared and we are thrown back for its terms on to a recital in the judgment in O. S. No. 569 of 1887 in the District Munsif's Court of Tiruppattur. The District Munsif there says :

"Its contents are to the effect that in consideration of the advances made in kind and in money to the tenants of the villages by Sesha Ayyangar, Krishna Ayyangar agreed to divide the income in cash and waram of the said villages with Sesha Ayyangar in the proportion of two to one, to give the latter accounts as to produce, waram, etc., of the two villages and in the result to conduct the affairs of the villages in consultation with Sesha Ayyangar. The document closes with a final clause to the effect that the contracting parties should divide between them any loss relating to these villages in the proportion mentioned."

Krishna Ayyangar's interest is now vested in the defendants and Sesha Ayyangar was the appellant's father. In Second Appeal No. 1307 of 1890, Ex. A, (2), Wilkinson and Handley, JJ., held with regard to this agreement :

"We see no reason to doubt that the grantor who was the uncle of the grantee, intended to alienate and did alienate in perpetuity to his nephew, a one-third share of the village which he held on permanent lease in consideration of services rendered and, in all probability, out of natural affection."

In Ex. L. Varadachari, the son of Krishna Ayyangar, the grantor, refers to the present plaintiff as "our coparceners Venkatachari and others." That is a deed of collateral security, dated 1896. In a plaint Ex. D in O. S. No. 663 of 1901, on the file of the District Munsif's Court of Tiruppattur, the present plaintiff and others brought a suit claiming one-third share in the villages and in Ex-D (1) the written statement of the 1st defendant Varadachari, in the same suit, he pleaded:

"In any case, the plaintiffs are entitled only to one-third share in the said villages."

In an affidavit Ex. F (1), in E. P. No. 1038 of 1908 in O. S. No. 530 of 1907 in the same District Munsif's Court, Varadachari refers to the two-thirds share belonging to him in the said village

and also in the same document states "After excluding the one-third share belonging to the plaintiffs in the permament ijara village of Pacharahalli I sold etc." This seems to me to be sufficient to show that what was really granted was not only one-third share in the income but one-third of the village itself and that was what both parties in the past have thought was the meaning of the agreement. The learned District Judge refers to a certain suit O. S. No. 2 of 1913, Ex. 1, and says that :

"The present plaintiff and the present defendants were arrayed as against each other as rival purchasers in a Court auction of that two-thirds right which was admittedly the property of their mutual judgment-debtor the vendor of the present defendants in this case," and held that the rights in the present village are not concluded by Ex. E. He did not consider the exhibits I have referred to. The law that a gift of the income may under circumstances amount to a gift of the corpus may be seen for example in *Southmolton (Mayor, etc., of,* v. *The Attorney-General* (1) where Lord St. Leonard said :

"As regards the law, if the rents of the estate are given, they represent the estate. If the rents are given in certain proportions so as to exhaust the whole of the present rents, and if no one is entitled to be benefited more than another beyond that which is specifically given, that is a representation of the estate itself in those proportions."

And in *Mannox* v. *Greener* (2) Vice-Chancellor Malins said :

"Now it has been argued in this case that a gift of the income of real estate does not pass more than life estate, but I think it is throughly settled that before the Wills Act a devise of the rents and profits pass a real estate for life. That being the case, that which would give a life estate before the Wills Act, by the 28th section of that Act, gives now a fee simple."

These two English authorities have been referred to in a judgment of this Court reported in *Vaithinatha Aiyar* v. *S. Thayagaraja Aiyar* (3) where it was held that a gift of the income of property without any limitation is a gift of the property itself.

A question has been raised as to the applicability of S. 54 of the Civil Procedure Code. The learned District Judge held that it was a right to income only that was to be partitioned. I fail to see why it should affect the question that the lessees were not registered when the estate was so registered. In the District Judge's view S. 54 had no application. I think in this respect the learned District Judge was wrong in my view, expressed above and that therefore, S. 54 could apply.

The lower appellate Court's decree must be reversed and that of the District Munsif restored (as modified below) with costs in this Court against 5th respondent, Respondent 1—4 who were the only appellants in the lower appellate Court must pay the present appellant's costs in the lower appellate Court. As to future mesne profits respondents 1—4 will be liable to plaintiff up to date of sale by them to 5th respondent; from that date the latter will be liable to the plaintiff.

Decree reversed.

(1) [1854] 5 H.L.C. 1.
(2) [1872] 14 Eq. 456.
(3) [1921] 41 M.L.J. 20.

A. I. R. 1926 Madras 251

SPENCER AND MADHAVAN NAIR, JJ.

Municipal Council, Tuticorin—Petitioner.

v.

T. Shunmuga Moopanar—Respondent.

Civil Revision Petition No. 553 of 1923, Decided on 21st September 1925, from the decree of the Dist. Munsif of Tuticorin, in Sm. Cause Suit No. 858 of 1922.

Madras Dist. Municipalities Act (5 of 1920), S. 249 and Sch. 5, Cl. (c)—Rice and broken rice is not grain and no license is necessary for the godowns in which they are stored.

"Rice," i. e., paddy without husk and 'broken rice" does not come within the meaning of the term "grain" in Cl. (c) of S. 5 of the Act, and so it is not necessary to take out licenses for godowns in which rice and broken rice etc., are stored for the wholesale trade. [P. 252, C. 2 P. 253. C. 2]

P. N. Marthandam—for Petitioner.

M. S. Vaidyanatha Aiyar—for Respondent.

Spencer, J.—The Tuticorin Municipal Council, which through its Chairman preferred this revision petition, resolved to require wholesale dealers in grain to take out licenses under S. 249 of the Madras Municipalities Act (V of 1920), and

accordingly published a notification under S. 328 in the Tinnevelly District Gazette. The respondent, who was one of such wholesale dealers, paid the fees demanded of him under protest and brought a suit in the Small Cause Court to recover what was illegally collected from him. He succeeded in obtaining a decree for a portion of his claim. The District Munsif held that he was not liable to take out licenses for godowns in which rice and broken rice, etc., were stored for the wholesale trade, but only for grain stores. It is contended for the petitioner that the word "grain" in Schedule V to the Act, includes rice and broken rice. The District Munsif observed : "Paddy without husk is rice. Rice is not a seed and does not sprout out. Hence rice or broken rice cannot be called a grain."

If the District Munsif meant by this that the distinction between grain and rice depended on the existence or absence of the power of germination, I think he went near the mark without hitting it. The germ or seed is in the rice. The outer husk merely serves as a protection from water and other external agencies which would penetrate and destroy the germ.

In the English language "corn" which is derived from the same Latin word "granum" as "grain" is commonly used to mean the grain of certain cereals, especially wheat in England and maize in America, while growing. Thus an Englishman would speak of a field growing wheat as a field of corn, but he would never include other plants grown from seed such as turnips, clover mustard, etc., under the head of "corn". After the wheat is harvested and threshed it is still corn and it is sold in a corn market, but after it has gone through a mill and become flour or meal, the individual corns or grains cannot be distinguished and a substance is produced which is not corn or grain, but something else. This meaning of the word "grain" was brought out in a case that went up to the House of Lords and is reported in *Cotton* v. *Vogan & Co.* (1), Lord Herschell in interpreting the meaning of the words which occur in the Metage on Grain Act of 1872: "In respect of all grain brought into the port of London for sale," observed : "If the Legislature had intended to include what had always been regarded and treated as manufactured articles such as flour and meal, as distinguished from the natural products of the earth untreated expect by gathering, the language would have been altogether different."

Using similar language I would say that if the Madras Legislature intended to include in Sch V (c) 'rice and broken rice,' which have gone through a certain process as distinguished from the natural products of the earth untreated except by gathering the storing of which without a license may be prohibited by any Municipal Council, they would have used more explicit language to denote their meaning. In Cls. b and q (proviso) the word "paddy" occurs and in Cl. 1 the word "flour" is used. There is, therefore, no reason to regard the word "grain" in Cl. O as being used in the comprehensive sense of all articles of commerce into which grain can be turned by some process or other. The use of the Tamil word "daniyam" in the translation of the notification as the equivalent of "grain" strengthens the respondent's case. A trader who sells rice may be called a grain merchant and his merchandise may, in a loose sense be called 'grain' when it includes both grain and rice ; but rice is strictly not grain and the separate entity of the grains by the process of disintegration disappears when they are converted into broken rice. For these reasons, I consider that there is no occasion to interfere with the District Munsif's decree. The Civil Revision Petition is dismissed with costs.

There is no substance in the objection taken in the memorandum of cross-objections that the notification was not published fully sixty days before it was enforced as required by S. 249 of the Act. There was evidence before the Court that the Gazette notice must have been published on January 30th to come into force on April 1st, and the District Munsif accepted that evidence. The memo of objections is dismissed with costs.

Madhavan Nair, J.—I agree. The main question for decision in this Civil Revision Petition is whether "rice," i. e., paddy without husk and "broken rice" come within the meaning of the term "grain" found in Cl. (c) of Schedule V of the District Municipalities Act. In the course of the argument we have been referred to well-known English diction-

(1) [1896] A. C. 457=65 L. J., Q. B. 486=74 L. T. 591 =61 J. P. 36.

aries, such as Murray's Oxford Dictionary, Chambers' Twentieth Century Dictionary, Webster's Dictionary, etc., wherein the word "grain" has been explained. According to Murray's Dictionary the word as "grain" is derived from the root granum which means 'seed.' From this, the inference is sought to be drawn that an article to be called "grain" should have the power to germinate or sprout and since this power is absent in rice which is husked paddy, it is argued that rice cannot be called "grain," but I am not quite sure whether this distinction can be accepted as a safe test because it involves the assumption that the presence of "husk" is the main determining factor in the matter of germination, whereas it is well known that rice contains the seed which germinates or sprouts, while the husk present in paddy merely serves to protect it from destruction during germination.

In a case under the Metage on Grains (Port of London) Act of 1872 (cf. S. 4) the House of Lords had to consider whether maize and oats imported with a view of their being first subjected to a process of grinding or crushing before sale would be " grain " brought into the port of London for sale " within the meaning of S. 4 of the Act. By S. 2 of the Act, " grain is defined to mean corn, pulse and seeds' except the following seeds when brought into the port of London in sacks or bags, that is to say, linseed, rapeseed, millet seed, etc., With reference to the argument of Mr. Denckwerts that maize and oats sold after being subjected to the process of grinding and crushing might come within the definition of 'grain' contained in the statute. Lord Herchell pointed out in his judgment that ; " If it (Legislature) had intended to include what had been always regarded and treated as manufactured articles, such as flour and meal, as distinguished from the natural products of the earth untreated except by gathering, the language would have been altogether different to that which is to be found in the statute." From this it may be inferred that the meaning of the term " grain " should be confined to natural products of the earth untreated by gathering. Lord Watson stated that ; " The result of that process was that substances operated upon ceased to answer the statutory description of a dutiable article." Though the decision was given with reference to the definition of the word " grain " contained in a special Statute, I think the description of the term " grain " in Lord Herschell's judgment is sufficiently general and may well be used for the purposes of the present case also. Judged by this test, " rice " which is paddy subjected to the process involving the removal of husk, and " broken rice " cannot strictly be called " grain." Mr. Sitarama Rao for the petitioner invited our attention to the definition of the word "grain" contained in S. 456 of the Merchants Shipping Act 57 and 58 Vict. Chapter 60. That section defines grain to mean any corn, rice, paddy, pulse, seed, etc. But the section itself makes it clear that this is a special definition applicable to provisions of the part of the Act specially dealing with the " Carriage of Grain Cargo. " Obviously, this definition cannot be of much help in deciding the present case.

Under S. 209 of the District Municipalities Act, Act 5 of 1920, " The Council may publish a notification in the District Gazette and by beat of drum that no place within the municipal limits or at a distance within three miles of such limits shall be used for any one or more of the purposes specified in Sch. 5 without Chairman's license and except in accordance with the condition specified therein. . . . . " S. 328 states : that " Every notification under this Act shall be published in the official gazette of the district in which the municipality is situated, both in English and in a vernacular language, of the district." That the Legislature never intended to include " rice " and " broken rice " within the meaning of the term " grain " appears to be clear from the fact that in the notification in Tamil published by the municipality in pursuance of the above provisions of the Act, the word (danyam) is used as the Tamil equivalent of the English word " grain." " Dhanyam " as generally understood in the Tamil language does not mean " rice." See Winslow's Dictionary.)

For the above reasons, I am inclined to hold that " rice " " broken rice " do not come within the meaning of the term " grain " in clause (O) to Sch. 5 of the District Municipalities Act. The decision of the District Munsif is right and the Civil Revision Petition should be dismissed with costs.

I agree that the memorandum of objections should also be dismissed with costs.

Revision dismissed.

A. I. R. 1926 Madras 254

PHILLIPS, J.

(*Pentakota*) *Somi Naidu* and *others*—Defendants—Appellants.

v.

Pentakota Sitaramayya — Plaintiff—Respondent.

Second Appeal No. 1660 of 1922, Decided on 22nd July 1925, from the decree of the Addl. Sub-J., Vizagapatam, D/- 11th April 1924 in A. S. No. 123 of 1922.

Evidence Act, S. 115—*Agreement by next reversioner with the remote reversioners during widow's lifetime and with her consent to divide properties—Possession given under the agreement continuing up to the widow's death—Next reversioner cannot challenge the agreement on widow's death.*

With the consent of a Hindu widow, the separated brother and another separated brother's sons of her deceased husband entered into an agreement by which her husband's estate was partitioned between the brother and the brother's sons and they entered into possession of the estate allotted to them and continued in such possession till the widow's death:

Held : that the brother cannot question the agreement after the widow's death and that he is not entitled to recover possession of the properties allotted to the brother's sons on the ground of his being the next reversioner. 40 *All.* 487, *Appl.*

[P 255 C 1]

B. Satyanarayana—for Appellants.

Y. Suryanarayana—for Respondent.

Judgment.—The plaintiff in this case, one Somi Naidu and the father of the defendants were brothers who effected a partition in 1898. This case relates to the share which fell to Somi Naidu. He died in 1906, leaving a widow. In 1907 the plaintiff and the defendants entered into an arrangement under which they partitioned Somi Naidu's share and agreed that the defendant should pay a certain sum to the widow, who lived till 1914. She appears to have taken no objection to this arrangement. The plaintiff now seeks to recover the property allotted to the defendants under this agreement of 1907, and it is contended for the appellants that he is barred from doing so by reason of this agreement and reliance is placed on a decision of the Privy Council in *Kanhai Lal* v. *Brij Lal* (1). In that case one Kanhai Lal who subsequently became the reversioner of a widow Ram Dei claimed the whole of the property which fell to the widow as reversioner. Before the reversion fell in, there was a litigation between the parties, Kanhai Lal claiming to be the adopted son of one widow and setting up that her husband was divided from his brothers. These disputes were compromised in 1892 and certain properties fell to each of the disputants Kanhai Lal Ram Dei and two other widows. It was held by the Privy Council that Kanhai Lal was debarred by his act in 1892 from claiming as reversioner. The Subordinate Judge declined to apply this decision of the Privy Council to the present case on the ground that Kanhai Lal did not enter into the compromise as reversioner, presumably holding that in this case the plaintiff entered into his arrangement with defendant as reversioner. There is nothing in the documents, Exs. 1 or 1A to, show that plaintiff was acting in his capacity as reversioner nor is there anything to show that he intended to or did transfer his spes successionis as has been held by the lower appellate Court. What was transferred was the plaint property and not only was it transferred by the document but actual possession was given by the plaintiff to the defendants and that possession has continued ever since. Even if the plaintiff's title to the property were bad, there is no legal objection to his transferring such title. He not only did this, but he also transferred his possessory title and gave effect to the latter by transferring possession. There is, therefore, no question of the transfer of a mere spes successionis. Had he purported to transfer only his right to the property, it no doubt, might be regarded as the transfer of his spes successsionis, which was the only right he had then in the property. In as much as he did transfer physical possession it is something more than a transfer of spes successionis. The Privy Council decision cannot, therefore, be distinguished on this ground. In other respects it appears to me to be clearly applicable. In *Kanhai Lal's* case (1)

(1) [1918] 40 All. 487=45 I. A. 118=22 C. W. N. 914=8 M. L. W. 212=24 M. L. T. 23=35 M. L. J. 459=16 A. L. J. 825=(1918) M. W. N. 709=28 C. L. J. 394=4 Pat. L.W. 294=20 Bom. L. R. 1048 (P. C.).

it was held that all the interest which he held in the property of the family in 1892, namely, when the compromise was entered into, was the mere possibility of becoming the immediate reversioner. Notwithstanding this, it was held that the compromise was not the mere transfer of a spes successionis and was consequently binding on Kanhai Lal. Here, too, the plaintiff had no other legal right to the property at the time he executed Ex. 1 but the possibility of succeeding to the estate : but he had possession of the property and purported to transfer that. Now he seeks to set aside that arrangement. That arrangement was entered into by the members of the family and the real owner of the property was an assenting party and also received some benefit under it. It is not now open to the plaintiff to go behind that arrangement and seek to deprive the defendants of the share allotted to them. The appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Appeal allowed.

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* A. I. R. 1926 Madras 255

DEVADOSS, J.

Sigamani Panditha n—Plaintiff—Appellant.

v.

Munibadra Nainar and *others*—Defendants—Respondents.

Second Appeal No. 1638 of 1922, Decided on 24th April 1925, against the decree of the Sub-J., Vellore, in A. S. No. 31 of 1922.

* *Transfer of Property Act, S. 55—Covenants apply to sale as well as to contract of sale.*

The statutory covenants in S. 55 are attached to the transaction of sale and not merely to the contract which precedes the sale. Under the English conveyancing practice all the covenants of title and covenants for quiet enjoyment are set out in the deed itself, but under the Transfer of Property Act the technicalities of the English conveyancing have been done away with and in the case of a sale of property all the covenants which are usually found in an English conveyance deed are to be read into the sale deed by reason of the provision of th Transfer of Property Act.

[P 255 C 2, and P 256 C 1]

* (b) *Limitation Act, Art. 116—Breach of covenants of title—Suit for compensation is governed by Art. 116—Transfer of Property Act, S. 55.*

A suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale deed executed after coming into force of the Transfer of Property Act is governed by Art. 116. 38 *Mad.* 1171 *Foll.* [P 256 C 1]

N. S, Rangaswami Aiyangar—for Appellant.

M. Patanjali Sastri—for Respondents.

Judgment.—The plaintiff purchased some property from Defendants 1 to 3 under Ex. A. After the sale a suit was brought by one Ammani Ammal for half the share of the property on the ground that she was entitled to it as the heir of her deceased son. That suit was decreed by the first Court on 20th March 1913. This was an appeal against the decree which was decided on 13th April 1914 and the second appeal was decided on 1st March 1917. The plaintiff who was not given possession under the sale sued for possession of the property and he was given a decree for possession of half the property on 22nd December 1913. The present suit was filed 10th November 1917.

Mr. Patanjali Sastri, for the respondents, contends that the suit is barred by limitation. His contention is that either Art. 62 applies or Art. 97. Under Art. 97 of the Limitation Act a period of 3 years is given for bringing a suit for money paid upon an existing consideration which afterwards fails. The Subordinate Judge has not definitely held that Art. 116 applies. His view is that the matter was not finally disposed of till 1st March 1917 when the second appeal was decided. This view of the law is wrong. The consideration for the sale failed when the decree of the first Court was given in Ammani Ammal's favour, i. e., on 20th March 1914 ; vide *Juscurn Boid* v. *Pirthichand Lal Choudhury* (1).

The next question is whether Art. 116 applies. In this case the document is a registered document and the plaintiff got only half the property and he did not get a title to the other moiety. Mr. Patanjali Sastri's contention is that there was no covenant in writing for good title. He urges that the statutory covenants embodied in S. 55 (2) of the Transfer of Property Act should not be imported into the sale deed as S. 55 speaks only of a contract. I am unable to accept this contention. The statutory covenants are attached to the transaction of sale and not merely to the contract with precedes the sale. To hold that the statutory co-

(1) [1918] 46 Cal. 670=17 A. L. J. 514=30 M. L. 7. 557=23 C. W. N. 721=21 Bom. L. R 632=(1919) M, W. N. 258=30 C. L. J. 71=26 M. L. T. 131=10 L, W. 416 (P. C.)

venants under S. 55 apply only to contracts and not to sales would be defeating the object of S. 55. If the statutory covenants do not apply to the actual sale itself, the vendor who executes a sale deed is relieved of the liability which is cast upon him by the statute under S. 55. No doubt under the English conveyancing practice all the covenants of title and covenants for quiet enjoyment are set out in the deed itself, but under the Transfer of Property Act the technicalities of the English conveyancing have been done away with and in the case of a sale of property all the covenants which are usually found in an English conveyance deed are to be read into the sale deed by reason of the provision of the Transfer of Property Act. The contention of Mr. Patanjali Sastri is that Art. 116 speaks only of breach of contract in writing and does not apply to a sale deed. The sale itself may not be properly called a contract in writing but contracts which are to be contained in a sale deed or such terms of contract which the law imports into a sale are contracts within the meaning of Art. 116 and a sale deed comes within Art. 116 of the Limitation Act. It is unnecessary to discuss this matter further as a Bench of this Court has, after a very careful consideration of the cases, come to the conclusion that a suit for compensation for breach of express or implied covenant for title and quiet enjoyment in respect of a sale deed executed after coming into force of the Transfer of Property Act is governed by Art. 116 of the Limitation Act. [*Arunachali* v. *Ramaswami* (2)]. With the reasoning of the learned Judges I entirely agree and I hold, therefore, that Art. 116 applies to this case.

It is next contended by Mr. Patanjali Sastri that the document itself has by express terms made the statutory covenants as to title and quiet enjoyment in applicable. I do not think the document is capable of that interpretation "*Idil engalal kalau illai*" are only capable of meaning that the transferrers had not created any encumbrance on the property and this does not mean that the vendors had no title to convey. There is nothing therefore in this contention.

The Subordinate Judge accepted the contention of the appellant and has in the concluding portion of the judgment directed the plaintiff to surrender the moiety of the property in his possession before he could get the amount of consideration for the other moiety which he had lost. I do not see why the plaintiff should surrender the half to which he has got a good title when he sues for damages for breach of the covenants of title in respect of the other half. The lower Court's decree should, therefore, be modified by deleting the portion of the decree as regards the surrender. The words to be omitted are "On plaintiff surrendering possession of the lands which he obtained in pursuance of the decree in O. S. No. 300 of 1912 on the file of the District Munsif's Court, Arni, on or before the 7th day of June 1922."

As regards the amount payable to the plaintiff by the defendants both the vakils have consented to put in a statement. It is agreed by both parties that the amount payable to plaintiff is Rs. 702-4-7. The plaintiff will have interest at 6 per cent. from date of plaint. Para. 2 of the lower Court's decree to be deleted. Parties will pay and receive proportionate costs throughout.

Decree modified

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* A. I. R. 1926 Madras 256

ODGERS, J.

V. Thirumalachariar—Plaintiff—Petitioner.

v.

Athimoola Karayalar and *others*—Defendants—Respondents.

Civil Revision Petition No.5 39 of 1924 Decided on 28th April 1925, from the order of the Sub. J., Tinnevelly, in I. A, No. 10 of 1925.

(a) *Civil P. C., O. 9, R. 13—Absence of pleader is sufficient cause for setting aside of an ex-parte decree.*

The absence of a pleader is a sufficient cause for setting aside the ex parte decree, and the High Court should not interfere in revision with the lower Court's discretion in regarding the absence of pleader as a sufficient cause for non-appearance. [P 257 C 2]

* (b) *Civil P. C., O. 9, R. 13—Cause of action not joint against all defendants—Court can set aside the ex parte decree at the instance of some only as regards them but not as regards the others.*

Where the cause of action against all the defendants is not joint and indivisible, the Court, at the instance of some of the defendants alone cannot set aside an ex-parte decree passed against all, but can set aside only as regards those who apply for setting it aside. [P 257 C 2

(2) [1914] 38 Mad. 1171=1 L. W. 849=27 M. L. J. 517=16 M. L. T. 397.

S. Rajagopalachari—for Petitioner.

S. Ramaswami Aiyar—for Respondents.

Order.—This was a suit by the plaintiff against 7 defendants. I understand that the suit is for specific performance of a contract entered into by the husband of the 1st defendant and the plaintiff. The suit is also in the alternative for the value of the land. The deceased was one Nambi Kone. The 1st defendant is his widow, the 2nd defendant his nephew, 3rd defendant is the son of the 2nd defendant, Defendants 4 to 6 are the sons of a brother of the 2nd defendant and 7th defendant is the daughter of the deceased. These persons are all said to have in their hands certain assets of the deceased Nambi Kone under some arrangement made in his lifetime, called a settlement. The suit was called on for trial on the 29th October 1923, before the Subordinate Judge Mr. N. S. Natesa Aiyar. The Defendants 1 and 7 and Defendants 2 to 6 had different vakils on the record. When the case was taken up, the vakil for the plaintiff was not there and neither of the vakils for the defendants was there. The plaintiff, however, went into the box and examined himself and one other witness and an ex parte decree was the result. A petition was then put in to the succeeding Suburdinate Judge Mr. R. Nageswara Aiyar on the 7th February 1924, by the Defendants 2 to 6 only to set aside the ex parte decree and restore the suit to file. The learned Subordinate Judge was inclined to believe that the petitioner's vakil was engaged elsewhere when the suit was taken up and was of opinion that that amounts to a reasonable cause for non-appearance of the petitioners on the day in question. He therefore set aside the ex-parte decree obtained as against all the defendants.

Two points have been argued before me in revision. The first is that the Judge has no jurisdiction to treat the absence of a practitioner as a sufficient cause for not appearing when the suit was called on for hearing under O. 9, R. 12 (2), Civil Procedure Code, and consequently that, even if the petitioner-plaintiff is wrong on this point, the ex parte decree ought not to have been set aside as a whole, but only with regard to Defendants 2 to 6 who requested that it should be so set aside. I am far from saying that if, I were hearing this case on the Original Side, I should hold as an invariable rule that the absence of a pleader is a sufficient cause for setting aside the ex-parte decree. But it is a very different thing to say that the learned Subordinate Judge acted without jurisdiction or with material irregularity in regarding that, as a sufficient cause for doing so. With regard to the absence or presence of pleaders, the parties were in much the same boat before the Subordinate Judge and I am not inclined to interfere in revision with his discretion in regarding the absence of the pleader of Defendants 2 to 6, as a sufficient cause for non-appearance. I, therefore, think that with regard to this part of the case, the Civil Revision Petition must be dismissed. But there is one point where I think the Subordinate Judge had made an omission with regard to Defendants 2 to 6. The Defendants 2 to 6 should pay Rs. 100 as and for the plaintiff's costs before August 15th, 1925.

With regard to Defendants 1 and 7, I am not prepared to say that the cause of action is necessarily joint and indivisible as against them. The plaintiff has, I dare say, quite wisely made defendant, everybody that he can possibly conceive would have any assets of the deceased Nambi Kone and there is no doubt that he hopes to catch some of the assets anyhow in the hands of these defendants. I think the cause really falls within the principle laid down by Mr. Justice Krishnan in the case reported in *Narayanaswami Aiyar* v. *Dorasami Pathar* (1). There the suit was one to obtain possession of separate items of the property from separate sets of defendants. I think really that is the case here as it is perfectly plain that, although the defendants are related by blood, they are of course in no sense a joint family nor is there any allegation, as far as I know, that they are living together or anything of the kind, so that I think that, with regard to Defendants 1 and 7, the learned Subordinate Judge was wrong. They did not petition either in the lower Court or here. The ex-parte decree, therefore, is not set aside as regards them. The petitioner will get his costs from Defendants 1 and 7 in this Court.

Revision partly allowed.

(1) [1921] M.W.N. 795.

A. I. R. 1926 Madras 258

PHILLIPS, J.

Vadapalli Varadacharlu—Petitioner.

v.

Khandavilli Narasimha Charlu—Respondent.

Civil Revision Petition No. 385 of 1925, Decided on 2nd October 1925, from the order of the Dist. J., Godavari, at Rajahmundry, D/- 2nd April 1925, in C. M. A. No. 1 of 1925.

(a) *Civil P. C., O. 39, Rr. 1 and 2—Execution—Injunction to restrain, cannot be granted.*

Injunction restraining the execution of a decree obtained by the defendant against the plaintiff cannot be granted under O. 39, Rr. 1 and 2. [P. 258, C. 1]

(b) *Civil P. C., S. 94 and O. 39—Inter-relation.*

Section 94 is governed by O. 39. [P. 258, C. 2]

(c) *Civil P. C., S. 151—Code making express provision—S. 151 cannot be invoked.*

When the Code makes provision for a certain procedure, the Code must be deemed to be exhaustive in that respect and the provisions of S. 151 cannot be invoked in opposition to those provisions. 43 *Mad.* 94 and *A. I. R.* 1924 *Mad.* 114 *Rel. on*; *A. I. R.* 1923 *Lah.* 144 *Dissented.* [P. 258, C. 2]

K. Ramamurthi—for Petitioner.

K. Kameswara Rao—for Respondent.

Judgment.—This is a petition for revising an order of the District Court of Godavari refusing to grant an injunction restraining the execution of a decree obtained by the defendant against the plaintiff's father. The Subordinate Judge held that he had no jurisdiction to grant such an injunction and this view was upheld by the District Judge.

It is now contended that such an injunction will come under O. 39, either R. 1 or R. 2. It certainly cannot come within the language of R. 1, for there is no suggestion that the property of which delivery is to be given is in danger of being wasted, damaged or alienated. It is then argued that R. 2 would be applicable and that this is an injunction to restrain the defendant from committing "other injury of any kind." The alleged injury is the execution of a decree lawfully obtained. In order to hold that that does constitute an injury, it is necessary to hold that that decree is illegal, for, if the decree is legal, the defendant has every right to execute it, and in doing so cannot be said to commit any injury.

It is then argued that S. 94, Civil P. C., is wider than O. 39 and covers the present case, but I think that contention must be at once negatived in view of the language of the section which says "in order to prevent the ends of justice from being defeated the Court may, if it is so prescribed," that is to say, the Court is given power provided that the rules make provision for the exercise of that power. The section is clearly governed by O. 39 which contains the rules prescribed.

A further contention is put forward that the injunction may be granted under the inherent powers of the Court under S. 151, Civil Procedure Code, and the petitioner relies, on a decision of the Lahore High Court; *Kanshi Ram* v. *Sharaf Din* (1). The reason for holding this view is not very clearly stated in that judgment and it appears to be opposed to the principles adopted by a Full Bench of this Court in *Neelaveni* v. *Narayana Reddi* (2) followed in *Krishnaswamy* v. *Chengalraya* (3) and in the case of *Joshi Shib Prakash* v. *Jhenguria* (4). The principle there laid down is that when the Code makes provision for a certain procedure the Code must be deemed to be exhaustive in that respect and the provisions of S. 151 cannot be invoked in opposition to these provisions. Here the Code lays down in S. 94 that the Court shall only have power if it is given by rules framed under the Code. It, therefore, seems to me impossible to hold that when rules have been framed to give the Court power, further power should be given by S. 151. If then the principle laid down in the Full Bench of this Court is correct, and I see no reason to doubt its correctness, it is applicable to this case also, and the District Judge was right in his order.

I may add that from the facts put before me here, although they were not considered by the lower Courts, the petitioner does not seem to have much ground for his present complaint.

The petition is dismissed with costs.

Petition dismissed.

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(1) A. I. R. 1923 Lah. 144.
(2) [1920] 43 Mad. 94=37 M. L. J. 599=26 M. L. T. 377=20 L. W. 603=(1920) M.W.N. 19 (F. B.).
(3) A. I. R. 1924 Mad. 114.
(4) A. I. R. 1924 All. 446.

* A. I. R. 1926 Madras 259

PHILLIPS AND RAMESAM, JJ.

Asanalli Nagoor Meera and *others*—Plaintiffs—Appellants.

v.

K. M. Mahadu Meera and *others*—Defendants—Respondents.

Appeals Nos. 144 and 145 of 1922 and 3 of 1923, Decided on 25th August 1925, against the decrees of the Sub-J., Tuticorin, in O. S. Nos. 3, 4 and 5 of 1920.

(a) *Civil P. C., S. 13—Execution of power of attorney to defend suits in foreign Courts amounts to submission—Person submitting as plaintiff cannot deny jurisdiction as defendant.*

The execution of a power of attorney authorsing an agent to conduct litigation in a foreign Court is a submission to jurisdiction. [37 *Mad.* 163 and *A. I. R.* 1925 *Mad.* 155 *Ref.*] A person who invokes the jurisdiction of a foreign Court as plaintiff cannot deny such jurisdiction as defendant. [P. 259, C. 1 and 2]

* (b) *Civil P. C., S. 13—Decision ex parte is one on merits.*

In a case in which there is no appearance and a decree is passed ex parte, the decision is still a decision on merits; *A. I. R.* 1925 *Mad.* 155, *Foll.* [P. 259, C. 2]

V. Narayana Aiyar and *A. Krishnaswami Aiyar*—for Appellants.

K. Narasimha Aiyar—for Respondents.

Judgment.—These are appeals in suits filed on judgments obtained in the Colombo Court against a partnership whose members were the defendants or their predecessors-in-interest. The lower Court has found that the partnership did not submit to the jurisdiction of the Colombo Court, but as against some of the defendants, there was jurisdiction because they individually submitted to that jurisdiction. It has been held in *Ramanathan Chettiar* v. *Kalimuthu Pillai* (1); and also in *Janoo Hassain Sait* v. *Mahamad Ohuthu*(2), that the execution of a power of attorney authorizing an agent to conduct litigation in a foreign Court is a submission to jurisdiction. In the present case, it is clear from the deed of partnership and from the power of attorney by one of the managing partners, Exs. H and J, that the holder of the power was authorized to file suits, to defend suits and to carry on all manner of proceedings in the Courts in Ceylon. It is suggested for the respondents that these documents were not in force at the time these suits were filed, because the partnership has been dissolved. The only evidence we have on this point is the statement of the plaintiff that he thinks that the partnership was dissolved at about the time of the riots and the statement of the 2nd defendant that the business of the firm ended in 1914, but the 2nd defendant adds :" I did not authorize my partners there to contest the suits in Ceylon," thus implying that there was a partnership existing. On this evidence, it is quite impossible to come to the conclusion that the partnership had been dissolved at the date on which the suits were filed. The mere fact that the partners ran away to India on account of the riots in Ceylon does not, as the Subordinate Judge remarks, terminate the partnership, and in the absence of any other evidence that the partnership was terminated, we must hold that this deed of partnership and the power of attorney were in full force on the date of the suits.

There is also an additional circumstance which would possibly give the Ceylon Court jurisdiction and that is the fact that the defendants' firm actually filed suit in the Ceylon Court, and having come in as plaintiffs can hardly be allowed as defendants to deny the jurisdiction which they themselves invoked; and in this connexion, I would refer to a judgment in Second Appeal No. 1492 of 1920 (not reported). The question whether the plaintiff obtained an assignment of the decrees benami for the defendants' firm was raised and contested in the Ceylon Court and consequently that finding is now conclusive under S. 13 of the Code of Civil Procedure.

The respondents raised a further point that in a case in which there was no appearance, the decision cannot be said to have been upon the merits, but this question has been fully discussed in *Janoo Hassain Sait* v. *Mahamad Ohuthu* (2), to which one of us was a party, and we are prepared to follow that decision again.

In the result the appeals must be allowed and there will be a decree in each case for the plaintiff as sued for with costs throughout.

Appeals allowed.

(1) [1914] 37 Mad. 163=24 M. L. J. 619.
(2) A. I. R. 1925 Mad. 155.

* A. I. R. 1926 Madras 260

JACKSON, J.

Tharamal Parkam Kalpathoor Thulicha Puthiatuth Sankaran Nair—Petitioner.

v.

Uruppoyil Ambu and *others*—Respondents.

Civil Revision Petition No. 776 of 1923, Decided on 8th September 1925, from the order of the Dist. Munsif, Payoli, D/- 15th March 1923, in R. E. P. No. 182 of 1922.

**Civil P. C., O. 21, Rr. 13 and 17—Application not conforming with R. 13—Court may or may not allow defect to be remedied.*

An applicant who files an application not in compliance with O. 21, R. 13, does so at his own risk, and he cannot demand, as of right, that it shall be regularized by the Court establishment. The Court has an option under O. 21, R. 17, either to reject the application or to allow the defect to be remedied within a time to be fixed by it. If it rejects the application its order is not illegal. *A. I. R.* 1924 *Mad.* 367 *Expl.*[P. 260, C, 2]

R. Govinda Menon—for Petitioner.

K. P. Ramakrishna Aiyar—for Respondents.

Judgment.—Petitioner seeks to revise the order of the District Munsif of Payoli in R. E. P. No. 182 of 1922 in S. C. S. No. 229 of 1910.

Petitioner obtained a decree on 7th March 1910. On 28th February 1922, he applied for attachment promising to furnish a list of immovables. The application was adjourned from time to time till July 1922, for the appointment of a guardian and then again from time to time till 15th March 1923, when it was finally dismissed, because the list of immovables was only produced on 5th April 1922, after the expiry of twelve years from 7th March 1910.

I cannot hold that the order is illegal. The Court has an option under O. 21, R. 17, either to reject the application or to allow the defect to be remedied within a time to be fixed by it. Possibly the Munsif might, even on 15th March 1923, have ordered the list of immovable properties to be produced on 5th April 1922, which would have dated the petition as from 28th February 1922, and would thus have saved the bar of limitation. But he cannot be said to have refused jurisdiction by declining to pass this remedial order. He is equally acting within his discretion when he finds that no time was fixed for remedying the defect, and, therefore, the application must date from the time when it fully conformed to O. 21, R. 13, which would be April 5. The ruling reported in *Vemuri Pitchayya* v *Rajah Yarlagadda Aknineedu* (1) turns on a converse case. There the District Munsif had exercised his discretion by fixing a time for the production of the descriptive schedule after the expiry of twelve years and this Court declined to interfere. But, of course, it was not held that the Munsif was bound to exercise his discretion in that manner. If he had liked to adopt the alternative he could have dismissed the application. Spencer, J. observes: "I am, with due respect, incined to think that the words 'on receiving an application for the execution of a decree' in R. 17 were not intended to make a party suffer for the failure of the Court establishment, which checks plaints and executions on their presentation, to at-once notice all defects in any application that may be received and that these words do not preclude a Court from making an order allowing a defect to be remedied at a later stage. This can hardly betaken as putting the whole responsibility upon the Court. An applicant who files an application not in compliance with O. 21, R. 13, does so at his own risk, and he cannot demand, as of right, that it shall be regularized by the Court establishment. In the present case, too, there is no question of suffering for the failure of the establishment because the petitioner knew all along that his application was defective, and remedied that defect on his own initiative.

This judgment has proceeded on the assumption warranted by *Vemuri Pitchyya* v. *Rajah Yarlagadda Ankineedu* (1) that a Court retains its discretion to order the defect to be remedied after the application has been admitted and registered, but before it has been finally disposed of in one of the ways mentioned in O. 21, R. 17 (1).

As regards *Asgar Ali* v. *Troilokya Nath Ghose* (2), which the lower Court cites, it may be observed that the point specifically referred to the Full Bench has now been settled by Cl. (2) of O. 21, R. 17, which is an addition to the old S. 245. If an application is defective by not containing a description of the property, it is none the less an application, provided

(1) A. I. R. 1924 Mad. 367.
(2) [1890] 17 Cal. 631 (F. B.).

that the Court has permitted the defect to be remedied. It also happened to be ruled in the same case that such permission could only be given before admission and registration (pp. 635—636). Whether "on receiving" in O. 21, R. 17 (1), requires such strict interpretation is the question discussed in *Vemuri Pitchayya* v. *Rajah Yarlagadda Ankineedu* (1). Of course it would make the petitioner's case considerably weaker, if it were held, following *Asgar Ali* v. *Troilokya Nath Ghose* (2) that the Munsif had no jurisdiction in 1923 to order the defect to be remedied; but even allowing in the light of *Vemuri Pitchayya* v. *Rajah Yarlagdda Ankineedu* (1) that he had jurisdiction, I do not find that he exercised it improperly.

The petition is dismissed with costs.

Petition dismissed.

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* A. I. R. 1926 Madras 261

KUMARASWAMI SASTRI, J.

Natarajan and *others*—Plaintiffs.

v.

P. M. A. Muthiah Chetty and *others*—Defendants.

Civil Suit No. 615 of 1919, Decided on 16th January 1925.

* (a) *Hindu Law—Maintenance—Illegitimate sons of Sudra are entitled to maintenance if the connexion of parents is continuous.*

In order to give rise to the rights of an illegitimate son of a Sudra either to succession or maintenance, all that is necessary is that the connexion between the parents should be continuous and neither adulterous nor incestuous. The fact that the woman kept is a dasi or a dancing-girl makes no difference as regards the rights of the illegitimate children. [P 262 C 2]

* (b) *Hindu Law— Maintenance — Persons, not entitled to succession are entitled to maintenance—Liability is on those who succeed—This applies to illegitimate Sudras as well as to Vysias—Maintenance can be made a charge.*

According to the Hindu Law, persons who by reason of certain circumstances are not entitled to a share in the estate, are entitled to maintenance by those to whom the estate passes by survivorship. The liability to maintain is on the coparceners by virtue of the fact that they take the estate of their deceased relations. Under the Hindu Law even though the parties are not Sudras but belong to the higher classes, e. g., Vysias, they still have got rights to get maintenance though they may have no right of succession. When the parties are Sudras there is the limitation that where the father is a member of a joint and undivided family and the properties of the father pass by survivorship to other members of the family, the illegitimate children of Sudras, in case the father had no self-acquired property, would not succeed to his estate but have only rights of maintenance out of the property, and such a maintenance can be made a charge on the family property. [P 263 C 1 & 2]

* (c) *Criminal P. C., S. 488—Section cannot take away the right under Hindu Law.*

The provision of a summary remedy under S. 488 cannot, unless an Act expressly says so, take away a right conferred by Hindu Law. [P 266 C 2]

* (d) *Hindu Law — Maintenance — Illegitimate daughter is entitled to maintenance until she is married or attains majority.*

So far as Hindu Law is concerned, the maintenance of females goes as a necessary corollary to their exclusion from inheritance and so long as they are members of the family, there is no reason why maintenance should not be given to them. If maintenance is given to an illegitimate daughter, it cannot be for her lifetime for she could not be in a better position than a legitimate daughter, but can only be given until she attains the age of 18 or is married earlier, and if she belongs to the caste of the dancing-girl, maintenance should continue till her marriage in case she were to marry or till she is able to earn her living according to the rules of her caste: (*Case-law considered.*) [P 266 C 2]

Nugent Grant and *K. S. Krishnaswami Aiyangar*—for Plaintiffs.

V. Radhakrishnayya and *S. Rangasami Aiyangar*—for Defendants.

Judgment.—This is a suit by the minor plaintiffs suing by their mother and next friend for maintenance. The case for the plaintiffs is that their mother Chinnammal was, shortly after she attained puberty, kept by the 1st defendant who is a Nattukkottai Chetty continuously and exclusively as his concubine, that the 1st and 2nd plaintiffs are his illegitimate sons and the third plaintiff his illegitimate daughter. Maintenance is claimed at Rs. 500 a month for all the three plaintiffs. The suit was originally filed against the 1st defendant only, but he died pending suit and Defendants 2 to 5, his undivided uncles and uncles' sons, have been brought on the record. The 1st defendant filed a written statement denying that the plaintiffs' mother Chinnammal was continuously kept by him as concubine from 1904 to 1919. He states that Chinnammal was a dancing-girl who did not abandon her usual mode of life which was that of prostitution and that he used to visit her occasionally. He denies that the plaintiffs are his children by Chinnammal. He denies that he was at any time maintaining the plaintiffs or began neglecting them from July 1919. He admits that demands were made by the plaintiff's mother but denies his liabi-

lity to maintain them. He denies that any charge can be created on the property mentioned in the plaint. He pleads that he belongs to the Nattukottai Chetty community and is a Vysia and that in any event, the claim for maintenance is excessive and that any maintenance that is granted can only be decreed till the plaintiffs attain majority. The 2nd defendant filed a written statement adopting the written statement of the 1st defendant and pleading in addition that the 1st defendant was a member of a joint undivided Hindu trading family possessed of considerable property, moveable and immovable, that he was not possessed of any separate property, that he died without leaving any issue, that his only son was adopted to his brother during his lifetime, that after the death of the 1st defendant all the family properties vested by survivorship in the other defendants and that the plaintiffs are not entitled to any relief as against the surviving coparceners. Defendants 3, 4, and 5 filed written statements adopting the statement of the 1st and 2nd defendants.

The following issues were settled :—

1. Was Chinnammal kept continuously or exclusively by the 1st defendant as concubine ?

2. Are the plaintiffs children of the 1st defendant by such continuous concubinage ?

3. Is the defendant bound to pay any maintenance to the plaintiffs and is the said maintenance a charge on the family property as alleged in the plaint ?

4. Is the defendant a Vysia ; and if so, are plaintiffs entitled to maintenance beyond the period of their majority ?

5. What maintenance, if any, are the plaintiffs entitled to ?

Chinnammal, the mother of the plaintiffs, belongs to a dancing-girl community. She was brought up by her aunt Bhagyammal who was dedicated to the temple at Thiruvalangadu. The 1st defendant is a member of an undivided family of Nattukottai Chetties, which family was dharmakartas of the temple at Thiruvalangadu. The 1st defendant was the dharmakarta of the temple along with the Rajah of Kalahasti. Chinnammal, according to the evidence, is now about 33 years old. She attained puberty, when she was 12 or 13 and was dedicated soon afterwards to the temple at Thiruvalangadu. The 1st defendant, who was looking after the duties of the Dharmakarta of the temple at that time was in addition the ijaradar of the place and he began to keep Chinnammal. The evidence, to which I shall refer later on in detail, is that from 1904 to 1919 he was keeping her. He was first visiting her at Thiruvalangadu and he then rented a house in Madras where Chinnammal was kept and where he was visiting her. He subsequently kept her in a house which he had purchased in Iyappa Chetty Street. The 1st defendant bore all her expenses and was paying her moneys in addition. He also made jewels for her for about Rs. 7,000 or Rs. 8,000. He built a house in Thirvalangadu for her and lands were also purchased for her, to the extent of 7 or 8 cawnies according to the evidence of the father, of which the father was in management for her. Chinnammal had a sister who was being kept by one Periyanna Chetty, who was a friend of the 1st defendant. In 1916 Chinnammal's sister filed a suit against Chinnammal and the 1st defendant for the recovery of certain jewels. A decree was passed on the 26th of April 1917, against both Chinnammal and the 1st defendant. Chinnammal and the 1st defendant continued to be friendly for two years afterwards and misunderstandings arose in 1919, after which notices passed between the parties and the 1st defendant gave up visiting her afterwards. As the 1st defendant has denied his liability to maintain the plaintiffs, Chinnammal's children, this suit was filed on the 19th September 1919. The 1st defendant died on the 23rd April 1921, and on his death 2 to 5 defendants were made parties. (His Lordship then discussed the evidence and held that chinnammal was under the protection of Muthiah Chetty, the 1st defendant, from 1904 or 1905 till 1919 and that the plaintiffs are the children born of the continuous concubinage of Muthiah Chetti.)

So far as the 1st and 2nd plaintiffs are concerned, the law has been clearly laid down in Madras that in order to give rise to the rights of an illegitimate son of a Sudra either to succession or maintenance, all that is necessary is that the connexion between the parents should be continuous and neither adulterous nor incestuous. The fact that the woman kept is a dasi or a dancing-girl makes no difference as regards the rights of the illegitimate children.

In *Soundararajan* v. *Arunachalam Chetty* (1) it was held by a Full Bench of this Court that an illegitimate son of a Sudra by a dancing-woman, who was by profession a prostitute, before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter, is entitled to get his share of the joint family properties after his father's death provided the connexion between his father and mother was not incestuous or adulterous. The whole law on the subject was reviewed and that was laid down as a condition requisite to give rights to illegitimate children of Sudras. In *Subramania Ayyar* v. *Rathnavelu Chetty* (2), I have discussed the law on the question of the right of illegitimate children and I have referred to all the cases on the subject. In the present case I have found that Chinnammal soon after her dedication and her attaining puberty, was in the continuous and exclusive concubinage of Muthiah Chetti till about 1919 and that the plaintiffs are the children born during that period and that, therefore, they have the rights of illegitimate children. Under the Hindu Law, even assuming that the parties are not Sudras but belong to the higher classes e.g., Vysias, they still have got rights to get maintenance though not the right of succession. When the parties are Sudras there is the limitation that where the father is a member of joint and undivided family and the properties of the father pass by survivorship to other members of the family the illegitimate children of Sudras, in case the father had no self-acquired property, would not succeed to his estate, but have only rights of maintenance out of the property. In the present case the evidence is to the effect that Muthiah Chetti was a member of a joint and undivided family, that he had no separate property and that after his death the properties passed to his coparceners who are his uncle and uncle's sons. It is, therefore, clear on the authorities that the plaintiffs are entitled to maintenance. The fact that the property has passed to coparceners is no ground for defeating their claim ; they would be entitled to a share if their father was a divided member of the family or had self-acquired properties and the Hindu Law is that, in cases of persons who by reason of certain circumstances are not entitled to a share in the estate, they are entitled to maintenance by those to whom the estate has passed by survivorship. The liability to maintain is on the coparceners by virtue of the fact that they take the estate of their deceased relations. In *Ananthaya* v. *Vishnu* (3), it was held that even among regenerate classes under the Mitakshara Law, an illegitimate son is entitled to maintenance, as long as he lives, in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance and that such a maintenance should be a charge on the family property. Muthusami Aiyar and Best, JJ., observe :

" There can be no doubt that,under the Mitakshara Law, by which the parties are governed, an illegitimate son is entitled to maintenance among the regenerate classes. The Smriti of Yajnavalkya and its exposition in the Mitakshara, Chapter I, S. 12, leave no room for doubt on this point. An illegitimate son is one of that class of persons, who, by reason of their exclusion from inheritance, are allowed maintenance by the Hindu Law, and it is clear from the facts that among Sudras he shares his father's property together with the legitimate son. It is urged on appellants' behalf that respondent is not entitled to maintenance after he attains his age, but we are unable to accede to this contention. The Smriti of Yajnavalkya awards maintenance to an illegitimate son, not as a provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives. We do not, however, desire to be understood as holding that his earnings, when he is able to earn, should not be considered in fixing the rate at which maintenance should be paid."

As regards the making it a charge upon the family property, their Lordships observe :

" As the maintenance awarded is the result of exclusion from inheritance and the Hindu theory is that the family

(1) [1916] 39 Mad. 186=29 M.L.J. 793=18 M.L.T. 552=2 L.W. 1247=(1916) 1 M.W.N. 31.

(2) [1917] 41 Mad. 44=22 M.L.T. 94=6 L.W. 149=(1917) M.W.N. 688=33 M.L.J. 224 (F.B.).

(3) [1894] 17 Mad. 160.

property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on family property as in the case of female members by being declared to be a charge."

Referring to the contention that the mother of the respondent in that case was only a dancing-girl by caste, they observe :

"But both the Courts find that the respondent is the illegitimate son of his father, and as this was a question of fact the finding is binding upon us. The position of the mother as a dancing-girl by caste is only important as showing that her connexion with the father was casual and not continued concubinage; but in the present case the Judge referred to evidence showing that the respondent's mother was the concubine of his father for a long period of years."

In *Kuppa* v. *Singaravelu* (4), it was held that the son of a Sudra who kept the wife of another person as a concubine for many years was entitled to recover maintenance. The point was that, as her connexion was adulterous, he could not succeed to a share, to which he would otherwise have succeeded, if the mother had not been a married woman and consequently he was entitled to maintenance. Turner, C. J., and Muthuswami Aiyar, J., observe :

"That an illegitimate son is not entitled to inherit to a Sudra under the Mitakshara law, if he is the offspring of incestuous or adulterous intercourse, has been already recognized by this Court in *Venkatachella Chetty* v. *Parvatham* (5). In *Muttusawmy Jagavera Yettappa Naicker* v. *Venktaswara Yettaya* (6), the Judicial Committee have, however, held confirming a decision of this Court that the natural son of a Hindu father recognized by him as such is entitled to maintenance, although he may not have been born in the house of his father or of a concubine possessing such a status as is necessary to entitle her son to inherit to his father."

In *Gopalasami Chetti* v. *Arunachellam Chetti* (7), it was held by Benson and Bashyam Ayyangar, JJ., that an illegitimate son was entitled to maintenance. The learned Judges observed that in fixing a compassionate rate of maintenance, regard should be had to the interest which the deceased father of the illegitimate son had in the joint family property and the position of his mother's family. It is enough to say that there is compassionate maintenance in case of disqualified heirs simply because the illegitimate man, who would succeed, if his father were separated, is ousted by the coparceners by virtue of the superior right of survivorship. In *Hargobind Kuari* v. *Dharam Singh* (8), it was held that illegitimate sons are entitled to maintenance from their father and his estate is liable for its payment. My attention has been called to *Panchapakesa Odayar* v. *Kanaka Ammal* (9), where it was held by Abdur Rahim and Srinivasa Aiyangar, JJ., that an illegitimate son of deceased Naidu had a right of maintenance against family property of which the putative father was the coparcener. It appears from the report that the decree of the lower Court awarded maintenance till the children attained majority, but there seems to have been no cross-appeal and no objection taken to that part of the decree, and there was no argument as to whether the maintenance should be for life or till majority. But as pointed out in *Ananthayya* v. *Vishnu* (3), already referred to, there is no principle under the Hindu Law where, when persons are given maintenance, the right (being a substitute of right for partition) can be subjected to any such limitation as to age. In *Nilmoney Singh Deo* v. *Baneshur* (10) the maintenance was refused, but that was a case arising under the Dhayabhaga law and the Judges state that, if it were under the Mitakshara, it would be different. So far therefore as the 1st and 2nd plaintiffs are concerned, there can be no doubt that they are entitled to maintenance from the joint family properties.

So far as the 3rd plaintiff the daughter, is concerned the position is different. She was born in 1908 and she is now 16 years old. It is contended by the defendant's vakil that there is no rule under the Hindu Law under which maintenance can be given in the case of

(4) [1885] 8 Mad. 325.
(5) 8 M. H. C. 134.
(6) [1867-69] 12 M. I. A. 203=2 B. L. R. 15=11 W. R. 6=2 Suther. 175=2 Sar. 395 (P. C.).
(7) [1904] 27 Mad. 32.
(8) [1884] 6 All. 329=(1884) A. W. N. 100.
(9) [1917] 6 L. W. 408=33 M. L. J. 455.
(10) [1879] 4 Cal. 91.

illegitimate daughters, the text only referring to dasi putra or son by the female slave and not to daughters. So far as the text is concerned, the Mitakshara deals with illegitimate children in Ch. I, S. 12. Vignaneswara refers to a text of Yajnavalkya which runs as follows: "Even a son begotten by a sudra by a female slave may take a share by the father's choice. But if the father be dead, the brother should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property, in default of daughter's sons."

Upon this, there is the commentary of Vignaneswara. It is argued that this section does not give any right to the daughters of the Sudras begotten by a Sudra. So far as I can see, there are no texts which refer in any express terms to the case of illegitimate daughters and which regulate their rights, nor are there any decisions which expressly decide this question. In *Parvati* v *Ganapatrao Balal* (11) the question was raised as to whether an illegitimate daughter was entitled to maintenance. It was raised because the father had disposed of certain joint family properties and the question arose whether that disposition was valid. Sir Charles Sargent, C. J., and Bayley, J., dealt with the question and were of opinion that there was no separate text. At page 183 they observe:

"Moreover, the right of illegitimate children to be maintained by the family is clearly an exceptional one as shown by the language of the text; and as the right to maintenance is laid down in terms in favour only of illegitimate sons, the proper inference, from the absence of any express provision for daughters, is, we think, that they are not contemplated as having the same right."

They go on to observe, "that even if the daughters were entitled to simple maintenance out of the family property, it was not within the competence of the father to alienate the share for that purpose." When they rest the decision on that ground, although it is obiter, it is a weighty dictum and is entitled to great weight in estimating the rights of illegitimate daughters. In *Bhikya* v. *Balu* (12) the question was raised whether under the Hindu Law, among the Sudras, an illegitimate daughter can succeed to her father's property in preference to the son of a divided brother. Mr Justice Batchelor and Mr. Justice Chaubal negatived the right of the illegitimate daughter to succeed on the ground that the Mitakshara referred only to an illegitimate son and not to an illegitimate daughter.

Benson and Bashyam Aiyangar, JJ., in *Lingappa Goundan* v. *Esudasan* (13) hold that though an illegitimate son, not a Hindu, is entitled to claim maintenance from his father under S. 488 of the Criminal Procedure Code, such claim can only be enforced during the lifetime of the father and the right terminates with his death. This case was, however, a case where the illegitimate son of a Hindu was born to a woman who was not a Hindu and was, therefore, not in the pale of Hinduism. The learned Judges held that it can only be in force in the manner provided by S. 488 of the Criminal Procedure Code, and not otherwise.

It is contended by Mr. K. S. Krishnaswami Aiyangar, that except in cases of aged parents, wife and infant children, the Hindu Law nowhere refers to the rights of maintenance of females by any separate text and that the right of maintenance comes only incidentally, and that under the Hindu Law, where a person who was a member of a Hindu family was excluded from a share, the law always allows maintenance to compensate for this exclusion. It is also argued that ancient Hindu Law takes no notice of individuals but only of the family as a corporation that the right of maintenance was cast upon the manager of the head of the family and that no special text was required, such right being incidental to the very nature of the corporate joint family. It is also argued that among Sudras, the illegitimate children are members of the family of their father and that they being members of the family of their father they are entitled to maintenance out of the family property by the person who is in charge of the family properties and all that you have to see is whether the person who claims the maintenance is an illegitimate child and can be said to be member of the family of the deceased. It is also argued, it is clear from the decision in *Sadu* v. *Baiza* (14) which was approved of by the

(11) [1894] 18 Bom. 177.
(12) [1908] 32 Bom. 562=10 Bom. L. R. 736.
(13) [1904] 27 Mad. 13.
(14) [1879] 4 Bom. 37.

Privy Council in *Jogendro Bhupati Hurrochandra Mahapatra* v. *Nityanand Man Singh* (15) that the illegitimate children can be members of the coparcenary with the legitimate children and that, being such members of the coparcenary, they are entitled to succeed by survivorship. There is on reason why daughters should not be members of the family. Reference has been made to the decision in *Subramania Ayyar* v. *Ratnavelu Chetti* (2) where it has been held that there is a right of inheritance on the ground of relationship and it is argued that illegitimate daughters may be treated as members of the family for all purposes except for the purposes of inheritance. Reference has been made to West and Buhler, p. 415 and *Ghana Kanta Mohanta* v. *Gereli* (16) where it was held that under the Hindu Law as well as under the general law, the father of an illegitimate child is bound to provide for its maintenance. I agree with the contention urged by plaintiffs' counsel. I have in *Subramania Aiyar* v. *Ratnavelu Chetty* (2) gone into the position of an illegitimate son in the family and it seems to me to be clear that having regard to the decisions in *Sadu* v. *Baiza* (14) and *Parvati* v. *Ganapatrao Balal* (11), where it was held that an illegitimate son can be held to belong to the coparcenary with his legitimate brother and having regard to the decisions of this Court where the right of a representative is given to an illegitimate son, I find it difficult to see why the illegitimate daughter should not be a member of the family of the illegitimate father and if she is a member of the family of the illegitimate father, it seems to me under the general law that she will be entitled to maintenance.

I am of opinion that in the absence of any authority directly against the view, there is no reason either in justice or equity to hold that illegitimate daughters are entitled to no right against the putative father. As observed in *Ghana Kanta Mohanta* v. *Gereli* (16), apart from Hindu Law, maintenance has to be awarded on general principles ; and if a father is bound to maintain his illegitimate daughter, his co-parceners who took his property by survivorship are equally bound to do so. The case was the case of an illegitimate daughter. I think that the provision in the Criminal Procedure Code would not take away the antecedent Hindu Law right. The provision of a summary remedy cannot, unless the Act expressly says so, take away a right confered by Hindu Law. There is great force in the contention of Mr. K. S. Krishnaswami Aiyangar that so far as Hindu Law is concerned, the maintenance of females goes as a necessary corollary to their exclusion from inheritance and so long as they are members of the family, there is no reason why maintenance should not be given to them. Mr. K. S. Krishnaswami Aiyangar admits that if maintenance is given to an illegitimate daughter, it cannot be for her lifetime for she could not be in a better position than a legitimate daughter and I think that so far as the 3rd plaintiff is concerned maintenance can only be given, until she attains the age of 18 or is married earlier. As she belongs to the caste of the dancing-girl maintenance should continue till her marriage in case she were to marry or till she is able to earn her living according to the rules of her caste. I am of opinion that the plaintiffs are entitled to maintenance.

The fourth issue relates to the question whether the defendants are Vysias or Dvijas and it has not been pressed or argued.

The fifth issue is, to what rate of maintenance the parties are entitled. As regards the rate of maintenance, the defendants in their written statement say that they belong to a wealthy class of Chettis. In the notice sent by Gurusami Chetti on behalf of the plaintiffs, they say that the property is worth 30 lakhs and there is no specific denial of in the reply. Mr. Radhakrishnayya has put in Ex. JJ., the income-tax assessment which shows that the property has been assessed at Rs. 50,000 by the income tax authorities but that relates only to the income from the business carried on. The defendants have not adduced any evidence as to what other properties they possess, but it has come out in evidence that they own large properties and that they have also purchased a village for 1&1/2 lakhs of rupees. Muthiah Chetti would have been entitled to 1/8 share of the family properties, if he had effected partition during his lifetime. Chinnammal

(15) [1891] 18 Cal. 151=17 I.A. 128=5 Sar 596 (P.C.).
(16) [1905] 32 Cal. 479=13 C.W.N. 150.

would have no rights of maintenance after she was discarded by Muthiah Chetti ; whereas her children would, under the law, be entitled to maintenance for they would be in the position of excluded coparceners. On the other hand, one has to remember that in these cases maintenance should depend not only on the share of Muthiah Chetty but other relations which he has got. Certain allowance is made for the rights of coparceners. Muthiah Chetti has left two widows who are now alive.

Having regard to all the facts of the case, I think that a sum of Rs. 100 a month for each of the 1st and 2nd plaintiffs during their lifetime and Rs. 50 a month for the 3rd plaintiff till she attains the age of 18, will be a fair sum to allow.

As regards costs I think the defendants have not only raised a false plea but have also supported it by perjured evidence and I think the defendants must pay the plaintiffs' costs. Certified for two counsel.

The maintenance will be a charge upon the property (242, Police Commssioner's Road), as it is alleged that the property mentioned in the plaint has been disposed of. The maintenance will commence from the date of the plaint and they are entitled to it from the date of the plaint to this date and future maintenance to be payable on the 16th of each succeeding month.

Suit decreed.

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* A. I. R. 1926 Madras 267

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(Kasturi) Narasimha Suryanarayana—6th Defendant—Appellant.

v.

Achuthana Lakshminarasimham and *others*—Plaintiffs 1 to 5 and Defendants 1 to 5 and 7—Respondents.

Appeals Nos. 258 and 333 of 1922, Decided on 26th August 1925, against the decree of the Addl. Sub-J., Guntur, D/- 30th January 1922.

* (a) *Civil P. C., S. 92—Temple trust—Hindus of neighbouring villages attending the temple on important occasions can sue under S. 92.*

Persons belonging to neighbouring villages who attend the suit temple on important occasions and also celebrate at that temple their marriages are persons having an interest in the temple trust within the meaning of S.92. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency, and the mere circumstance that the plaintiffs do not habitually resort to a temple is not sufficient to debar them from exercising the right under the section : *A. I. R.* 1924 *P. C.* 221, *Rel. on.* [P, 268, C, 2]

(b) *Civil P. C., S. 11—Trust suit—Trust property represented—Decision in the suit is res judicata against representatives of trust in subsequent suit.*

When in a suit, where the trust is properly represented, after real and genuine contest a decision is given, it is absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be retried. [P. 269, C. 2]

G. Lakshmanna and *K. Kameswara Rao*—for Appellant.

P. R. Ganapathi Aiyar, V. Krishna Mohan, G. Krishna Arya and *Viraraghavalu*—for Respondents.

Venkatasubba Rao, J.—This is a suit instituted under S. 92 of the Civil Procedure Code. It relates to the temple dedicated to Chennakeswaraswami at Cherukupalli, Repalle taluq. There are five plaintiffs and the plaint asks for reliefs contemplated by S. 92, Civil P. C. The learned Subordinate Judge has passed a decree and the present appeals have been filed by the defendants in the suit.

The appellants in Appeal No. 333 of 1922, firstly contend that the plaintiffs are not persons having an interest in the trust within the meaning of S. 92 and the suit, therefore, does not lie. The lower Court has rejected this plea, and in my opinion, rightly. The 1st plaintiff is a resident of Arumbaka, and Cherukupalli, where the temple is situated, is a hamlet of this place. The 1st plaintiff's marriage was performed at the temple in question. He is the karnam of Cherukupalli. The 2nd plaintiff resides at Balusulapaliem which is at a distance of two miles from Cherukupalli. The 3rd, 4th and 5th plaintiffs reside at Sirupudi which is within three miles from the suit temple. At both these places the temple owns lands. According to the evidence, persons belonging to these villages attend the suit temple on important occasions and they also celebrate at that temple their marriages.

Can it be said that in these circumstances the plaintiffs are not person having an interest in the trust ? Th

case that has been most strongly relied on by the appellants is *T. R. Ramchandra Aiyar* v. *Parameswaran Unni* (1): but, in my opinion; this case does not support them. Whether the plaintiffs have an interest in the trust or not is a pure question of fact and the case cited must be understood with reference to the facts of that case. All that it decided is, that although prima facie any Hindu has a right to worship in any Hindu temple it does not necessarily follow that every Hindu has in relation to every Hindu temple the interest which gives him the right to sue under S. 92. The danger of the extreme view contended for in that case is very well pointed out by Sir John Wallis, C. J., for, according to that view, any Hindu out of the millions of Hindus in India may insitute a suit in respect of any temple. Coutts-Trotter, J. (as he then was) also refers to the absurdity of of this position by pointing out that a Hindu resident of Peshawar cannot be said to have an interest within the meaning of S. 92 in a temple in Malabar. While avoiding this extreme view, one must not commit the mistake of going to the other extreme. The view now urged by the appellants is that unless a person habitually resorts to a temple for worship he cannot be said to have an interest under the section. As pointed out in one of the judgments in that very case, the Christian conception of a parish with special local rights in its parishioners is utterly foreign to the Hindu mind. This fact must not be lost sight of when dealing with Hindu institutions and there is nothing in S. 92 to compel the Courts to accept the very limited and narrow construction suggested by the appellants. A Hindu will feel surprised to be told that he has no interest in a temple which is within a few yards of his residence, because he does not habitually attend at that temple for purposes of worship. To worship the god in the temple it may not be always necessary to resort to the temple. Can it be said that a man who lives in the vicinity of a temple and regularly comes out to worship the idol when it is taken in a procession is not a person having an interets in that temple? The Civil P. C. of 1877 (S. 539) provided that the persons authorized to sue must have a "direct interest" in the trust. The word "direct" is omitted in the present Code and the very object of this change will be defeated if the narrow construction suggested is adopted. The interest which the plaintiffs possess must be real and not remote, must be substantial and not illusory, must be an existing interest and not a mere contingency. The most authoritative statement of the law is that contained in *Vaidyanatha Aiyar* v. *Swaminatha Aiyar* (2). Their Lordships of the Judicial Committee say: "That the bare possibility however remote, that a Hindu might desire to resort to a particular temple does not give him an interest under S. 92 in the trust." This is the limitation we must recognize, but it is not a proper inference from this, that whatever may be the proved facts, the mere circumstance that the plaintiffs do not habitually resort to a temple is sufficient to debar them from exercising the right under the section.

The next point raised in the appeal relates to the question of res judicata. Defendants 1 to 5 are hereditary archakas and they claim with reference to a large extent of the property, the subject-matter of the suit, that it was in the remote past set apart as a special endowment for (1) archaka service, and (2) Nitya Dhupa Dheepa Naivedyam. According to their case, their ancestors who were archakas were put into possession of these lands and they were to perform the archaka services and provide the articles of worship. In other words, it was a unified or a combined endowment and from the income of the property moneys were to be spent not only for the purchase of the materials but also for remunerating their own services, i. e., the services of the archakas. Has this question become res judicata by reason of the judgment of the High Court (in Appeal No. 283 of 1914) in the previous Suit No. 77 of 1910? The present 6th defendant, the hereditary trustee, was the plaintiff, and the present Defendants 1 to 5, the archakas, were the contesting defendants in that suit. The hereditary trustee claimed in it possession of these properties and the archakas resisted that claim. They put forward in that suit the same defence as they have now put forward in this. In paragraph 3 in the written statement in

(1) [1918] 42 Mad. 360=36 M. L. J. 396=25 M. L. T. 304=9 L. W. 492=(1919) M. W. N. 370.

(2) A. I. R. 1924 P. C. 221.

C. S. No. 77 of 1910 the archakas claimed that the lands in question "were originally endowed specifically for archaka service which consists of daily worship, naivedyam and lighting." A portion of the second issue in that case runs thus:—

"Were the lands originally granted for archaka service and are the defendants entitled to hold them without the interference of the Dharmakartha, if any?"

The case was disposed of finally by the learned Judges of this Court and the contention of the defendants was accepted by them. We have carefully read the judgment and we cannot help coming to this conclusion. After referring to the contention raised in para. 3 of the written statement the learned Judges said :—

" The origin of these endowments is not known but the evidence is that these lands have been in the possession, always from time immemorial, of the archakas and that they have applied the profits for the services mentioned in the written statement."

They decided that the trustee was not entitled to possession of these lands and made the following observation:—

"The long possession of the defendants raises a strong presumption in their favour that their possession had a legal origin."

Not only did the learned Judges find that the defendants were entitled as against the trustee to remain in possession but they also found that their possession had a legal origin. What can this legal origin be referred to ? The archakas claimed that the lands had been put in their possession for certain specific purposes mentioned. That claim the High Court recognized in the earlier part of the judgment and the finding in favour of a legal origin can only refer to the recognition of the same claims as then put forward.

The respondents' learned vakil has laid stress upon the following portion of the judgment :—

"As regards the possession of these lands, we are of opinion that the plaintiff has made out no cause of action."

What the learned Judges meant to say was, that in a suit framed as one for possession the plaintiff could get no relief on their findings. Nothing more could have been meant. They merely intended to say that although the contention of the archakas was well founded, nevertheless if breach of trust or mismanagement could be shown on their part, the plaintiff could obtain relief in appropriate proceedings. This does not mean that they decided only the question of possession. I am therefore clearly of the opinion that the archakas put forward their right in the previous suit, that it formed the subject of an issue and that in the final judgment in the case the High Court upheld that right. Are then the plaintiffs not bound by that adjudication ? When in a suit where the trust is properly represented, after real and genuine contest a decision is given, it will be absurd to hold that persons not parties to the previous suit, although they may have an interest in the trust, can ask the matter to be re-opened and the question to be re-tried. I am satisfied that the plea of res judicata must prevail.

The learned Subordinate Judge has disallowed the claim of the defendants to about 23 acres out of 130 acres claimed by them. He has found that this land had been endowed for the lighting of the akhandam. This finding has not been questioned in the appeal and we confirm it.

The result is that, after excluding the lands set apart for the akhandam, the rest of the land out of 130 acres will be declared as having been set apart for the archaka services and for nitya dhupa. dheepa, naivedyam.

In the case of this endowment there arises a conflict between interest and duty. The position of the archakas offers to them the temptation of spending as little as possible on nitya dhupa deepa naivedyam, for whatever is not spent in that way may be retained by themselves as remuneration for their own services. We therefore think it necessary that we should fix the proportion. 3 7ths of the net produce we desire to set apart for purposes connected with nitya dhupa dheepa naivedyam and the archakas will be at liberty to retain the balance, that is 4/7ths as remuneration for the archaka services.

Lastly remains the question (raised in App. 258 of 1922) : Is it necessary to remove the hereditary trustee ? In our opinion it is neither necessary nor desirable. The temple is in a petty village and it is not likely that the services of an efficient trustee will be available. Most of the charges against the trustee show

that he has been guilty of neglect, but it must be said that he has not wasted or alienated the corpus and has for a long time been fighting with the archakas with a view to get for the temple the properties in their possession. This temple, though well endowed, is apparently not an important one, and the neglect of the trustee has aroused little public attention. It seems to us that the present suit was directed more against the archakas than against the trustees. The decision in the previous suit having been against the trustee this was a fresh attempt made in the same direction to get the lands claimed as a special endowment declared to belong to the general endowment of the temple. We do not think that, in the interests of the temple, the 6th defendant should be removed from the office of trustee. We declare that the office is hereditary in his family and we direct that he shall continue as trustee.

The archakas will be directed to deliver up possession to the 6th defendant of all lands which have not been declared to be the subject of the special endowment referred to above. The archakas will be entitled to retain with themselves 4/7ths of the net produce of the lands forming the special endowment and to hand over to the 6th defendant the remaining 3/7ths.

We understand that the interim trustee appointed by the Court has certain moneys with him either in his hands or in deposit in Court. These sums he will be directed to pay into the hands of the 6th defendant who shall deal with them in accordance with the rights declared in their judgment.

In the scheme to be framed, it will not be necessary to insert any provision regarding the repairing or the rebuilding of the temple. These are matters which, no doubt, the trustee will attend to at an early date in the discharge of his duties.

Each party will bear his costs in these appeals. So far as the costs of the suit in the lower Court are concerned, the plaintiffs will get 2/3rds of their costs from the 6th defendant from and out of the temple funds: the balance of 1/3rd they shall get from Defendants 1 to 5 and 7 personally.

The parties are required to bring in a scheme to-morrow.

A copy of this judgment and the scheme will be forwarded to the Religious Endowments Board.

Madhavan Nair, J.—I agree with the judgment just now delivered by my learned brother. As regards the meaning of the term "interest" as used in S. 92, Civil Procedure Code, I have already expressed my opinion in my judgment in A. S. No. 88 of 1922 and for that reason I do not think it necessary to further deal with it here. On the facts of this case, I am clearly satisfied that the plaintiffs have the interest contemplated by S. 92, Civil Procedure Code.

The following scheme has been submitted to us and we approve of it :—

1. The office of trustee shall be hereditary in the family of the 6th defendant. He shall be the first trustee under this scheme and shall hold office for life.

2. The trustee shall ordinarily reside in Repalle taluq, Guntur district.

3. The trustee shall utilize the 3/7ths of the income to be paid by the archakas which has been referred to in the judgment for the nitya dhupa deepa naivedyam.

4. The archakas shall be permitted to live in the house and site described in Sch. A belonging to the temple.

5. Save as is expressly provided herein the provisions of the Religious Endowments Act (Madras Act I of 1925) shall apply to the hereditary trustee and all matters connected with him or the management of the trust.

Scheme settled.

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* A. I. R. 1926 Madras 270

VENKATASUBBA RAO, J.

Malabar Forest and *Rubber Company, Limited, Bombay* — Defendants—Appellants.

v.

D. H. Macleod and *another*—Plaintiffs—Respondents.

Second Appeal No. 474 of 1923, Decided on 14th April 1925, from the decree of the Dist. J., South Malabar, in A. S. No. 104 of 1922.

* *Master and servant—Wrongful dismissal—If the servant is incompetent to discharge duties given to him, he is not entitled to recover damages for wrongful dismissal by his master.*

A servant was employed under a company as superintendent of a certain estate, the main pro-

ducts of which being tea and timber. The servant knew nothing about timber and the company incurred losses on account of his incompetency and he was dismissed. In the letter of dismissal it was stated that the company was thankful to the servant for his services.

Held **: that the servant having been proved to be incompetent for the duties of the office which he undertook to discharge, the company could dispense with his services and that the servant was not entitled to recover damages for wrongful dismissal by the company.** [P. 272, C. 1]

K. Bashyam Aiyangar and *T. S. Srinivasan*—for Appellants.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar*—for Respondents.

Judgment.— The plaintiff has instituted this suit for recovery of damages in respect of wrongful dismissal. The defendant company justifies its action by alleging that the plaintiff was incompetent and grossly negligent in the discharge of his duties. The trial Court has decided against the plaintiff finding that the dismissal was justified, but on appeal, the decision of the Court of the first Instance was reversed by the District Judge.

The lower appellate Court in effect finds that the plaintiff was incompetent, in regard to work that pertained to timber but is of the opinion that that circumstance does not entitle the defendant company to dismiss the plaintiff. Is this position correct ? Before the employment in question, the plaintiff had been working at Aralam. Regarding his duties at that place, he says " In Aralam, it was all timber and no tea." As the conditions at Aralam were not to his liking, he sought employment at Kottanad under the defendant company. I may observe that the plaintiff some years previously had an interest in this very Kottanad Estate and having become greatly indebted got it sold and the defendant company became the purchaser. The plaintiff's designation was " Superintendent of the Kottanad Estates." What then were his duties ? Part of his work related to tea. The plaintiff having said this, deposes next:

" Timber was the other source of income in Kottanad. I was the sole Superintendent and I had also to get the timber work done. I told Mr. Chari that there was a lot of timber on the estate."

Mr. Chari referred to Mr. Raghavachari who negotiated the purchase of the Kottanad Estate for the defendant company. Let me now turn to another admission of the plaintiff.

" I do not claim to be a timber expert. I know nothing practically about timber."

Indeed, the District Judge makes a point of the plaintiff's ignorance of the work connected with timber. Exs. 1 and 2 betray such a woeful lack of knowledge that no course was possible to the plaintiff other than admitting that he was utterly ignorant of everything that was in any way connected with timber.

The extracts I have given above from the plaintiff's deposition itself show beyond any possibility of doubt : (1) that it was a part of his duty as Superintendent to do work connected with timber ; and (2) that he was utterly incompetent to discharge this part of his duty.

The result of this incompetence has been that the defendants have suffered undoubted loss. I shall take only two outstanding facts.

The plaintiff had to get timber out for the purpose of making broad gauge sleepers. The District Judge finds as a fact that the timber was in many instances not of the required length. As a result, the Company suffered considerable damage. These facts are not denied. But the District Judge disposes of the case in a very curious mannnr. He says that the plaintiff was not given specific instructions on the point, meaning thereby, that he was not specifically told that the required measurement was 9 feet 6 inches. The plaintiff did not put forward any such case. On the contrary, he says very distinctly that he gave definite instructions to the maistry to cut sleepers of this dimension and that accordingly sleepers of the required measurement were in fact cut. I shall once again reproduce his own words.

" I gave strict injunction about the length and gave him a rod of 9 feet 6 inches. . . . . .I personally knew that all the logs were cut into 9 feet 6 inches in length. . . . . .I tested the whole lot : I saw and satisfied myself that every piece was long enough for broad gauge sleepers".

It is found, as I have said, that this version is not true and that many of the pieces cut were not suitable for the purpose. Where then does absence of instructions come in ? I am afraid the

District Judge has completely misunderstood the case.

Secondly the defendant complains that the plaintiff negligently overpaid the maistry. Apart from other allegations made in this respect, it now transpires, if the plaintiff is to be believed, that the maistry disobeyed instructions and cut the timber into pieces of insufficient lengths. But still the plaintiff would say: "When I left the estate I paid Rs. 1,050-8-0 to Cherikan Maistry and the balance due to him was only Rs. 8-1-0."

It is unnecessary to enquire into other heads of incompetence and negligence. On the findings of the District Judge I am clearly of the opinion that it has been amply proved that the dismissal was for justifying causes.

Mr. Ramachandra Aiyar contends that I must not interfere with any finding of fact. Perfectly true. I have not tried to form my opinion on the evidence.

One point that is pressed against the defendant company is that in the letter of dismissal it was stated that the company was thankful to the plaintiff for the services rendered. Mr. Sabnis has explained this by saying that he intended the statement to be ironical. This is clearly not true and on account of this explanation I was naturally disposed to view the defendant's conduct with some suspicion. It is unfortunate that the true explanation was not offered. A careful perusal of the record, however, shows that the defendants were utterly dissatisfied with the plaintiff; that on that account they transferred him to Tamaracheri within about 6 months of his employment; and that they thought it prudent to get rid of him amicably and even offered a month's wages in lieu of notice thanking him for his past services, but that it was found that the plaintiff was on the war path asserting what he fancied to be his legal rights and that the defendants were then finally driven in self-defence to retaliate by going up to a lawyer and withdrawing the offer, thus taking up, what they were advised, was strictly a legal stand. Though the defendants have deviated from truth in this respect, I cannot allow that fact to stand in their way and I am satisfied that the decision of the District Judge is in law wrong and I accordingly allow the appeal and dismiss the suit with costs throughout.

Appeal allowed.

A. I. R. 1926 Madras 272

DEVADOSS AND WALLER, JJ.

T. R. M. S. Ramanathan Chetti—Decree-holder—Appellant.

v.

Nalla Veerappa Pillai—Judgment-debtor—Respondent.

Appeal No. 303 of 1923, Decided on 23th September 1925, against the order of the Dist. J., Ramnad, at Madura, D/- 4th January 1923.

Execution—Court should not pass order as "proceedings closed" or the like.

No Court which executes a decree can pass such an order "Proceedings closed" or "Petition lodged" or "The matter is held over" for statistical purposes. It is the duty of the executing Court to execute a decree and it can dismiss the application, only if the creditor does not take proper steps and does not help the Court in executing the decree. [P 272 C 2]

R. Srinivasa Aiyanyar and *K. S. Narayana Aiyangar*—for Appellant.

R. Kesava Aiyangar—for Respondent.

Judgment.—The District Judge passed the following order:—

"Proceedings closed. Sale held on the 31st July 1922 is confirmed."

We have pointed out in more cases than one that no Court which executes a decree can pass such an order as "Proceedings closed" or "Petition lodged" or "The matter is held over" for statistical purposes. It is the duty of the executing Court to execute a decree and it could dismiss the application, only if the creditor does not take proper steps and does not help the Court in executing the decree.

We, therefore, set aside the order of the District Judge and direct him to restore the application to file and dispose of it according to law.

Costs will abide the result.

Order set aside.

* * A. I. R. 1926 Madras 273

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

Janakiram Chetty and *others*—Defendants—Appellants.

v.

G. C. Nagamony Mudaliar — Plaintiff —Respondent.

Original Side Appeals Nos. 38, 40 and 44 of 1924, Decided on 23rd April 1925, from the decree of Devadoss, J., D/- 28th February 1924.

(a) *Hindu Law—Joint family—Existence of property is not a necessary incident.*

There is nothing in Hindu Law which states that the properties to be called joint family properties should be immovable properties or that there should be any minimum value which is required to constitute a joint family. Nor is there anything in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family. A joint family is composed of persons who live together and who are joint in food and worship and the possession of property is not a condition precedent to the establishment of their status. [P. 274, C. 2.P. 275, C, 1]

(b) *Hindu Law—Partition—Possession of property is not necessary to decide status.*

Possession of property is not a necessary element in determining whether persons are joint or separate, [P. 275, C. 1]

* * (c) *Hindu Law—Will—Bequest to persons who would not inherit to testator or would inherit his property as obstructed heritage—No presumption about legatees taking as joint tenants exists.*

Per Kumaraswami Sastri, J.—In cases where the donees are the sons and grandsons and would succeed to the property of the testator in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn, where the Will is silent as to the nature of the estate conferred, that they would take it as unobstructed heritage with the same incidents as would follow if there was no Will. But where the donees, though members of a joint undivided family, are not related to the testator or though related to him would in the absence of any Will either immediately or at a later stage take the property as obstructed heritage and only as tenants-in-common there is no reason for applying the presumption that the testator by devising the property to them intended that there should be a joint tenancy. [P. 278, C. 1]

Per Krishnan, J.—Where there is nothing in the Will to show definitely and clearly that the bequest was to the family and not to the individual members thereof separately, the ordinary presumption that when there are several joint donees, they take as tenants-in-common, applies.

[P. 279, C. 2. P, 280, C. 1]

A. Krishnaswami Aiyar, *K. Kajah Aiyar* and *K. G. Srinivasa Aiyar*—for Appellants.

K. Krishnamachariar and *K. M. Bashyam Aiyangar*—for Respondent.

Kumaraswami Sastry, J.—The only question raised in these appeals is whether the respondent who is legatee under the Will of one O. Kandaswamy Mudaliar took the property bequeathed under the Will as a tenant-in-common with his father and brothers or as a joint tenant.

The Will which has been probated is filed as Ex. F. The testator Kandaswamy Mudaliar died leaving a widow, three sons and two daughters. He also left two brothers one of whom was Kadirvelu Mudaliar (father of the respondent) who was appointed executor. There was another brother, Krishnaswamy Mudaliar, who had two sons. So far as the respondent is concerned, the terms of the Will concerning him are very short. Paragraph 4 of the Will says:

"Items 4, 5, 6, 7, 8 and 9 under assets in paragraph 1, above, I bequeath and leave to my brother G. Kadirvelu Mudaliar and his sons."

Paragraph 5 goes on to state that in consideration of the help given by Kadirvelu Mudaliar as regards the business carried on by the testator, he bequeaths to Kadirvelu Mudaliar and his two sons a half-share in the stationery business carried on in the Minerva Press and Thompson and Company, that the stationery business should be conducted by Thompson and Co., that the profits arising from the same, as per accounts separately and correctly maintained, should be divided equally every year before the end of March between his sons, on the one part, and his brother and his sons on the other. In case his sons do not agree with his brother and his sons, the stationery and stock-in-trade were to be valued and the testator's sons were to give Kadirvelu and his sons one-half of the estimated value.

It appears from the evidence, and it is not disputed before us, that the testator and his brothers were members of a divided family and that the brothers and their children were living together as members of an undivided family, though it is contended by the respondent's vakil that there was no joint family property owned by Kadirvelu and his sons who were the legatees aforesaid. It is also clear from the evidence that Kadirvelu and his sons would not, in the ordinary course, succeed to the properties of the testator as the testator left a widow, sons and daughters and that Kadirvelu and his sons were, at best, only remote heirs.

So far as the terms of the Will go, there is very little to indicate that Kadirvelu and his sons were to take the property as members of a joint family with rights of survivorship. It is argued by the vakil for the appellants, that the fact that the testator gives the property to Kadirvelu and his sons without naming his sons and the fact that in paragraph 10 of the Will the gift to the daughters provides for a sale of the house and the division of the sale proceeds equally among the daughters, if necessary, indicate that the gift to Kadirvelu and his sons was a gift to them as members of a joint family. It is argued by the respondent's vakil that the fact that paragraph 3 of the Will, which gives certain items to the sons of the testator, expressly states that the property shall be the common property of his sons, whereas the next paragraph, which contains a gift to Kadirvelu and his sons does not make any such statement as to the property being common property shows that the testator's intention was the other way. It is also stated that the clause as regards the daughters in paragraph 10 of the Will was so worded, because one of the daughters was omitted, and so it was necessary to mention the names, and that as the property was a house which could not be divided equally, provision had to be made for the distribution of the sale proceeds. If we had to depend solely on the Will and look to its terms for a construction of the estate which Kadirvelu and his sons took, I do not think it can be said that there was an intention displayed by the testator in express language to indicate that Kadirvelu and his sons took the property as members of a joint family with all the rights and obligations arising therefrom. Some reliance was placed by the vakil for the respondent on the fact that Kadirvelu, who was executor and trustee under the Will, shortly after the Will executed conveyances to the various legatees including himself and his sons and that the terms of these conveyances indicate that the donees took the property as tenants-in-common and not as joint tenants.

It was argued that even assuming that the intention of the testator was that the gift was to be taken by them as members of a joint family, the act of the executor in conveying the estate to the various legatees as tenants-in-common was sufficient to impress the legacy with that character, whatever may have been the intention of the testator. This question was not raised in the pleadings nor was it put in issue, and as pointed out by the vakil for the appellants, there are subsequent documents which show the dealings with the property by the adult members of the joint family, and I do not think this aspect of the question can be raised for the first time in appeal, as it is a mixed question of law and fact as to how the property was treated after the death of the testator.

Another question which was raised before the learned trial Judge was whether, if Kadirvelu and his sons had not joint family properties at the date of the gift, it can be said that they are members of a joint undivided Hindu family so as to call in aid the presumption that the gift to them was as joint tenants. The argument that found favour with the trial Judge was that, if there was no joint family property in existence, there could be no joint family. In cases where persons live together and are joint in food and worship, it is difficult to conceive of their possessing no property, not even the ordinary household articles which they would enjoy in common. There is nothing in Hindu Law which states that the properties should be immovable properties or that there should be any minimum value which is required to constitute a joint family. It is, therefore, very difficult to say of any persons that live together, unless they are a number of ascetics owning no properties at all in the world, that there is no property in common of any sort or kind. Nor is there anything in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family. It is no doubt true that, so far as Courts are concerned, the affairs of a joint family can come before a Court only where property is involved; but that is due to civil Courts not taking cognizance of disputes unless they are of a civil nature and such disputes can hardly arise where there is no property worth the name which the joint family possesses. Supposing that a family is joint and possesses joint property all of which is either destroyed by fire, flood or is stolen or alienated, can it be said that the moment this happens the family becomes a divided family and does it become joint family again if properties are again acquired by the members? I think it will lead to

strange consequences if such a doctrine was upheld. I am not prepared to assent to the broad view that the possession of property is a necessary element in determining whether persons are joint or separate. A joint family is composed of persons who live together and who are joint in food and worship and the possession of property is not a condition precedent to the establishment of their status.

I do not think that the question whether the donees had or had not joint or joint family properties has any bearing on the construction of the Will.

In this state of things, we have to fall back upon the presumption that arises in cases of gifts of this kind, viz., gifts to persons who constitute a joint family.

In dealing with this class of cases, I think that a difference should be made between cases where gifts to persons who form a joint family are made by persons to whom they would succeed according to the law of intestate succession, if no Will was made; for example, gifts by a father to his children, and by a husband who dies without issue to his wife or daughter and cases where gifts are made by Will by persons to whom the donees would not inherit and who could have no interest in the properties on the death of the testator but for the Will. In the former class of cases, the authorities in Madras show that a presumption may be drawn that the donees were intended to take the estate as joint tenants, but I do not think that in the latter class of cases, there is any ground or necessity for drawing such a presumption. There is a conflict of opinion between the various High Courts even as regards cases where a father bequeaths property to his sons who are members of an undivided family. It is unnecessary to refer to the various decisions of the various High Courts as their Lordships of the Privy Council in *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1) have summarized the authorities. Their Lordships observe as follows:

"It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest, made by a father, of property, which in the father's hands was selfacquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddan Gopal* v. *Ram Buksh* (2) when it was held that such property would be ancestral, and this has been followed in the later case of *Hazari Mall Babu* v. *Abaninath Adhurjya* (3), decided in 1912. In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed shall be ancestral or self acquired, on the principle of *cujus est dare ejus est disponere*, but that unless he expresses his wish that it should be deemed selfacquired, it is ancestral: See *Tara Chand* v. *Reeb Ram* (4) and compare it with *Nagalingam Pillai* v. *Ramachandra Tevar* (5) and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self acquired: See *Jugmohandas Mangaldas* v. *Sir Mangaldas Nathubhoy* (6) and *Nanabhai Ganpatrow Dhairyavan* v. *Achratbai* (7). At Allahabad, the decision was that such property is selfacquired: see *Parsotam Rao Tantia* v. *Janki Bai* (8) decided in 1907. Finally, in Oudh, in the case of *Rameshar* v. *M. Rukmin* (9) decided in 1909, after a review of all the cases, it was held that: "Where selfacquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death . . . . . ."

"But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case."

In *Nagalingam Pillai* v. *Ramachandra Tevar* (5), which is the leading case on the subject in Madras, the Will was by a

(1) A. I. R. 1923 P. C. 160.

(2) 6 W. R. 71.
(3) [1912] 17 C. W. N. 280=17 C. L. J. 38.
(4) [1866] 8 M. H. C. R. 50.
(5) [1901] 24 Mad. 429=11 M. L. J. 210.
(6) [1886] 10 Bom. 528.
(7) [1888] 12 Bom. 122.
(8) [1907] 29 All. 354=4 A. L. J. 257=(1907) A. W. N. 77.
(9) [1911] 14 O. C. 244.

Hindu father who was possessed of self-acquired property and the disposition was in favour of his sons. Shephard J., after stating that the father might have bequeathed the property to a stranger and that his sons could not have called the dispositions in question, observed at p. 437. (24 Mad.)

"As the father is at liberty to make any disposition he pleases or to leave his self-acquired property to descend as ancestral property, so, when making any disposition in favour of his son, he is at liberty to preserve for the property the quality of ancestral property. Whether, in any given case the property was intended to pass to the sons as ancestral property, or as self-acquired property, must be a question of intention turning on the construction of the instrument of gift. Following the principle laid down in *Mahomed Shumstool Moulvi* v. *Shewukram Moulvi* (10), I think that, if there are no words indicating a contrary intention, the natural inference should be that the father intended his sons to take his property as their ancestral estate."

Yethirajulu Naidu v. *Mukunthu Naidu* (11) is also a case where a father bequeathed property to his sons. Subramania Aiyar, J., at p. 373, (28 Mad.) observes as follows:

"The remaining point for consideration in connexion with this house is whether the sons took it as tentants-in-common as contended on behalf of the 4th defendant. The decision of the Judicial Committee in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (12), points out that the principle of joint tenancy, as obtaining in England, is quite foreign to the Hindu Law and that, when property is gifted to more than one, in the absence of anything in the grant to the contrary, the presumption is that the donees take as tenants-in-common. But, as implied in that decision itself, joint ownership of another description is of course not only not foreign to the Hindu system, but quite familiar to it, viz., that special kind of which the joint holding by the members of an undivided Hindu family is the type. And in cases like the present the question for determination is but one of intention to be ascertained with reference to the terms of the particular Will. If the grant is to persons who are incapable of forming a Hindu joint family, they can of course take only as tenants-in-common. If, on the contrary, the grant is to persons who constitute such a family, even then it may be that the prima facie view is that they take in severalty and that those who argue in favour of the opposite construction, have to show some clear foundation for it in the terms of the Will. Of course the donees here, the sons, were persons who could be and were members of a joint family."

Venkatramiah Pantulu v. *Subramaniam Pillai* (13) was a case where the Will was by a father giving property to his sons. *Indoji Jithaji* v. *Kothapalli Rama Charlu* (14) was also a case of a Hindu father bequeathing his self-acquired property to his sons by Will and Abdur Rahim and Spencer, JJ., referred to *Nagalingam Pillai* v. *Ramachandra Tevar* (5) with approval. In *Raja of Ramnad* v. *Sundara Pandiaswamy Thevar* (15), Seshagiri Aiyar, J., considered the case where property was given to a son by a father and observed:

"In my view, the fact that the defendant took the estate as a gift from his father will not take away the liability which would have devolved on him, if he had succeeded to the property as son and heir. As pointed out in *Nagalingam Pillai* v. *Ramachandra Tevar* (5), where property is given by Will to a person who would otherwise be entitled to it as heir, the character of the property is not changed. The same principle should be extended to transfer inter vivos.

In fact it was conceded in the course of the arguments that all the Madras cases, with the exception of the case reported in *Mahalakshmi Amma* v. *Nagapayya* (16), are cases where the gifts are by a father to his sons. *Mahalakshmi Amma* v. *Nagappaya* (16) was no doubt a case where the gift was by a person to whom the donees would not be heirs in the ordinary course of events ; but the judgment proceeds on the ground that the terms of the Will indicate that the donees were intended to take the gift as members of a joint family, the circumstance being that the adult member was to manage the properties.

(10) [1874] 2 I. A. 7=14 B. L. R. 226=22 W. R. 409 (P. C.).
(11) [1905] 28 Mad. 363=15 M. L. J. 299.
(12) [1896] 23 Cal. 670=23 I. A. 37=6 M. L. J. 75=7 Sar 13 (P. C.).
(13) [1915] 16 M. L. T. 489.
(14) [1920] 10 L. W. 498.
(15) [1914] 27 M. L. J. 694.
(16) [1921] 62 I. C. 814.

As regards cases where the donees though forming members of a joint family would not succeed in the ordinary course, I see no reason to extend the same principle. I can find nothing in the authorities which state that the mere fact that a gift was to persons who formed the members of an undivided family by a person to whom they would not succeed on intestacy or by stranger without more, necessarily implies that the donees were intended to take the gift with all the incidents of joint family property because they are members of a joint family especially as members of a joint family can and often do own separate or self-acquired property. It is a well-settled rule of Hindu Law that in cases of obstructed inheritance a male succeeding takes the property as a tenant-in-common and not as a joint-tenant. If, as I take it in *Nagalingam Pillai* v. *Ramachandra Tevar* (5), the ratio decidendi is that because but for the Will the donee would have taken it as ancestral property, it is, therefore, a reasonable presumption to draw that where a testator gives property to such a person without in terms indicating his intention he intended it to be taken in the same character as he would have taken but for the disposition; this would not apply to cases where the donees would succeed if there was no intestacy as tenants-in-common or in cases where they would not be even reversioners to the estate but strangers. In *Mahomed Shumstool* v. *Shewukram* (10) their Lordships of the Privy Council remark that it may be assumed that,as a Hindu knows,as a general rule at all events women do not take absolute estates of inheritance which they are entitled to alienate and that in construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the disposal of property. In cases of persons, who, like the respondent, his father and brother in the present case, would, if they succeed eventually, take as tenants-in-common, under the Hindu Law,there is no reason to suppose that the testator knowing this fact intended them to take as joint tenants; it is more reasonable to presume that he wanted them to take the ordinary estate they would have taken if they succeeded on intestacy and to require express words if a contrary were intended by the testator. There is, in my opinion, little reason. to apply the observation of the Privy Council to cases of bequest to persons who would not take the estate as joint tenants if they succeeded on intestacy and much less to persons who would not be heirs in any event. In *Rewun Persad* v. *Mt. Radha Beeby* (17) the testater gave his widow a life estate in all his property and after her decease he gave one-half to his brother and his sons. It was held that the sons took a vested interest in the property as tenants-in-common and not as joint-tenants. The facts of this case show that at the date of the death of the testator the brother and his sons to whom one-half was given were members of an undivided family and that the division was only afterwards, and their Lordships of the Privy Council observed :

" The testator after the death of his widow gives the property to his brother Beekhary Das. After his death it becomes divisible into two parts. We apprehend that they would take as tenants-in-common ; in fact, that they had each of them a vested interest in one-fourth share not to come into actual enjoyment till the death of the widow."

It is difficult to distinguish the facts of that case from those of the present one with the exception that the sons were named by the testator in *Rewun Persad* v. *Mt. Radha Beeby* (17) but in the present case the gift was to the father and his sons, the sons not being named ; but I do not think that makes any difference. In *Karuppai Nachiar* v. *Sankaranarayanan Chetti* (18) Sir Arnold White, C.J., Subramania Aiyar and Bashyam Ayangar, JJ., who constituted the Full Bench, observed at page 300 : (27 Mad.)

" It would be revolutionary to hold that all property which comes to two or more persons who happen to be members of an undivided family is taken by them with benefit of survivorship and there is no warrant whatever in the Mitakshara for such a general proposition. It has been held in more cases than one that property which comes to members of an undivided family by devise or gift is not taken by them with benefit of survivorship," and after referring to the decision of their Lordships of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayamma Bahadur Garu* (19),they observed:

(17) [1846-50] 4 M. I. A. 137=7 W. R. 35 (P. C.)
(18) [1904] 27 Mad. 300 (F. B.).
(19) [1902] 25 Mad. 678=29 I.A. 156=4 B. L. R. 657=7 C.W.N. 1=12 M. L. J. 299. (P. C.).

"But their Lordships have abstained from laying down that, as a universal rule, a heritage which devolves upon co-heirs who happen to be all or some of the members of an undivided family under the Mitakshara is taken by them with benefit of survivorship."

Reference has been made by Mr. Alladi Krishnaswami Aiyar to *Chakkara Kannan* v. *Kunhi Pokker* (20), which was a case of gift by a person to his wife and children following the Marumakkatayam Law and, it was held that the donees took the property with the incidents of tarwad property. Here again it is a case where the gift is by a father to his wife and children, and even though there was no marriage in the strict sense of the term in Malabar the same intention can be assumed where a father gives property to his wife and children as was assumed in *Nagalingam Pillai* v. *Ramachandra Tevar* (5). Moreover it would be unsafe to apply to a joint family under the Mitakshara the same principle as would apply to tarwads in Malabar where partition is, except by consent of all parties, impossible.

The view I take is that in cases where the donees are the sons and grandsons and would succeed to the property of the testator in the absence of any testamentary disposition and take the property as ancestral property, the presumption may be drawn where the Will is silent as to the nature of the estate conferred, that they would take it as unobstructed heritage with the same incidents as would follow if there was no Will. But where the donees, though members of a joint undivided family, are not related to the testator or though related to him would in the absence of any Will either immediately or at a later stage take the property as obstructed heritage and only as tenants-in-common, there is no reason for applying the presumption that the testator by devising the property to them intended that there should be a joint tenancy. As pointed out by their Lordships of the Privy Council in *Jogeswar Narain Deo* v. *Rama Chundra Dutt* (12), which overrules the decision in *Vydianada* v. *Nagammal* (21), the principle of joint tenancy is quite foreign to Hindu Law and that the ordinary rule is that where property is given to two or more persons they take it as tenants-in-common. It is no doubt true, as pointed out by Subramania Aiyar, J., in *Yethirajulu Naidu* v. *Mukunthu Naidu* (11), gifts may be made to a joint family, but I think that unless the gifts are made in such terms as would clearly indicate that the donees should take them as joint family members with the rights of survivorship, the mere fact that the donees are members of a joint family ought not to determine that they take it with benefits of survivorship and with all the liabilities of properties which are joint family properties.

I think the decision of the learned trial Judge is correct and would dismiss the appeals with costs.

Krishnan, J.—The point for decision in these appeals is. What estate did plaintiff and his brothers and his father Kadirvelu Mudaliar take in the suit properties under the Will of his father's divided brother Kandaswami Mudaliar, Ex. F. Was it a joint estate with incidents of joint family property attached to it or did they take each a one-sixth share separately as tenants-in-common?

The decision turns on the words of the Will. The Will says in paragraph 4:

"Items Nos. 4, 5, 6, 7, 8 and 9 under assets in paragraph 1, above, I bequeath and leave to my brother Kadirvelu Mudaliar and his sons."

It is not denied that under this clause the five sons and their father are joint legatees of the properties mentioned, some of which are the suit properties, it is not argued that the words "and his sons" are mere words of purchase. As the testator was dealing with his self-acquisition it is clear that it was open to him to give the properties to Kadirvelu and his sons as joint family property just as it was open to him to give them separate shares in the property. The question is: What did he do in this case?

A good deal of argument was addressed to us as to what the proper presumption to be drawn is in such a case. It has been held in Madras that where a father gives his self-acquisitions to his sons by a will, the proper presumption to draw is that he gave them a joint estate with the incidents of joint family property, unless the contrary is clear from the words of the Will or otherwise. This was so laid down in *Nagalingam Pillai* v. *Ramachandra Tevar* (5) and that view has since been

(20) [1915] 39 Mad. 317=29 M.L.J. 481=18 M.L.T. 255=(1915) M.W.N. 740 (F.B.).

(21) [1888] 11 Mad. 258.

followed in this Court. The same view is taken in Calcutta, but in Bombay and Allahabad, the presumption is held to be in favour of the view that the sons take such property as self-acquired property. This conflict of opinion was brought to the notice of the Privy Council in the recent cases of *Lal Ram Singh* v. *Deputy Commissioner of Partabgarh* (1); but while their Lordships set out what they consider the views of the different High Courts to be on page 604 (of 45 *All.*) they decided it unnecessary to pronounce on the point. We must therefore follow the Madras view on the point. The present case, however, is not on all fours with *Nagalingam Pillai* v. *Ramachandra Tevar* (5) as here we have a bequest by a Hindu to his divided brother and his sons, and not one by a Hindu father to his sons. The Privy Council point out in p. 605 (45 *All.*) that :

"The principle upon which it is contended that such property (that is property bequeathed by the father to his sons) should be deemed ancestral property is that the son is only getting by his father's Will that which, but for the Will, he would have received by descent according to the Mitakshara Law."

Now, this principle obviously cannot apply to the bequest by the divided brother as the legatees will not get the properties by inheritance except for the bequest. The remote contingency of their taking as reversioners does not affect the question.

On the other hand, it is argued that in all cases where property is given to more than one person the donees take separately as tenants-in-common and not as joint-tenants and reliance is placed on the ruling of the Privy Council in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (12). No doubt that case lays down that the principle of joint tenancy is quite foreign to Hindu Law and that where property is given to two or more donees they take as tenants-in-common. But as pointed out by Subramania Iyer, J., in the case of *Yathirajulu Naidu* v. *Mukunthu Naidu* (11), the Hindu Law is quite familiar with one kind of joint tenancy, namely, the joint holding by members of an undivided Hindu family. If property is therefore given in terms expressly to a joint Hindu family, in my opinion, the family would take it with all the incidents of ancestral or joint family property. There is nothing in the Privy Council decision or in the principles laid down by their Lordships contrary to the above view. If the gift is to the family, the family will take the property and hold it as other family property and it would not matter who made the gift. The question therefore has to be decided on the words of the Will, whether the bequest was to the joint family or to the members of it individually, in which case they would, no doubt, take in severalty. I do not agree with the learned Judge that Kadirvelu and his sons did not constitute a joint family on the ground that they had no property at all. The learned trial Judge has accepted the argument that the existence of joint property is an essential requisite to constitute a joint family. With respect, I am unable to accept this position. Hindus get a joint family status by birth and the joint property is only an adjunct of the joint family. So long as the status continues, the family constitutes a joint family. The plaintiff's vakil concedes that even according to his argument the existence of a chembu or a pot common to all the members is sufficient to constitute a joint family. That shows to my mind the unreal character of the contention. When asked what the position of the family is before it gets joint property, whether it is a divided family or joint family, the plaintiff's vakil could not say. According to him the joint family ceases every time when joint property is wholly lost, and revives again when any joint property is again acquired. We cannot accept a contention leading to such a position. The possession of joint property is no doubt a normal incident of a joint Hindu family, but it is not in my opinion a pre-requisite for its constitution. In the passage in Sir Bhashyam Aiyangar's judgment in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (22), quoted by the learned trial Judge, he was discussing the Mitakshara doctrine of joint family property and not the requisites of a joint family. I have no doubt that Kadirvelu and his sons constituted a joint Hindu family when the Will took effect. But it cannot be said that there is anything in the Will to show definitely and clearly that the bequest was to the family and not to the individual members thereof separately. The ordinary presumption that when there are several joint donees

(22) [1902] 25 Mad. 149=11 M.L.J. 358.

they take as tenants-in-common must therefore prevail. I agree with my learned brother that these appeals fail and must be dismissed with costs.

Appeals dismissed.

A. I. R. 1926 Madras 280

SPENCER AND MADHAVAN NAIR, JJ.

Ramasami Goundan — Defendant 1—Appellant.

v.

Alagia Singaperumal Kadavul and *another*—Plaintiff and Defendant 2 — Respondents.

Appeal No. 330 of 1924, Decided on 7th September 1925, against an order of remand by the Addl. Sub.-J., Coimbatore, in A. S. No. 3 of 1924, D/- 30th June 1924.

Civil P C..S. 92—Founder appointing himself to be trustee and after his death, his heirs—Founder's widow alienating trust property—Reversioner, to challenge alienation by widow, must obtain sanction under S. 92 and get the widow removed from trusteeship.

The founder of a trust appointed himself as manager during his lifetime and his heirs after his death. Founder's widow after his death alienated the trust property. The plaintiff, who was the reversioner to the estate of the founder sued to recover property alienated by the founder's wife.

Held: that the widow could not be transposed as plaintiff and the plaintiff could not claim to be trustee. The proper remedy for the plaintiff was to sue for the removal of the widow from the trusteeship by a suit properly framed under S. 92, Civil P. C., after obtaining Advocate-General's permission.

Held: further that plaintiff could not be allowed to do that in this suit as that would alter the nature of the suit. [P 280 C 2]

T. M. Krishnaswami Aiyar and *T. G. Ramaswami Aiyar*—for Appellant.

S. Srinivasa Aiyar and *V. Subramania Aiyar*—for Respondents.

Judgment.—This suit was brought by a male reversioner to the estate of the founder of a trust for the temple of Alagia Singaperumal Kadavul to recover property alienated in favour of 1st defendant by the act of the founder's wife, who is 2nd defendant. The District Munsif held that the plaintiff was not entitled to maintain the suit and dismissed it. The Additional Subordinate Judge was of a contrary opinion and ordered the suit to go on.

He relied on two cases *Cunniah Chetty* v. *Ramanujachariar* (1) and *Srinivasachariu* v. *Subuddhi* (2). Both of these decisions were given in suits instituted when the Civil Procedure Code of 1882 was in force. When the amended Act of 1908 came into force, it contained a new provision in Cl. 2 of S. 92 barring suits in respect of charitable and religious trusts without first obtaining the permission of the Advocate-General.

We have been referred in the course of the arguments to two other cases, *Subramania Iyer* v. *Nagarathna Naicker* (3) and *Rangaswami Naidu* v. *Krishnaswami Aiyar* (4). These were cases in which a number of persons had a common interest in a temple or charitable institution, and a representative suit was allowed by the Court to be brought on behalf of all, under S. 30 of the Code of 1882 (now O. 1, R. 8). When a village temple is owned in common by all the villagers of a certain village, this is the proper form of suing. In the present case the founder of the trust appointed himself as manager during his lifetime and his heirs after his death. His widow who is second defendant, is his nearest heir, and as she alienated the trust property, she cannot be transposed as plaintiff. The reversioner cannot claim at present to be trustee. The proper course is for the plaintiff, together with one or more interested persons, after obtaining the required sanction under S. 92 to sue for 2nd defendant's removal from the trusteeship, and for appointment of himself or some other fit person to be trustee in her place. In such a suit the validity of the alienation could be decided.

The person who becomes trustee or a Receiver appointed in the suit may then sue on behalf of the idol for the recovery of the property improperly diverted from trust purposes. It is suggested that we might allow some time for the plaintiff to apply and get permission to proceed either under O. 1, R. 8 or under S. 92, Civil Procedure Code, but we think that this cannot be done as it would alter the nature of the suit. The appeal is accordingly allowed with costs to be paid by 1st respondent in this Court and the lower appellate Court, and the decree of the District Munsif dismissing the suit with costs is restored; 2nd respondent to bear her own costs.

Appeal allowed.

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(1) [1913] 24 M.L.J. 48=(1913) M.W.N. 368.
(2) [1912] 23 M.L.J. 348.
(3) [1910] 20 M L.J. 151=8 M.L.T. 114.
(4) A.I.R. 1923 Mad. 276.

A. I. R. 1926 Madras 281

PHILLIPS, J.

K. S. Kuppuswami Aiyar—Plaintiff—Appellant.

v.

The Corporation of Madras—Defendant—Respondent.

Appeal No. 140 of 1923, Decided on 10th March 1925, against the decree of the City Civil Court, Madras, D/- 16th August 1923, in O. S. No. 204 of 1923.

Madras City Municipal Act (4 of 1919), S. 169 (5)—Committee can fix different maximum for different conditions.

On the language of S. 169 (5) the Standing Committee has power to determine what should be the free supply of water under varying conditions, and the very fact of the word "a" in the section having been used before "maximum" shows that there was not intended to be one and only one maximum. [P 281 C 1, 2]

K. Bashyam Aiyangar—for Appellant.

S. Rangaswami Aiyangar—for Respondent.

Judgment.—The main point argued in this appeal is that the regulations passed by the Standing Committee of the Madras Corporation in respect of the rates levied for the supply of water are ultra vires. Under S. 169, Cl.(5),

"for all water supplied under this section, in excess of a maximum determined by regulations of the Standing Committee payment shall be made * * ."

The section relates to private water supply for domestic consumption and the contention for the appellant is that there can only be one maximum for the supply of such water. He takes no objection to the regulation in so far as it provides a varying maximum in accordance with the rental value, but yet he contends that there can be only one maximum. The very fact of the word "a" having been used before "maximum" would show that there was not intended to be one and only one maximum; otherwise the words would be "the maximum." If the latter were the wording it might possibly be contended that the maximum must be a definite number of gallons for every consumer irrespective of the size of the house he occupies. That is not the contention now raised and, in fact, it would reduce the case to an absurdity. I am satisfied that, on the language of the section, the Standing Committee has power to determine what shall be the free supply under varying conditions. They have determined this by regulations framed on the 15th of April 1921 and these have been communicated to the plaintiff. As these regulations are not ultra vires of the Standing Committee, the plaintiff cannot object to their enforcement.

The next point raised is that these regulations were not approved by the Council. The evidence of the only witness examined shows that the regulations were put before the Council and it is clear even from the extract from the minutes which is now before me that the Council did not take any objection to these regulations. The power of framing them is vested in the Standing Committee and that that was done is proved by the proceedings of that body.

A further objection is taken that the regulations have not been published in the manner determined by the Council. This point was not raised in the plaint, but apparently was taken at the time of argument. It is contended that to every regulation should be appended the manner in which the Council determines to publish that particular regulation. Such a proposition, I think, requires no argument; for obviously if the Council decides to publish regulations generally in a particular manner that complies with the provisions of S. 355 of the Act. There is evidence that this regulation was published in the usual manner ordered by the Commissioner and there is no evidence to show that it was not the way in which the Council determined that it should be published. If really this objection were to be pressed, it should have been mentioned in the plaint; for it is a question of fact to be determined by evidence which evidence was naturally not available at the hearing. As this point was not raised in the plaint or in the issues, I think that the learned Judge was wrong to consider it at all without an amendment of the plaint.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

* A. I. R. 1926 Madras 282

ODGERS, J.

(*Gonnabathula*) *Thammayya*—Plaintiff—Appellant.

v.

Gonnabathula Chinnayya and *others*—Defendants—Respondents.

Second Appeal No. 51 of 1923, Decided on 4th September 1925, from the decree of the Addl. Sub-J., Vizagapatam.

* *Evidence—Admissibility— Waiver or consent does not make inadmissible evidence admissible—It affects the mode of proof only.*

Neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. But a wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward : 43 *Mad.* 609 (*F. B.*) *Rel.* on. [P 283 C 1]

P. Somasundaram—for Appellant.

V. Govindarajachari—for Respondents.

Judgment.—The question in this suit was whether the plaintiff had been adopted by one Chinnayya before his death in September 1918. The District Munsif came to the conclusion on the evidence before him that the plaintiff was so adopted. On appeal to the Subordinate Judge, the Subordinate Judge came to a different conclusion on the evidence. It is contended in second appeal that the conclusion which the Subordinate Judge came to was influenced by the reception in evidence of Ex. A. and Ex. II. These were attempted to be put in before the learned District Munsif but were rejected. Therefore, application was made to the Subordinate Judge to admit these. Ex. A is a public copy of the deposition of P. W. 3 (4th defendant herein) before the Revenue Inspector. The request to admit this Ex. A was made by the respondent, and on that application the learned Subordinate Judge makes this note :

" P. L. N., who argues the case for the appellant's learned vakil, has no objection to have the document marked. Mark this as an exhibit on the plaintiff's side, A."

As to Ex. II this is a statement made by the natural father of the adopted boy and the Judge's note on the petition to admit that is:

" There is no objection to the statement made by the natural father."

The question I have to consider is whether the consent or want of objection by which Exs. A and II were admitted in evidence by the Subordinate Judge is valid or whether, as contended for by Mr. Somayya for the appellant, the documents would naturally become evidence if and when they were put to the witness either to corroborate or contradict them. In other words, is the consent to the reception of these matters simply a waiver of formal proof or does it go to the root of the matter ; and is it an attempt to make evidence of what is really not evidence under the provisions of the Evidence Act. I may at once say that Ex. A is sought to be put in under S. 157 and Ex. II under S. 145. Several cases have been quoted, for instance, *Bhavamma* v. *Ramamma* (1). By S. 145 of the Indian Evidence Act, the credit of a witness may be impeached by proof of his former inconsistent statements, and before a witness can be impeached he must be given an opportunity of making any explanation which is open to him. And further in *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (2), documents had been used for the purpose of contradicting witnesses without calling their attention to the portion of the documents so used. These depositions in a criminal case were imported in bulk into a civil enquiry as to a question of adoption. Their Lordships of the Privy Council held that there were no circumstances in that case to bring the matter within the purview of S. 33 of the Evidence Act, nor any warrant for using the documents for the purpose of either contradicting or discounting the evidence of the witnesses given in the suit. There is no question there of any consent or waiver of objection. On the other hand in a Full Bench case in this Court, *Jainab Bibi Saheba* v. *Hyderally Sahib* (3), it was held that the evidence recorded in a previous proceeding between the same parties may be made admissible in

(1) A. I. R. 1924 Mad. 537.

(2) [1915] 39 Bom. 441=42 I. A. 135=13 A. L. J. 570=19 C. W. N. 729=17 B. L. R. 527=22 C. L. J. 1=29 M. L. J. 34=18 M. L. T. 1=(1915) M. W. N. 484=2 L. W. 611 (P. C.).

(3) [1920] 43 Mad 609=38 M. L. J. 532=28 M. L. T. 23=(1920) M. W. N. 360=12 L. W. 64 (F. B.).

a subsequent proceeding by their consent. Courts-Trotter, J., there said :

"It is clear that in this country neither an omission by an advocate to object to the giving of irrelevant and inadmissible evidence, nor the failure of the tribunal to exclude it of its own motion, will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises where the objection is not as to the nature and quality of the evidence in itself, but merely as to the mode of proof put forward."

And the learned Judge holds that :

"Consent can cure what would otherwise be a defective method of letting in evidence in its substance and context relevant and germane to the issue."

I am of opinion that this is what has happened in the present case, namely, that there has been consent or waiver of objection to the mode in which these statements, which are admittedly relevant under the Evidence Act, should be admitted to the record. An earlier case in *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao* (4), is to the same effect. There the learned Judges say :

"The facts admitted in evidence being themselves relevant, the provisions of law intended to test the credibility of witnesses or to enable the trying Judge to make the test himself are not of such an important character that parties cannot waive the benefit of those provisions."

I am, therefore, of opinion that the learned Subordinate Judge was justified in receiving these statements, Exs. A and II, and in estimating the oral statements made by the witnesses in the light of the statements made by them in these documents.

The second appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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(4) [1915] 38 Mad. 160=25 M. L. J. 360=(1913) M. W. N. 800.

A. I. R. 1926 Madras 283

RAMESAM AND REILLY, JJ.

(*Kancherla*) *Pushkaramba* and *another* —Petitioners.

v.

Kancherla Nagaratnamma — Respondent.

Civil Mis. Petition No. 2356 of 1924, Decided on 26th August 1924, against the decree of the Sub-J., Bezwada, in O. S. No. 48 of 1921.

Civil P. C., O. 41, R. 22—Day for appearance mentioned in notice of appeal under Madras O. 41-A. is not day fixed for hearing.

The day of appearance of respondent mentioned in the notice issued in the form No. 6-A appended to O. 41-A (Madras High Court) cannot be regarded as the day fixed for hearing as contemplated by O. 41, R. 22. [P. 283, C. 2]

P. Satyanarayana Rao — for Petitioners.

K. Kameswara Rao—for Respondent.

Judgment.—In this case a notice in the form (No. 6-A.) appended to O. 41-A., Sch. 1, Civil P. C., made by the High Court was received by the 1st respondent (1st petitioner) on 21st December 1923, and the 2nd respondent (2nd petitioner) on 5th January 1924. A memorandum of cross-objections was filed on 11th February 1924. The respondent's vakil claims that he is in time as he has not yet received a notice fixing the date of hearing and it is only within 30 days from the receipt of such a notice that he was to file his memorandum of cross-objections. In framing O. 41-A., and Form 6-A. fixing time for appearance, Civil P. C. O. 41, R. 22, seems to have been overlooked. O. 41, R. 12, requires that a day for hearing should be fixed and even if we can construe O. 41-A as making this unnecessary, there must be some rule guiding the litigants as to how O. 41, R. 22, should be complied with. There is no rule saying that the day fixed for appearance shall be regarded as the day fixed for hearing within the meaning of O. 41, R. 22, Civil P. C.

The actual notice now in use cannot be construed as fixing a day for hearing by implication. The appellant's (respondent's) vakil contends that the 25th day from receipt of notice should be regarded as the day fixed for hearing. This cannot be, as the case cannot be heard on the 25th day. It cannot be earlier than the 26th. But R. 39 of

the Rules of the High Court, Appellate Side, shows that it cannot be within 3 months after the admission of the appeal. This last consideration shows the undesirability of implying the date fixed for hearing. Either O. 41, R. 22 must itself be modified by the High Court, or some other rule must be made to provide for its working.

We are constrained to hold that the memorandum of cross-objections is not out of time.

The attention of the Secretary to the Rule Committee will be drawn to this order.

Petition allowed.

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* A. I. R. 1926 Madras 284

PHILLIPS, J.

Thayammal—Plaintiff—Appellant.

v.

Perumal Chetti and *another*—Defendants—Respondents.

Second Appeal No. 14 of 1923, Decided on 6th August 1925, from the decree of the Dist.-J., North Arcot at Vellore, in A. S. No. 149 of 1920.

(a) *Trust Act. Ss. 5, 6—Trust—Specific property not bequeathed—Document purporting to be a Will, not signed by testator—No Will nor a trust thereunder is created.*

Plaintiff, alleging that her deceased father had deposited a sum of money with the 1st defendant out of his self-acquisitions and directed her uncles, 2nd and 3rd defendants, to pay her marriage expenses out of that amount and hand over the balance to her on attaining majority, sued for the recovery of the same. A document was produced purporting to be a Will of her father, but not signed by him, and at the end of it there was a recital that as it had become impossible for him to sign the document after it had been written out, his brothers had agreed to act in accordance with the recitals contained in the alleged Will. Defendants 2 and 3 had signed the document. The Courts below found that the plaintiff's father had no self-acquisitions, that he and his brothers were members of an undivided family whose whole property was held as joint family property ; and that there was no entrustment to the 1st defendant.

Held; there was no specific property assigned in trust, that there was no effective Will at all and that it was at the most a voluntary agreement on the part of Defendants 2 and 3 which in the absence of consideration was not legally binding. [P 284 C 2]

(b) *Trust Act, S. 6—Express trust and interest to be affected by trust must exist.*

To constitute a trust there must be a trustee with an express trust and an estate or interest in lands vested in the trustee and which the trust must affect. [P 285 C 1]

(c) *Hindu Law—Will—Father can bequeath a reasonable portion to daughter with coparcener's consent. (obiter).*

Obiter : A father in a joint Hindu family can with the consent of all the other coparceners bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent: 40 *Mad.* 1122, *Ref.* (P 285 C 2]

A. Krishnaswami Aiyar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondents.

Judgment.—The appeal only deals with the question of interest, but a memorandum of objections has been filed by Respondents 1 and 2, Defendants 2 and 3, in which the whole decree is sought to be impeached and it will be necessary to deal with the memorandum of objections first.

The plaintiff is the daughter of one Ramu Chetti, whose brothers, Perumal Chetti and Gopal Chetti, are Defendants 2 and 3. In her plaint she alleges that her father deposited with Madar Saheb, 1st defendant, a sum of Rs. 4,000 out of his self-acquisitions and directed that Defendants 2 and 3 should, out of the said sum and its interest, pay the plaintiff's marriage expenses and hand over the balance to her on her attaining majority. Both the lower Courts have found that Ramu Chetti had no self-acquisitions and that he and his two brothers were members of an undivided family whose whole property was held as joint family property. It has also been found that there was no entrustment to the 1st defendant whose legal representatives are consequently not impleaded here. In the plaint the plaintiff states that the arrangement pleaded by her was referred to in a Will executed by her father. This Will is Ex. A, dated 28th January 1906. It is not signed by Ramu Chetti, but at the end of the document we have the recital: "as just when writing of this Will was finished, it became impossible to sign it as referred to above, Nos. 1 and 3 agree to act as stated in the Will." This is signed by Defendants 2 and 3. By that recital they undertook within two years from the date of the document to marry the plaintiff and to pay her for her stridhanam Rs. 3,794-0-6 out of their self-acquired and ancestral properties. Both the Courts have found that the arrangement was as recited in Ex. A, and it is in evidence that on the date of the Will the 1st defendant was indebted to Ramu Chetti's family in the said sum of Rs. 3,794-0-6. The

lower appellate Court has exonerated the 1st defendant and his legal representatives, but has held that Defendants 2 and 3 are trustees, and are bound to repay this sum with interest from the date of the plaintiff's marriage. It is now argued that the lower appellate Court is wrong in holding that any trust was created and I think this contention must be upheld. No specific property was assigned in trust for the plaintiff, but a sum of money was to be paid to her out of the whole family property of Defendants 2 and 3. The entrustment to 1st defendant having been found against, it follows that there was no specific money or property which was assigned in trust. The lower Court also finds that the suit is one for an account, but gives no reasons for this finding, and I do not understand how a suit to recover a specific sum of money, with accumulated interest, can be deemed to be a suit for an account.

As pointed out in *Cunningham* v. *Foot* (1), to constitute a trust "there must be a trustee with an express trust and an estate or interest in lands vested in the trustee and which, therefore, the trust must affect." In that case an annuity was bequeathed to the testator's wife to be paid "out of all profits arising from all and every part of my estate and property whatsoever" and it was held that although this might create a charge and a liability in favour of the annuitant, the charge and the liability together do not amount to an express trust or establish fiduciary relations which such a trust implies, because the charge was general and the liability affected everything bequeathed or devised. The very same arguments appear to be applicable in the present case; the bequest, if any, to the daughter was to be made out of the whole family property and no specific property was set apart as trust property. I may also refer to *Henry* v. *Hammond* (2). At page 521 Channel, J. observes: "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in bank or elsewhere, and to hand that money so kept as a separate fund of the person entitled to it, then he is a trustee of that money . . . . . If, on the other hand, he is not bound to keep the money separate, but is entitled to mix it with his own money and can deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money but merely a debtor." If there is no trust, the plaintiff's suit would be barred by limitation. Under Ex. B the money was to be paid within two years from 28th January 1906, and consequently the plaintiff's cause of action accrued on 28th January 1908. She was then a minor, but it has been found that she has brought this suit more than three years after attaining her majority. The suit is therefore barred by limitation.

It is then contended for the plaintiff that Ex. A is an effective Will. In the first place a member of an undivided family has no power to devise property by Will. In the second place the will has not been executed, as it is not signed by the testator. As regards the second point, it is urged that even an unsigned Will may be effective. Reliance is placed on the ruling in *Tara Chand Bose* v. *Nobeen Chander Mitter* (3), but in that case not only was the unsigned document produced, but there was also evidence of the witnesses who were present when it was drawn up that the Will was drawn up according to the instructions of the testator, and that he signified in their presence his assent thereto. This would in effect be good evidence of an oral Will. Such circumstances and evidence are absent in the present case; for there is no suggestion that the testator assented to the terms of Ex. A before he died or that he made any oral Will.

As regards the first point: reliance is placed on the decision of a Bench of this Court in *Patra Chariar* v. *Srinivasa Chariar* (4), where it was held that a father in a joint Hindu family can, with the consent of his adult son and with the consent of his relations who are interested in his minor son, bequeath a portion of his ancestral property to his daughter provided the portion is reasonable in extent. The validity of this decision has been questioned in a later case *Subbarami Reddi* v. *Ramamma* (5), but not defin-

(1) [1878] L. R. 3 A. C. 974=38 L. T. 889=26 W. R. 859.

(2) [1913] 2 K. B. 515=82 L. J. K. B. 575=108 L. T. 729=12 Asp. M. C. 332=57 S. J. 358 =29 T. L. R. 349.

(3) 3 W. R. 138.

(4) [1917] 40 Mad. 1122=32 M. L. J. 364=5 L. W. 544=21 M.L.T. 408=(1917) M. W. N. 355.

(5) [1920] 43 Mad. 824=12 L. W. 249=(1920) M. W. N. 529.

itely dissented from on the ground that the testator obtained the consent of all his coparceners. In the present case it is alleged that there were sons of Defendants 2 and 3 in existence on the date of the Will and we have no evidence that the assent of their guardians was obtained. The decision in *Patra Chariar* v. *Srinivasa Chariar* (4) is not therefore applicable to the facts of the present case. I may also add with reference to the claim based on the Will, that no such claim is put forward in the plaint, the plaint being based entirely on an arrangement. It is unnecessary to decide the point, but it appears to me that the agreement evidenced by Ex. A being purely a voluntary agreement on the part of Defendants 2 and 3, for there is no evidence that they obtained any consideration for it, it would not be legally binding upon them, although they might be under a moral obligation to pay the money. It would appear that Defendants 2 and 3 were willing to pay the amount decreed against them for they did not appeal against the decree and offered to pay plaintiff the money if 1st defendant would pay them. Unfortunately the plaintiff has been sufficiently ill-advised as to press her claim for further interest and consequently has given the defendants an opportunity of setting aside the whole decree,but possibly they may yet recognize their moral obligation to pay the plaintiff some money as stridhanam.

In the result the memorandum of objections must be allowed and the second appeal dismissed. The plaintiff's suit is dismissed with costs throughout.

Appeal dismissed.

A. I. R. 1926 Madras 286

JACKSON, J.

(*Muthyala*) *Venkobanna* —Surety — Appellant.

v.

Firm of Myachand-Venichand—Plaintiffs —Respondents.

Appeal No. 117 of 1922, Decided on 12th March 1924, against an appellate order, of the D/- J., Bellary, in Appeal No. 97 of 1921.

Civil P. C., S., 55 (4)—Judgment-debtor not applying within one month to be declared insolvent —No charge, of failing to appear when required to do so, against Judgment-debtor—Surety is liable —Time cannot be extended.

Under S. 55 (4) surety does not merely undertake that the judgment-debtor will appear when called upon to do so, but also that the judgment-debtor will apply to be declared an insolvent within the prescribed period. If the judgment-debtor does not apply to be declared an insolvent within the prescribed one month, the surety can be proceeded against. The Court has no power to extend the period for the judgment-debtor's filing a petition to be declared an insolvent, beyond the prescribed month.

Obiter. The surety is liable even after the dismissal of the execution proceedings against the judgment-debtor. [P, 286, C. 2]

A. Viswanatha Aiyar—for Appellant.

K. Rajah Aiyar—for Respondent.

Judgment.—Appellant stood surety for a judgment-debtor under S. 55 (4). Civil P. C. The judgment-debtor filed his insolvency petition one day after the prescribed month. The District Judge held that the Court has no power to excuse the delay and ordered execution to preceed against the surety. Hence this appeal.

I agree with the lower appellate Court that where the Code prescribes one month the Court cannot grant a longer period. Even if it has such discretion *cf. Abdul Hussein Essufalli* v. *D. J. Mistri & Co.* (1) I should not exercise it in this case, for there was no need for the judgment-debtor to postpone filing his petition till the last moment.

It is then urged that under S. 55 (4) Civil P. C., if the judgment-debtor fails to present his petition, he must be called upon to appear and only upon his failure to comply with that summons, is the surety liable. I find no warrant for this interpretation. The surety undertakes that the judgment-debtor will apply to be declared an insolvent and that he will appear when called upon in any proceeding upon the application or upon the decree, which certainly is not an undertaking simply that he will appear when called upon the decree.

It was lastly urged that the bond is not in the terms of S. 55 (4), Civil P. C. This is not raised in the grounds of appeal, and I find that to all intents and purposes it corresponds.

That the surety is liable even after the dismissal of execution proceedings against the judgment-debtor is ruled in *Dedhraj* v. *Mahabir Prasad* (2).

The appeal fails on all grounds and is dismissed with costs.

Appeal dismissed,

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(1) A. I. R. 1922 Bom. 340

(2) [1920] 5 P. L. J. 417=(1921) P. H. C. C. 19=1 P. L. T. 604.

* A. I. R. 1926 Madras 287

COUTTS-TROTTER, C. J., AND BEASLEY, J.

The Commissioner of Income-tax, Madras—Referring Officer.

v.

Sri Krishnachandra Ganapathi Narayana Deo, Rajah of Parlakimidi — Assessee.

Refs. Nos. 3 of 1924 and 8 of 1925 by the Commr. of Income-tax, D/- 17-8-1925.

* (a) *Income-tax Act* (11 *of* 1922), *S.* 9—*House ready for residence but not lived in, is assessable.*

If a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so, he is assessable, though he may not reside in it one day in a year. *Queen* v. *Assessment Committee of St. Paneras* (2 *Q. B. D.* 581) *Rel. on.* [P 287 C 2, P 288 C 1]

(b) *Income-tax Act* (1922), *S.* 34—'*Escaped assessment' means wrongly assessed as well as omitted from assessment.*

The words "escaped assessment" in S. 34 apply to the cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act, as well as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment. [P 288 C 1, 2]

M. Patanjali Sastriar—for Comissioner.

T. R. Ramchandra Aiyar for *L. A. Govindaraghava Aiyar* and *L. S. Veeraraghava Aiyar* — for Assessee in both cases.

Coutts Trotter, C. J.— The short point here is whether certain bungalows which belong to the Rajah of Parlakimidi are, or are not, assessable under S. 9 of the Indian Income-tax Act 11 of 1922. The sub-section material to this question is sub-S. I (vii) :—

"In respect of vacancies, such sum as the Income-tax Officer may determine, having regard to the circumstances of the case, is to be the tax payable by the assessee."

The question we have to determine is what the section means by "vacancies." The executive authorities have issued, for the guidance of their officers, a manual, and the case has been put forward in the form of asking us to say whether S. 32 of the Manual is in consonance with the words of the Act. Ordinarily, we should not view the matter from that point of view because the Manual, which is called notes of instructions, is obviously merely a document for the guidance of officials. All we have to determine is two short questions: first, whether these bungalows in the circumstances of the case can be described, within the meaning of the section, as being vacant ; the second question which I shall deal with separately in a moment is whether the assessment in this case can be made retrospective for one year under the provisions of S. 34. To take the first question : the Manual says outright, that the sub-section only applies to property which is usually let to a tenant. Without deciding whether that is correct or not, and whether a man who had a house that he never let, but who dismantled it and locked it up for the year would or would not be assessable, it is clear that these houses are, in fact, never let. The description of the case stated by Mr. Strathie is quite clear :

"Bungalow No. 1 is kept by the Rajah as a guest-house for Government officers and others visiting Parlakimidi. Bungalow No. 2 is only used by the Rajah or his officers visiting Berhampore. Bungalow No. 3 is occupied only about 2 months in the year when the Rajah visits Madras, during the season. Bungalow No. 4 is occupied during the hot weather, obviously by the Rajah."

It is clear from the way in which the case is framed that the contention put forward was that, although these bungalows were ready for occupation and therefore must necessarily have been equipped with the furniture necessary for the occupation of the Rajah, they are not assessable, if, in fact, it so happened in any one year, that they were not lived in by the Rajah or the other persons in question, guests or officers of the Rajah's staff. In my opinion there is nothing in the section to warrant that construction, and, if a man owns a house ready for his own occupation, ready for him to live in when he chooses to do so—and there is a statement here that not only was that the case, but that servants of the Rajah were actually kept on the premises, in order to get it ready for occupation whenever he wanted to go there—he is assessable. In these circumstances, I think that the case falls within the exact words of Lush, J., in *Queen* v. *Assessment Committee of St. Paneras* (1). The words are to be found at p. 588, where the learned Judge says this.

"If, however, he (that is the owner) furnishes it (that is) the vacant house and) keeps it ready for habitation whenever, he pleases to go to it, he is an occupier

(1) 2 Q. B. D., 581,

though he may not reside in it one day in a year."

That seems to me to be conclusive and I respectfully agree with that view and think that that is the proper construction of the statute. In my opinion, therefore, the assessee is liable for assessment in respect of all the bungalows referred to in the case.

The next point is whether the assessment can be made retrospective. It appears that in the previous year the Income-tax Officer had to consider the question and come to the conclusion that the Rajah was not assessable in respect of these bungalows. The section of the English Act of 1918, S. 125, is quite clear, because it provides expressly for the case where an allowance or exemption or abatement unauthorized by the Act has been deliberately made by the predecessor of the surveyor with whom the section is concerned. The Indian Act (S. 34) is not quite so explicit. What it says is this :

"If, for any reason, income chargeable with income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, within a year, serve a notice."

It is said that 'escaped assessment' must mean, not that the question has been considered and decided in favour of the assessee, but that the Income-tax Officer has omitted to consider the question at all or was unaware of the existence of the property now sought to be taxed and, therefore, passed it over, and that it does not apply to cases where the Income-tax Officer, on consideration, came to the conclusion, ex hypothesi, an erroneous conclusion, that the property in question was not assessable. It seems to me, that construction is forbidden by the alternative case put in the section :

"Where the income . . . . has been assessed at too low a rate."

That cannot be a matter of mere inadvertence ; that must refer to a deliberate assessment made by the Income-tax Officer, in the preceding year, with knowledge of the facts and circumstances. It appears to me that a similar view must be taken of the previous words 'escaped assessment' and that it applies to the cases where the Income-tax Officer has deliberately adopted an erroneous construction of the Act just as much as to a case where the officer has not considered the matter at all, but simply omitted the assessable property from his view and from his assessment. In my opinion, the question referred to us must both be answered adversely to the assessee, and it must be held that the property referred to us is not property describable as vacant during the year of assessment and that there is nothing in the statute to prevent the assessing officer from recovering income-tax for the previous year as allowed by S. 34. Rupees 150 will be allowed for costs in each case.

Beasley, J.—I agree.

Questions answered in affirmative.

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VENKATASUBBA RAO, J.

Devasikamani Mudaliar—Petitioner.

v.

Narayana Prasad—Accused.

Cri. R. No. 221 and Cri. R. P No. 190 of 1924, Decided on 2nd April 1924.

Criminal P. C. Ss: 202 and 203—Complaint against Police—Every facility should be given for proving complainant's allegation.

Complaints against Police Officer should be handled with the greatest care. In such cases the complainant should be given every facility to prove his allegations.

T.G Aravamuda Iyengar-for Petitioner.

K. M. Ganapathi—for the Accused.

K. P. Krishna Menon—for the Crown.

Order.—Serious allegations have been made against the accused who is a Head Constable. If the complaint is true, the accused abused his official position in order to benefit his mother who had dealings with the *sowcar* and also to benefit himself.

The complainant should have been given every facility to prove his allegations. He mentioned that he had witnesses but none of them was examined.

It has been held that complaints against Police Officer should be handled with the greatest care. See *Shama* v. *Ejaz Ahmad* (1), *Harihar Prasad* v. *Emperor* (2). Apart from the Magistrate's order being legal or illegal, the question relates to the propriety of the exercise of his discretion under Ss. 202 and 203, Cr. P. C.

The Magistrate's order is very laconic.

I direct the Chief Presidency Magistrate being one of the Magistrates subordinate to him to make further enquiry into the complaint. The order is set aside.

Order set aside.

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(1) [1920] 18 A. L. J. 731=21 Cr. L. J. 649.
(2) [1920] 21 Cr. L .J. 343.

** A. I. R. 1926 Madras 289

DEVADOSS AND WALLACE, JJ.

Visvanatha Mudali and *another*—Appellants.

v.

Doraiswami Mudali and *another*—Respondents.

Appeal No. 39 of 1924, Decided on 12th February 1925, against the order of the Dist. Court of North Arcot in Appeal Suit No. 244 of 1922.

** *Hindu Law — Succession — Legitimate descendants of different sons of a dancing-woman —One branch can inherit to the other—Hindu Law—Applicability.*

The rule of collateral succession obtains among the legitimate descendants of the two sons of a dancing-woman whose paternity is unknown, i. e., each branch can inherit to the other.

It is a misnomer to call the son of a dancing-woman, whose paternity is unknown, an illegitimate son. The illegitimate son is one born out of wedlock, i. e., where no marriage is solemnized between the father and the mother. In the case of sons of prostitutes or dancing-women the paternity is unknown and it is only an euphemism to call them illegitimate sons.

People who have been born in India and who are of the Hindu faith, and whose customs and manners are those of Hindus, are governed by the Hindu Law. In the case of a dancing-woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindus, and the Hindu Law therefore is applicable to them. It is consonant with reason and principle that when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom, valid and binding, is proved to the contrary, or else the application of that system is modified either by statute or by anything contained in the rules of that system. It is not necessary that in order to have heritable blood inheritance should be traced through the father. It logically follows that the sons of a dancing-woman or a prostitute have heritable blood between them. Hence, there is heritable blood between the lines of their legitimate descendants (*Case law discussed.*) [P 289, C 2, P 290, C 1; P 291, C 1; P 292, C 1; P 293, C 1]

Per Wallace, J.—Illegitimate children *inter se* when there is no contest between them and legitimate children, inherit to their mother and to one another. [P 295, C 2]

E. A. Govindaraghava Aiyar—for Appellants.

A. C. Sampath Aiyangar—for Respondents.

Devadoss, J.—The plaintiffs sue for a declaration that the sale of the plaint property in favour of Defendants 1 and 2 is not binding on them as they are the reversioners of one Murugesa Mudali. They claim to be the grandsons of Muthusami Mudali, the divided brother of Kachi Muniappa Mudali. The District Munsif held that being the sons of a prostitute there was no heritable blood between them and the plaintiffs had no reversionary right to the estate of Murugesa Mudali and dismissed the suit. The Subordinate Judge has reversed the decree of the District Munsif holding that the plaintiffs are reversionary heirs to Murugesa Mudali and has remanded the suit for disposal on the merits. Defendants 1 and 2 have preferred this appeal.

Muthusami Mudali and Kachi Muniappa Mudali were the sons of a dancing-woman called Thanji Ammal. It is admitted that the plaintiffs are the legitimate grandsons of Muthusami Mudali and that Murugesa Mudali was the legitimate great-grandson of Kachi Muniappa. The question for decision is: Does the rule of collateral succession obtain among the legitimate descendants of the two sons of a dancing-woman whose paternity is unknown? There is no authority on the point in the Hindu Law books. We have not been referred to any decision in which the question was raised or decided. The principle applicable to the present case has to be deduced from the texts of the Hindu Law books and some of the decided cases.

A good deal of the argument in this case was with reference to the rights and disabilities of the illegitimate sons of Sudras. It is well settled that the illegitimate son of a man belonging to the twice-born class cannot inherit to his putative father; he has only a right to maintenance, but in the case of Sudras, the illegitimate son inherits to his father, his share being half of that of the legitimate son, and he takes the whole in certain circumstances: West and Buhler 82, 194, 3rd Ed. Courts have gone the length of holding that a man's legitimate grandson by an illegitimate son succeeds to him in preference to a divided brother on the theory of representation: *Ramalinga Muppan* v. *Pavadai Goundan* (1). It is unnecessary to consider in detail all the decisions that have been quoted at the Bar with regard to the rights of the illegitimate sons. It is a misnomer to call the son of a dancing-woman whose paternity is unknown an illegitimate son. The illegitimate son is one born out of wedlock, i. e., no marriage was solemnized between the father and the mother. In

(1) [1908] 25 Mad. 519=11 M. L. J. 399.

the case of sons of prostitutes or dancing-women the paternity is unknown and it is only a euphemism to call them illegitimate sons. In Roman Law they are called *nullius filius*. Dancing-women have their peculiar customs. Their status is recognized in Hindu society. Their customs have received the sanction of judicial decisions and the adoption of girls by them is recognized by law, and the daughters of dancing women inherit in preference to their sons.

The question in this case is: What is the law which is applicable to the descendants of the sons of a dancing-woman assuming that the parentage of the sons is unknown and that they are not the sons of an individual? In *Subbaratna Mudali* v. *Balakishnaswami Naidu* (2) a Bench of this Court held that the male members of the dancing-girl caste are Hindus and are usually governed by the Hindu Law and usage. At page 208 (of 33 *M. L. J.*) the learned Judges observe: "All the women appear to have followed the profession of a prostitute. That members of this caste are Hindus is certain, though the ancient writers and their modern exponents find some difficulty in fixing them in one of the four castes; but whether they belong to the Sudra or fourth caste or to a separate fifth caste is immaterial. That male members of this caste are usually governed by the Hindu Law and usage does not seem to have been questioned; so also when female members marry and have children, as they sometimes do, their family relation is governed by the Hindu Law and presumably the ordinary Hindu Law of Inheritance will govern succession to their properties. At the same time their female children may remain unmarried and become prefessional *dasis* without any degradation or stigma attaching to them so long as they observe the caste customs." This decision is consonant with reason.

The plaintiffs and the defendants in this case are Hindus by religion, as well as by their customs and manners. If the Hindu Law is not applicable to them, what other law is applicable? Though the Sruthis and the Smrithis are applicable only to the Aryans, yet the text-writers have extended the law to all the residents of India, and the Courts have applied the Hindu Law to all the races inhabiting this vast country in the absence of proof of any special or local custom. The Dravidians of Southern India who are of Turanian origin had settled in India long before the Aryans entered it. They had their own laws and customs which are prevalent even to-day. The Aryans, when they settled in this part of India, attempted to introduce their customs and laws, but they were never completely successful. The laws relating to family relations and succession and inheritance laid down by Manu and the commentators like Yagnavalkya and Vignaneswara were never accepted as binding by all the people. It was the East India Company's Courts that held for the first time that the laws contained in the ancient Sruthis and Smrithis were applicable to all Hindus in Southern India in the absence of any custom or customary law governing any class of people. Manu, in order to extend the influence of the Aryans, compendiously uses term "Sudras" to the people of this country who are not Aryans in the same way as the Europeans use the word "native" to all those who are not of European descent, and postulates that they are all Sudras who have fallen away from the high place once occupied by them in the Aryan polity as the following verses show: Chap. 10, verse 43: "the following races of Kshatriyas of their omission of holy rites and by seeing no Brahmins have gradually sunk among men to the lowest of the four classes." Verse 44: "Paundrakhas, Oodra Dravidas, Kambojas, Yavannas and Sakeas; Paradas, Pahlavas, Chinas, Kirates, Deradas and Chasas." Verse 45: "All those tribes of men who sprang from the mouth, the arm, the thigh and the foot of Brahma, but who became outcastes by having neglected their duties are called Dasyus or plunderers, whether they speak the language of the Mlechchhas or that of Aryas." This attempt on the part of the law-giver Manu to extend the influence of the Aryans among the races who inhabited this land was always pushed in the direction of influencing their religion and the rules of succession. When the East India Company's Courts were established, the Judges took the law from the pandits who naturally relied upon the texts of the ancient law-givers and commentators as authority for their opinions. In course of time the Courts have come to

(2) (1917) 6 L. W. 184—22 M. L. T. 91—33 M. L. J. 207—(1917) M. W. N. 569.

regard Manu and the commentators as authoritative exponents of the law applicable to all the inhabitants of this country who don't profess any distinctive faith like Muhammadanism or Christianity. The customary law was considered as an exception to that contained in the Sruthis and Smrithis. Under the loose term "Hindu" all classes of people are brought within the pale of "Hindu Law" as expounded in the texts of the various Sruthis and Smrithis and their commentators. It therefore follows that people who have been born in India and who are of the Hindu faith, and whose customs and manners are those of Hindus, are governed by the Hindu Law.

In the case of a dancing-woman or a Hindu prostitute her religion is Hindu and her customs, manners and observances are Hindu, and her sons are Hindu, and the Hindu Law therefore is applicable to them.

The caste and persuasion of the mother determine the rights of her son, if illegitimate. In *Lingappa Goundan* v. *Esudasan* (3) it was held that the illegitimate son of a Hindu by a Christian woman was not entitled to maintenance from the estate of his Hindu father. Benson and Bhashyam Aiyangar, JJ., observe at p. 14: "The Hindu Law lays down certain rules for determining the caste of offspring of unions between parents belonging to different castes (amongst the four recognized main castes) and gives separate names to the mixed castes to which such offspring will belong. In all these cases the dharma or religious rites applicable to the offspring are those prescribed for the mother's caste: *Brindavana* v. *Radhamani* (4). The plaintiff, therefore, cannot be regarded as a Hindu by birth, and he is, therefore, beyond the pale of, and not governed by, the Hindu Law. There is no text of Hindu Law, under which an illegitimate son of a Hindu, by a woman who is not a Hindu, can claim maintenance, and in none of the reported cases has maintenance been ever awarded to an illegitimate son who was not a Hindu by birth."

With all due respect it is difficult to see why the illegitimate son of a Hindu is not a Hindu when he follows the Hindu customs and manners. It is the Hindu father who is bound to support his illegitimate son and the mothers's religion has nothing to do with his liability to maintain him. It is unnecessary to question the soundness of this decision in this case. The principle of the decision is the mother's religion determines the rights of her children. If the mother is a Hindu the children are Hindus, and the Hindu Law therefore is applicable to them. In *Myna Bayee* v. *Uttaram* (5) the facts briefly are: one Hughes kept two married women as his concubines; one of them was a Gowda Brahmin. Two sons were born to the Brahman woman and he bequeathed his property to the sons. One of the sons died and the other son claimed to succeed to him. The Privy Council held that the illegitimate children of a Brahmin married woman born to a European father were to be considered as Hindus and their rights governed by that law. On remand the Madras High Court held (2 *Madras High Court Reports*, 196) that the sons of an Englishman by a Brahman woman living apart from her husband were Hindus and their rights were to be determined by the rights of the class of Hindus to which they belonged; and they also held that they were to be regarded as Sudras or a class still lower, and in the absence of preferable heirs the two sons inherit the property of the mother and of one another. It was not possible to plead any custom in support of the claim. The learned Judges observed at page 203: "Our reasoning, therefore, is that there is no authority against the existence of heritable blood between the woman and her illegitimate offspring. Toukuram and his brother are decided to be Hindus. They are the Hindu sons of a woman who was either a woman of a class lower than the fourth of Manu's classes, and in this case sons are cognate to her and to one another, as the children of a class not twice-born out of wedlock, and entitled to inherit to their mother and only not capable of inheriting to their father because he is not a Hindu at all. If not so she is a mere prostitute, and of the cognation between her and her offspring there exists no doubt whatever." They relied upon the Roman Law which recognized the relationship between an erring mother and her sons and of the sons towards one another. It was the influence of Christianity in the West that stood in the way of

(3) [1905] 27 Mad. 13.
(4) [1889] 12 Mad. 72.
(5) [1850] 8 M. I. A. 400 = 2 W. R. (P. C.) 4.

the claim of illegitimate son on his putative father. The principle deducible from these decisions is that if the mother is a Hindu and the children follow the Hindu religion and adopt Hindu manners and customs, the law applicable to them is the Hindu Law and it does not matter whether the father is a Christian or Muhammadan, European or an Indian. It necessarily follows that persons whose paternity is unknown and who are the descendants of Hindu mothers are governed by the Hindu Law. In a recent case [*A. I. R.* 1924 *Patna* 420,] the Patna High Court held that the sons of the daughters of Hindus of the Naick caste who were converted to Muhammadanism but who lived with their Hindu grandparents and were brought up as Hindus, are governed by the Hindu Law even though they have adopted the profession of dancing and have become prostitutes. Jwala Prasad, J., after an exhaustive consideration of the texts contained in the Sruthis and Smrithis relating to the point and the decided cases bearing on the point, has come to the conclusion that the sons of the prostitutes converted to Muhammadanism who were brought up by the Hindu grand-parents as Hindus are governed by the Hindu Law. It follows from this decision that the Hindu Law is the proper law which governs the relations and the inheritance of persons who are Hindus in faith and in customs and manners. Though it is stated that a Hindu is born and not made, yet when the question is what is the law applicable to persons who are Hindus in fact, the only answer is that the ordinary Hindu Law is applicable, and if the ordinary Hindu Law is applicable, unless there is some prohibition, statutory or otherwise, the whole of that law isapplicable. In this case supposing Muniappa Mudali had died without issue and the widow alienated his property improperly would not Muthusami Mudali if he survived Muniappa, be entitled to bring a suit that the alienation was not binding on him as reversioner? If Muthusami Mudali could bring such a suit, could not his son bring such a suit? And if he could, his legitimate descendants can certainly bring such a suit. It is consonant with reason and principle that when a particular system of law is made applicable to a set of persons, the whole of that system should be applied and not portions of it, unless any custom valid and binding is proved to the contrary or else the application of that system is modified either by statute or by anything contained in the rules of that system. From the decisions in 8 *M.I.A.* 400 and 2 *M.H.C.R.* 196, it is clear that Muthusami Mudali and Kachi Muni appa Mudali had heritable blood between them. This is not seriously disputed by the appellant. The question is whether their descendants can inherit to one another, in other words, whether the principle of collateral succession applies to the descendants of these two persons. The contention of Mr. Govindaraghava Aiyar for the appellant is that collateral relationship is traceable only through the father, in other words, it is only in case of agnatic relations that the principle of collateral succession is applicable, that an illegitimate son cannot inherit to his father's collateral relations and that in the case of Muniappa Mudali and Muthusami Mudali the father being unknown agnatic relationship does not exist and, therefore, there can be no collateral succession among their descendants. Reliance is placed on the following cases in support of the appellant's contention. Amongst the Sudras governed by Mitakshara an illegitimate son cannot inherit collaterally in preference to legitimate heirs. *Ravji Valad Mahadu* v. *Sakuji Valad Koloji* (6). Amongst Sudras governed by Mitakshara an illegitimate son does not inherit collaterally to the legitimate son by the same father: *Shome Shankar Rajendra Varore* v. *Rajesar Swami Jangam* (7). The illegitimate son is under Hindu Law excluded from all collateral succession: *Dharma Lakskman* v. *Sakharam Ramjiras* (8). The son of the legitimate son of a Sudra could not inherit to his illegitimate son: *Zipru* v. *Bomtya* (9). It is well settled that an illegitimate son cannot claim to inherit to his father's collaterals. He cannot claim to succeed to the ligitimate son of his father, but can succeed only to his father, and the father can succeed to him. The relationship is therfore only between an illegitimate son and his father. In *Subramania Ayyar* v. *Rathnavelu Chetti* (10) it was

(6) [1910] 34 Bom. 321=12 Bom. L. R. 204.
(7) [1898] 21 All. 99=(1898) A. W. N. 117.
(8) [1920] 44 Bom. 185=22 Bom. L. R. 52.
(9) A. I. R. 1922 Bom. 176.
(10) [1917] 41 Mad. 44.

held that the father was entitled to succeed to his illegitimate son who left no issue, widow or mother. In all the cases where the illegitimate son was denied the right to succeed to his father's collateral relations the following text of Manu was relied upon: "The son of the young woman unmarried, the son of a pregnant bride, a son bought, a son by a twice married woman, a son self-given and a son by a Sudra are the six kinsmen but no heirs to collaterals": Manu, Chap. IX, verse 160.

But for this text the illegitimate son would have the right to succeed to his father's collaterals. The question of succession to the putative father's collaterals does not arise here and the cases noticed above have, therefore, no application to the present case.

In the time of Manu a woman was allowed to marry more than once as is clear from Manu, Chapter IX, verse 191. The sons of a mother, though by different fathers, were considered to have heritable blood between them; for Nanda Panditha gives the order to precedence among brothers and sisters of whole blood and half blood thus: (1) brothers of the whole blood (2) sisters of the whole blood, (3) sons of the same father by different mothers and (4) sons of the same mother by different fathers. The existence of heritable blood between sons of the same mother by different fathers cannot, therefore, be through the father and is attributable only to their being sons of the same mother. It is not, therefore, necessary that in order to have heritable blood inheritance should be traced through the father. It logically follows that the sons of a dancing-woman or a prostitute have heritable blood between them.

If A can succeed to B in the absence of preferable heirs why should not A's legitimate son succeed to B if A predeceases B in the absence of law or custom to the contrary? If two men are sons of the same mother they have heritable blood between them unless such a principle is opposed to any distinct text either in Manu or in the Mitakshara or in any one of the various commentaries. There is no text of Manu or any of his commentators against the descendants of the sons of a prostitute having heritable blood between them. Both Muthusami Mudali and Kachi Muniappa Mudali were brothers and their descendants are all legitimate; i. e., the plaintiffs are the legitimate sons of the legitimate son of Muthusami Mudali; similarly Murugesa Mudali was legitimate in descent from Kachi Muniappa Mudali. There was no *bar sinistar* so far as he or his father or grandfather was concerned. Seeing that there was heritable blood between Muthusawmi Mudali and Muniappa Mudali, did the tie cease to exist between Muthusami's son and Muniappa's son? If there was heritable blood between the fathers, it is difficult to understand why that should not continue in the case of the sons. If Muthusami Mudali could succeed to Kachi Muniappa it is difficult to see why the legitimate son of Muthusami should not succeed to Kachi Muniappa. The principle of representation, as enunciated in 25 *Mad.* 519, is against the appellant's contention. In that case it was held that the legitimate son was entitled to succeed to a man in preference to his divided brother. Bhashyam Aiyangar, J., who delivered the judgment in the case observed with regard to *Krishnayyan* v. *Muthasami* (11); *Ranoji* v. *Kandoji* (12) and *Parvathi* v. *Thirumalai* (13). "The effect of these decisions is that it is only when the father dies a seperated house-holder that an illegitimate son is entitled to inherit to his separate estate, but that when the father dies an "avibhakta" (undivided from his brothers or other collaterals) he is entitled only to maintenance. The principle of these decisions is explained as follows in *Thangam Pillai* v. *Suppa Pillai* (14). But these decisions proceeded on the view that he had no claim by survivorship against his father's co-parceners by *jus representationis*, and that he was neither a coheir with his father nor a sapinda in relation to his father's coparceners." The learned Judge goes on to observe at page 523: "Assuming, as explaided in *Thangam Pillai* v. *Suppa Pillai* (14), that by reason of his illegitimacy an illegitimate son cannot claim his father's share as against his father's coparceners by *jus representationis* that principle will not be applicable to a legitimate son representing his father though the father was the illegitimate son

(11) [1884] 7 Mad. 407.
(12) [1885] 8 Mad. 557.
(13) [1887] 10 Mad. 334.
(14) [1889] 12 Mad. 401.

of the grandfather. If a Sudra dies, leaving a legitimate son and a grandson or great-grandson by a predeceased illegitimate son can it be contended that the legitimate son is not bound to allow half a share to the son or grandson of his deceased illegitimate brother just as he would be if the illegitimate son did not predecease the father? If the grandson, as representing his father though not claiming under him, would be entitled as against his uncle to claim his father's share it can hardly be maintained, though his father predeceased the grandfather, that he cannot claim the grandfather's estate as against the grandfather's divided brother. An illegitimate son's right of inheritance to his father's property, or at least to a part of it, is not contingent but absolute, as in the case of a legitimate son since if he has legitimate half-brothers or other heirs of his father down to a daughter's son, he gets a half share, and in the absence of such heir the whole estate. The Sudra's illegitimate son is, therefore, in a position more analogous to that of a legitimate son than to that of other relations whose right of inheritance is liable to obstruction. The principles, therefore, applicable to the succession of sons and grandsons of legitimate sons may by analogy be applied to the sons and grandsons of an illegitimate son, viz., that they should be considered capable of representing the illegitimate son and in case he dies before his father, of taking the share which would have fallen to him if he had not so died." The learned Judge relies for his opinion upon West and Buhler, III Edition, pp. 72, 82, 83 and 390; and Mr. Jolly's Work on Hindu Law, pp. 185, 186. I respectfully adopt the reasoning of that very learned Judge and I am of opinion that the legtimate descendants of Muthusami Mudali represent Muthusami Mudali and the legitimate descendants of Muniappa Mudali represent Muniappa.

If Muniappa Mudali's son had died without issue would not Muthusami Mudali, if he was alive, have succeeded to the property of that son? And if it is once granted that Muthusami's son represents him and Muniappa's son represents him then it is difficult to understand how their sons could not represent Muthusami and Muniappa respectively. If that is so then there is heritiable blood between them and one line can succeed to the other line according to the principle of collateral succession. It is immaterial to consider whether Thanjai was a dancing-woman or only a prostitute. Whether the mother be a dancing-woman or an ordinary prostitute the legitimate descendants of her sons have heritable blood between them, and this decision does not turn upon any custom or law peculiar to dancing-women. On a careful consideration of the cases quoted at the Bar and the various passages in the Hindu Law books touching on this point, I have come to the conclusion that the plaintiffs are the reversionary heirs to Murugesa Mudali.

The appeal is dismissed with costs.

Wallace, J.—I am of the same opinion.

It appears to me that on the plaintiff's own case, the mother of the two brothers was of the dancing-girl caste. Both P. Ws. Nos. 1 and 3 state that this woman was a dancing-girl and had no fixed husband. She was not, therefore, a married woman who had fallen from lawful wedlock. The law first of all to be applied is then the law founded on usage which governs inheritance to women of the dancing-girl caste, the paternity of whose children is unknown and is not a fact for consideration at all.

So far as appears further from the evidence, these two brothers lived in caste, married wives according to the Hindu caste customs and had legitimate offspring.

Authority regarding the law of succession of natural offspring of a dancing-girl there is, so far as I can find, none. Though a recent case *Guddati Reddi* v. *Ganapati Kandama* (15) lays down that the degraded married woman is not for purposes of the law of succession in the position of a dancing-girl, I do not think it is incorrect to say that, if the natural sons of such women take their place in Hindu society as respectable members of such and live as caste Hindus following the laws and customs of such, they must be taken as having adopted the usages and customs of the Hindu people with whom they associate. It does not appear to have been pleaded in this case that the law of succession of male offspring of a dancing-girl differed in essence from the law of offspring of a degraded married woman and in fact both sides proceeded on the footing that

(15) [1912] 23 M. L. J. 493=(1912) M. W. N. 1138=12 M. L. T. 467.

the law was much the same. I may take it then, without wasting time by further remand of the case, that the usage and custom of succession to their mother and inter se of male offspring of a dancing-girl are those of such succession of the male illegitimate offspring of a degraded married woman. It may also be taken as not in question that male offspring will not belong to any of the three higher castes, whatever their paternity may have been and that if they are in caste at all, they must be in the Sudra caste.

I do not think that the placita from various ancient texts really assist this case because they are not, in my opinion, dealing with the rights of succession or inheritance in favour of illegitimate children at all, except in the case of the illegitimate son of a Sudra; that is, in those texts 'son' means a legitimate son and 'daughter' means a legitimate daughter. This applies even to the passage from Nanda Pandita quoted at page 207 of Jolly's Hindu Law, (1885 Edition): illegitimate children have no place in Hindu Law when there are legitimate heirs except in the special case already referred to: see *Meenakshi* v. *Muniandi Panikkan* (16). I also find very few of the cases cited before us of any real help since this is not a contest between an illegitimate offspring and a legitimate, or a case of a claim by an illegitimate offspring to succeed to his putative father's collaterals. The question is purely whether two illegitimate sons of the same mother have between them heritable blood. The rule laid down in *Mayna Bai* v. *Uttaram* (17) that the children of a prostitute, when the contest is purely between themselves, succeed to the property of their mother and to one another, is, I think, the rule to be followed in this case. As I read that case, the principle did not in the slightest degree depend either on the facts that the father was known or on the fact that the father of both illegitimate sons was the same person. It rested not on the common paternity, but on the common maternity of illegitimate sons: (Compare also the ratio decidendi of *Lingappa Goundan* v. *Esudasan* (3)). That principle in this narrow form has never, so far as I can ascertain, been challenged in succeeding cases, and it is also, in my opinion, reasonable and equitable and in consonance with the general spirit of, if not prescribed by, the letter of the law of the Mitakshara wherein heritability follows propinquity of blood and sapinda relationship is determined by the possession of particles of the same body, whether father's or mother's: see Mitakshara quoted by Setlur in his Hindu Texts 1911, Edition, Appendix-A, page 543 and the view of Sadasiva Iyer, J., in his letter of reference in *Subramania Iyer* v. *Ratnavelu Chetty* (10). I do not think that there is any authority in Madras for the proposition that sapinda relationship cannot exist without a father.

The only reported cases which I can find of contest between illegitimate children inter se are *Mayna Bai* v. *Uttaram* (17). I already dealt with, and *Arunagiri Mudali* v. *Ranganayaki Ammal* (18) in which latter case neither side appears to have raised any general contention that the Hindu Law principle which gives preference to daughters over sons as heirs of their mother could not be applied because Hindu Law generally could not be applied.

I think the net result of the authorities and the case-law is this, that Hindu Law texts have no application to illegitimate children except in the case of the illegitimate son of a known Sudra father, that so far as the Hindu Law canon goes illegitimate children have no right of succession to either parent, but that the general principles of Hindu Law will be applied to such a case unless such application would violate equity and good conscience and that applying these the Courts will hold that illegitimate children inter se, when there is no contest between them and legitimate children, inherit to their mother and to one another.

The next step is more difficult: if the Court holds that outside Hindu Law there is heritable blood between any two illegitimate children, will that heritability carry with it all the adjuncts of heritability under Hindu Law, so that the legitimate male descendants of one branch can claim as reversioners to oust the legitimate widows and legitimate

(16) [1914] 38 Mad. 1144=1 L. W. 704=16 M. L. T. 270=(1914) M. W. N. 672=27 M. L. J. 353.

(17) [1864] 2 M. H. C R. 196.

(18) [1898] 21 Mad. 40.

descendants of the other branch ? That is the point now before us. In essence, *Arunagiri Mudali* v. *Ranganayaki Ammal* (18) has approved of that principle although the general question does not appear to have been then argued at all. But it was there taken for granted that Hindu Law principles would be extended to the illegitimate children of a Hindu woman. In *Mayna Bai* v. *Uttaram* (17) as I read it, it was clearly laid down that the illegitimate children of a Hindu mother are to be considered to be Hindus to whom Hindu Law, so far as it can be analogically applied, will be applied, and it is not open unless and until special custom to the contrary is proved, for persons who are in the eye of the law Hindus, to plead that the ordinary adjuncts of the principle of Hindu Law, for example that of the restricted nature of the estate taken by a widow from the last male owner, do not apply or that they are entitled to set up new rights of succession and inheritance not known to Hindu Law. I cannot see that such an analogical application of Hindu Law to persons living as Hindus and following Hindu customs and usages can in any way offend the general principles of equity and good conscience. I hold, therefore, that the legal principles to be applied are those set out above.

It is not denied before us that these parties are, so far as they can, conforming to the Hindu Law governing their neighbours, that, for example, their wives were legitimately married to them according to the forms of Hindu Law, and that their wives derive their status as lawful wives and their children their status as lawful children from the fact that their families are conforming to the general usages and customs of Hindus. No special custom derogating from the applicability of Hindu Law principles to descendants of these two illegitimate brothers has been pleaded or proved in the case. It follows in my view that the ordinary principles of Hindu Law should be applied to them. That the lower Court has done. My opinion, therefore, is that the decision of the lower Court is correct and I agree that this appeal be dismissed with costs.

Appeal dismissed.

✻ A. I. R. 1926 Madras 296

DEVADOSS AND WALLER, JJ.

R. V. Kaliappa Goundan and *others*—*In re.*

Criminal Revisions Nos. 411 and 412 of 1925 and Criminal Rev. Petitions Nos. 345 and 346 of 1925, Decided on 7th August 1925, from the order of the Addl. S. J., Coimbatore, D/- 26th June 1925.

✻ *Criminal P. C., S. 494—Sessions Judge refusing permission to withdraw—High Court would be reluctant to interfere.*

Where the Sessions Judge has exercised his discretion in refusing permission to withdraw a case under S. 494, the High Court would be very reductant to interfere with his discretion. 48 *Cal.* 1105, *Cons.*

S. Swaminathan—for Petitioners.

J. C. Adam—for the Crown.

Order.—These are applications to revise the order of the Additional Sessions Judge of Coimbatore refusing permission to withdraw Sessions Cases Nos. 51, 52 and 53 of 1925. Dr. Swaminathan contends that the learned Judge has misdirected himself as to what he should do in a case of this kind. The application was made by the Public Prosecutor under S. 494 and he gave certain reasons for the withdrawal of the cases. The Sessions Judge has considered the reasons and has come to the conclusion that these were not fit cases for withdrawal. He relies upon the decision in *Rajani Kanta Shaha* v. *Idris Thakur* (1) and says that where there is evidence against the accused which, if believed, would end in conviction, it would not be proper to give permission to withdrawn a case under S. 494. But that is not the only reason which should guide a Court in granting or refusing permission. In this case, the learned Additional Sessions Judge has exercised his discretion in refusing permission, and we cannot say that he has improperly exercised his discretion. The reasons that he gives may not be the only reason for an order of this kind but that is no ground for saying that he has not exercised a judicial discretion in granting or refusing permission to withdaw a case, Where a Judge has exercised judicial discretion in the proper way the High Court will be very reluctant to interfere with his discretion and we, therefore, decline to interfere with his order. The petitions are dismissed.

Petitions dismissed.

(1) [1921] 48 Cal. 1105=25 C. W. N. 615=43 C. L. J. 51=22 Cr. L J. 760.

A. I. R. 1926 Madras 297

ODGERS AND MADHAVAN NAYAR, JJ.

Mahammad Raza Saheb Belgami—Petitioner.

v.

Sadasiva Rao and *others* — Respondents.

Civil Revision Petition No. 165 of 1923, and Civil Misc. Petition No. 3407 of 1922, Decided on 27th April 1925, against the order of the Dist.-J., Guntur, in O. P. No. 131 of 1921.

(a) *Madras Dist. Municipalities Act* (5 *of* 1920), *S.* 13—*Expenses made on unrecognized schools is illegal and can be surcharged on the person making it.*

The Government can prohibit by passing special orders the expenditure of the Muncipal fund on schools of which it does not approve and, therefore, payments made by a Municipal Chairman for defraying the expenses of these schools subsequent to an order of Government withdrawing recognition of such schools are illegal, being made contrary to Government orders prohibiting such expenditure and the Auditor is entitled under R. 60 (1) of Part 2, Sch. 4 of the District Municipalities Act, to surcharge the amount on the person making, or authorising the making of such illegal payments. [P. 303, C. 1]

(b) *Government of India Act* (1919), *S.* 49 (1)—*Orders meant to be issued by Governor in respect of educational matters, issued by Secretary to Government—Orders are valid.*

The Government orders issued "by order of the Government, Ministry of Local Self-Government" and signed by the "Secretary to Government," though required by R. 37 to be issued by the Governor in Council are valid in view of S. 49 (1), Government of India Act. [P. 304, C. 1]

(c) *Madras District Municipalities Act* (5 *of* 1920), *Sch.* 4, *R.* 61—*Remedy by issue of certiorari writ is not open under the Act.*

The remedy by way of an issue of a writ of certiorari is not open to aggrieved persons under the District Municipalities Act. [P. 305, C 1]

(d) *Certiorari—Other remedy open—Writ is not generally granted* (*Madhavan Nayar, J.*).

Writs of certiorari are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of. [P. 305, C. 1]

A. Krishnaswami Ayyar—for Petitioner.

C. V. Ananthakrishna Ayyar—for Respondents.

Odgers, J.—*Civil Revision Petition No.* 165 *of* 1923.—This is a petition to revise the order of the District Judge of Guntur confirming a surcharge order made by the Examiner of Local Fund Accounts (Ex. A) on the petitioner as Chairman of the Guntur Municipal Council. The ground for the surcharge is that the petitioner illegally issued cheques against the Municipal funds under the powers given him by R. 55 (1), part 2 of Sch. 4 of the Madras District Municipalities Act (5 of 1920), for the maintenance of 25 elementary schools managed by the Guntur Municipal Council, such objects not being authorized objects under Act 5 of 1920. On 13th July 1921, the Guntur Municipal Council passed a resolution (Ex. I), (a) to introduce the national system of education in all the institutions under the management of the Council ; (b) to dispense with the annual grant by Government ; (c) to conduct Municipal primary schools independently of Government control.

On 19th August 1921 (Ex. II), a committee of the Guntur Municipal Council was appointed to formulate the methods of working the national system of education. The 25 elementary schools had been up to this date recognized by Government under the Educational Rules and Government had made a grant towards their maintenance. On 15th August 1921, the Government issued two Government orders, No. 1583 (Ex. IV) was issued under R. 37, Sch. 4 of the Madras District Municipalities Act (5 of 1920) as a special order. This Government order ran as follows :

"No portion of a Municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval."

(By order of the Government, Ministry of Local Self-Government.")

It may be here stated that R. 37, Sch. 4 of the Madras District Municipalities Act, 1920, reads as follows :

"The purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by laws or rules, and in general everything necessary for or conducive to, the safety, health, convenience or education of the inhabitants or to the amenities of the Municipality and everything incidental to the administration ; and the fund shall be applicable thereto within

the Municipality subject to these rules and such further rules or special orders as the Governor in Council may prescribe or issue ; and shall be applicable thereto without the Municipality if the expenditure is authorized by this Act, or specially sanctioned by the Governor-in-Council."

So the Municipal fund is applicable to these objects within the Municipality "subject to these rules and such further rules, etc." The other G. O. No. 1584 (Exhibit P) was an order on the resolution of the Guntur Municipal Council set out above and reads as follows :

"Recorded. 2. The Government presume that the Municipal Council does not require any financial help from the Government for any purpose.

(By order of the Government Ministry of Local Self-Government)."

The Guntur Municipal Council considered on 14th October 1921, these Government orders and on No. 1584, passed the following resolution :

"This Council decided to dispense with Government grants only in regard to the national schools, but it is inexpedient that the Government should put a wrong interpretation upon it and presume that the Council does not require financial help from them for any purpose. The Council is of opinion that under these circumstances it is worthy only not to ask for financial help from the Government."

G. O. No. 1583, they considered and merely recorded. They also considered a letter from the Inspector of Schools (Ex. IX), requiring whether the Council intended to apply for recognition for the newly nationalized elementary schools and resolved that such recognition was unnecessary. On 22nd October 1921, the District Educational Council of Guntur met and adjourned a resolution (Ex. B) to withdraw recognition from the newly nationalized elementary schools "in accordance with G. O. No. . . . , dated . . ." Previously, on 8th October 1921, the Sub-Assistant Inspector of Schools informed the petitioner that he intended to inspect the schools of the Municipality "as per my annual programme of work" (Ex. C), and, on 27th October 1921, the Chairman issued a memo.(Ex. C-1) to head masters and headmistresses to that effect. The Inspector attended and extracts from his inspection book are (Ex. E), dated 31st October 1921. On 9th November 1921 (Ex. VII) the Government drew the attention of the Guntur Municipal Council to G. O. No. 1583 (Ex. IV) and added :

"Since the Council has decided not to seek recognition for its schools, expenditure of Municipal funds on such schools is illegal."

That is the evidence on which the District Judge has come to the conclusion that as from the passing of Ex. I on 13th July 1921, the Municipal schools ceased to be recognized by Government. The first contention addressed to us for the petitioner is that as these schools never ceased to be recognized, they did not fall within the mischief of G. Os. 1583 (Ex. IV) or 2208 (Ex. VII). The facts that the District Educational Council adjourned consideration of the resolution to withdraw recognition and that the schools were inspected as usual by the Government Inspector in October 1921, are cited to support this construction. It is to be observed as regards the first of these that the District Educational Council proposed to act in accordance with a a certain G. O. (Probably No. 1583 is referred to). If so, it is quite possible that the Council thought that any action on its part was unnecessary as Government had already treated these schools as unrecognized. That this latter is true there can be no doubt. It is perfectly clear from Ex. IV that Government rightly or wrongly purported not to recognize or approve the schools after the proceedings of the Guntur Municipal Council on 13th July 1921 : see also Ex. IX. Exhibit IV clearly shows that Government assumed equal or superior powers to the District Educational Council to recognize or approve. Section 41 of Act 8 of 1920 (Elementary Education) is relied on to show that recognition of elementary schools is to be applied for through the Inspector to the District Educational Council, which is the recognizing authority subject to an appeal to the Director of Public Instruction. Section 124, District Municipalities Act, makes the rules, etc., in Sch 4 part of the Act. Section 304 gives the Governor-in-Council, power to amend or cancel the schedule. R. 37, Sch. 4, has been set out above and appears to me to give the Government a final control over the expenditure of the Municipality. It is said

for the petitioner that so long as the aims of the latter are educative, Government has no control over the kind of education which is provided. The objects of expenditure of Municipal funds are set out in R. 40. The ways in which the Council may provide instruction are set out in R. 48. This and R. 47 (as to the duty of providing education generally), are part of Part II of the schedule of which R. 37 (above) is the first rule and which sets out the authorized objects of expenditure. Reading these rules and S. 304 together, I feel no doubt that the clause "subject to these rules, etc." in R. 37 would also apply to control R. 48. Therefore Government cannot only refuse its own grant to schools of which it does not approve but can control the expenditure of the Municipality on such schools. I do not think the fact that a Government inspection of these schools took place in accordance with the Sub-Assistant Inspector's programme, no doubt arranged long beforehand, as indeed he states, has any bearing on the question. The Government did not wish to proceed to the extreme and it was not till 9th November 1921 (Ex. VII) that they definitely pointed out that expenditure on the schools was illegal. It appears to me that recognition is a matter of assent on both sides. Government must accept recognition and the Educational authority must desire it. As soon as either side withdraws, recognition is at an end. This is not an appeal. It is not necessary for me to say whether on the evidence I should have come to the same conclusion as the District Judge, but it appears to me there is evidence on which the District Judge could come to the conclusion he did with regard to this matter, viz., that the schools were unrecognized at any rate at the date from which the surcharge begins, viz., 10th August 1921.

The next point is as to the liability of the Chairman petitioner. It is said that under S. 22 of the District Municipalities Act the Chairman was bound to give effect to the resolution of the Council of 13th July 1921. Section 13 lays down the general duties of the Chairman ; by S. 13 (c) he is to carry into effect the resolutions of the Council and by S. 13 (e)

"The Chairman of the Municipal Council shall perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions, hereinafter imposed, exercise the executive power for the purpose of carrying out the provisions of this Act, and be directly responsible for the due fulfilment of the purposes of this Act."

The power of signing cheques on Municipal funds is given to the Chairman by R. 55 (1) of Sch. IV.

By R. 56 to 62, the audit of accounts is controlled. By R. 60 the auditors are to charge against any person making or authorizing the making of an illegal payment. Rule 62 provides that the Chairman shall apply to the Court for payments of any sum certified as surcharged and it is said that this cannot apply to a case where the Chairman is surcharged himself. It no doubt applies where the Chairman recovers from other members or from a former Chairman as might be done in this case. Section 353 of the Act renders the Chairman as well as the other members liable for loss, waste or misapplication of municipal money. On the other hand, it is said that S. 22 is opposed to S. 13 (e) where the words "subject to all other restrictions, limitations and conditions hereinafter imposed" occur. This would bring in the restrictions already referred to in R. 37, Sch. IV. It is perfectly clear to my mind that the Chairman is as liable as any member for misapplication of moneys. It may be hard that he be rendered so liable because he was merely carrying out a resolution of the Council though I think it is on record that he voted for that resolution himself. I think S. 13 (e) and Rr. 37 and 55 (1) apply to this case. The Chairman cannot be obliged to carry out illegal resolutions and S. 22 provides that he is relieved from carrying out a resolution modified, suspended or cancelled by a controlling authority. If the resolution of 13th July 1921 is to be construed as authorizing him to spend municipal money on the schools after the Council had dispensed with Government aid and control, it may be said that resolution was afterwards cancelled by a controlling authority; there are, however, no specific words to this effect in the resolution and there does not appear to be any subsequent resolution to that effect. The Chairman

signed the cheques and, as I have already found, he did so for an illegal purpose. He is, therefore, in my opinion liable; whether he has any remedy over against the other members is of course not open to discussion here.

A third point is raised for the petitioner. It has not been taken below. That is, that the G. Os. were signed thus by the Secretary to Government: "By order of the Government, Ministry of Local Self-Government." It is of course well known that eduction is a transferred subject under S. 45-A, Cl. (1), sub-Cl. (d) of the Government of India Act which came into force on 17th December 1920. The date of the District Municipalities Act is 29th June 1920. It is said that R. 37 of Sch. IV of the District Municipalities Act provides that the "Special orders" must be prescribed or issued by the "Governor-in-Council" and that as these G. Os. were signed as set out above they are invalid as they do not conform to this express statutory provision. Section 49 of the Government of India Act provides as follows:

"All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings.

Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceedings on the ground that they were not duly made by the Government of the province."

In my opinion this provision was made expressly to meet a case like this and must be taken to override the provision in R. 37. There is thus no substance in this objection. These are the points raised in the Civil Revision Petition and in my opinion they all fail and the Civil Revision Petition must be dismissed with costs.

Civil Miscellaneous Petition No. 3407 *of* 1922.—This relates to the same subject-matter and is a petition for the issue of a writ of certiorari to bring in and quash the auditor's order of surcharge referred to in my judgment in Civil Revision Petition No. 165 of 1923.

That this remedy is open under the English procedure is undoubted. The Public Health Act, 1875, S. 247 (8), provides that: "Any person aggrieved by disallowance made (under (7)surcharges) may apply to the Court of Queen's Bench, for a writ of certiorari to remove the disallowance into the said Court, etc." cf. *Rex* v. *Roberts* (1), *Rex* v. *Roberts, Ex parte Scurr* (2). The question is: Is such a remedy open under the District Municipalities Act? Sch. IV, R. 60, corresponds to the Public Health Act, 1875, S. 247 (7), but sub-S. (8) of the Statute runs as already set out above, whereas R. 61 runs thus:

"Any person aggrieved by disallowance, surcharge or charge made, may, within fourteen days after he has received or been served with the decision of the auditor, apply to the Principal Civil Court of original jurisdiction to set aside such disallowance, surcharge, or charge, and the Court, after taking such evidence as is necessary, may confirm, modify or remit such disallowance, surcharge or charge with such orders as to costs as it may think proper in the circumstances or in lieu of such application any person so aggrieved may appeal to the Governor-in-Council, who shall pass such orders as he thinks fit."

Rule 62 corresponds generally with S. 247 (9). It seems to me therefore that the remedy by certiorari in this particular matter is not open under the District Municipalities Act and that a substituted remedy has been provided in that Act for the remedy by certiorari given by the Statute. Therefore whatever may be or may not be the general powers of the Court to issue this writ, it seems to me that that power, if it ever existed in the present case, has been by implication removed by the Act, which provides another and specified remedy. Further, even if the power exists in the present case, no prima facie case has in my opinion been made out for its exercise by us. The petition must be dismissed with costs.

Madhavan Nayar, J.—*Civil Revision Petition No.* 165 *of* 1923. — The facts necessary for the decision of this Civil Revision Petition and the Civil Miscellaneous Petition are fully set out in my

(1) [1908] 1 K. B. 407.
(2) [1924] 2 K. B. 695.

learned brother's judgment with which I agree.

The Civil Revision Petition is against the order of the District Judge of Guntur refusing to set aside the order made by the Examiner of Local Fund Accounts, Madras, surcharging the petitioner, the Chairman of the Guntur Municipality, with Rs. 1,771-6-0. The surcharge certificate was issued by the first respondent under R. 60 (1) of Sch. IV of the Madras District Municipalities Act (V of 1920) which empowers every auditor to:

"Disallow every item contrary to law and surcharge the same on the person making, or authorizing the making of, the illegal payment."

The case against the petitioner, as mentioned in the surcharge certificate, is that he issued cheques against the Municipal funds on different dates between the 10th of August 1921 and the 31st of October 1921 for amounts aggregating to Rupees 1,771-6-0 towards the salaries of teachers and for expenses in connexion with the maintenance of 25 educational institutions within the Municipality contrary to special orders issued by the Government under R. 37 of Part II of Sch. IV of the District Municipalities Act, which made such payments illegal. The Guntur Municipal Council, by its resolution, dated the 13th of July 1921, Exhibit I, decided to introduce: (1) the national system of education in all the institutions under management of the Council; (2) to dispense with the annual grant by the Government; and (3) to conduct the Municipal primary schools independently of Government control. On the 10th of August 1921 the Government passed the following G. O. No. 1583 (Exhibit IV) under R. 37, Sch. IV of the District Municipalities Act (V of 1920) as a special order and communicated it to all Chairmen of Municipal Councils including the Chairman of the Guntur Municipal Council.

"No portion of a Municipal fund shall be applicable to the purpose of maintaining or aiding any educational institution which is not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval.

(By Order of the Government, Ministry of Local Self-Government.)

(Sd.) F. J. RICHARDS,
Secretary to Government."

On the same date, reading the resolution of the Municipal Council, Exhibit I, the Government communicated to the Chairman, G.O. No. 1584 (Exhibit P) in which it was stated that:

"The Government presume that the Municipal Council does not require any financial help from the Government for any purpose."

On the 9th of November 1921 the Government passed and communicated to the Guntur Municipal Council G. O. No. 2208 (Exhibit VII) in which, after drawing its attention to Exhibit IV, the Government stated that

"Since the Council has decided not to seek recognition for its schools, expenditure of Municipal funds on such schools is illegal."

The question for our decision is whether the expenditure of Municipal fund by the Chairman on the educational institutions mentioned in the surcharge certificate subsequent to Exhibit IV is illegal.

Three arguments have been advanced before us by Mr. Krishnaswami Ayyar on behalf of the petitioner: (1) since the schools in question, which were already recognized schools (i. e., prior to Exhibit I), never ceased to be recognized, they did not fall within the ban of G. O. No. 1583, or of any other Government order passed in connexion with this matter and, therefore, the expenditure of Municipal funds on such schools is not illegal; (2) according to law, the Chairman of a Municipality is not liable to be surcharged for making illegal payments; and (3) G. O. No. 1583 and the other G. Os. issued by the Government are not valid orders as they were not issued by the Governor-in-Council as required under R. 37, Part II, Sch. IV of the District Municipalities Act. I shall examine these arguments, separately.

(1) The 25 educational institutions under the control of the Guntur Municipality were "recognized institutions" prior to the passing of the Madras Elementary Education Act (VIII of 1920). After the Elementary Education Act came into force, these continued to remain as recognized institutions (see S. 41, Cl. IV of the Act), and the power to with-

draw recognition or to confer it afresh was vested by the Act in the District Educational Council. It is argued by the learned vakil for the petitioner that the Government had, therefore, no power to withdraw the recognition already conferred upon the schools and, since the District Educational Council did not specifically withdraw the recognition consequent upon the passing of the Resolution, Exhibit I, the expenditure of the Municipal fund on these institutions is not illegal.

The various resolutions of the Council and the G. Os. passed by the Government are referred to in detail in my learned brother's judgment. I have no doubt that by Exhibit IV the Government purported not to recognize or approve of the Municipal schools after the Council had passed the resolution dated the 13th of July 1921, Exhibit I. In pursuance of it the Government on the same date communicated to the Municipality the order, Exhibit V, in which they presumed that the Municipality did not require any financial help. The proceedings set out in my learned brother's judgment show clearly that the order of the Government passed on the 10th of August 1921 was understood as an order withdrawing recognition and prohibiting the expenditure of the Municipal fund on the schools in question which ceased to be recognized on that date. The intention of the Government was, however, made absolutely clear by Exhibit VII, which clearly declared that expenditure of Municipal funds on the said schools was illegal. In my opinion, it is not necessary, for the purpose of this case, to consider whether after the passing of the Madras Elementary Education Act (VIII of 1920), the Government still had the power of granting recognition to the elementary schools or withdrawing it from them ; that the Government thought that it still had the power to grant recognition for the Municipal secondary schools is clear from its order, Exhibit VI, G.O. No. 1942, dated the 5th of October 1921, which is to the following effect : in G.O. No. 1583, L. & M., dated 10th August 1921, the Government issued a special order under R. 37, Sch. IV of the Madras District Municipalities Act, 1920, prohibiting the expenditure of Municipal funds on educational institutions which are not recognized or approved by the Government, the District Educational Council or any other authority duly authorized by the Government in this behalf to grant such recognition or approval. Under S. 41 of the Madras Elementary Education Act, 1920 :

"District Educational Councils are empowered to grant recognition to Municipal elementary schools. The Government are now pleased to authorize the Director of Public Instruction to grant recognition for Municipal secondary schools for the purpose of this order."

Rightly or wrongly, the Government purported to withdraw the recognition of the elementary schools in question and consequently passed orders prohibiting expenditure on those schools. The real question to be considered is whether the Government have the power to control the expenditure of Municipal funds by passing special orders prohibiting the expenditure. If such power is vested in the Government, whether the exercise of it in any particular case is justifiable or not, it is clear that expenditure contrary to such orders will be contrary to law and illegal, and the auditor will, therefore, be entitled to surcharge the same on the person making, or authorizing the making of, such expenditures under R. 60 (1) of Part II, Sch. IV. Rule 37 of Part II, Sch. IV of the Madras District Municipalities Act provides that :

"The purposes to which the Municipal fund may be applied include all objects expressly declared obligatory or discretionary by laws or rules, and in general everything necessary for, or conducive to, the safety, health, convenience or education of the inhabitants or to the amenities of the Municipality and everything incidental to the administration ; and the fund shall be applicable thereto within the Municipality subject to these rules and such further rules or special orders as the Governor-in-Council may prescribe or issue."

Section 124 of the Act makes the rules and tables embodied in Sch. IV as part of Ch. VI which relates to taxation and finance. Under S. 304

"The Governor-in-Council may make rules altering, adding to, or cancelling Sch. II, Sch. V, Sch. VI or Part II of Sch. IV."

According to the District Municipalities Act, the expenditure of the Municipal fund is limited to purposes

including "education" specified in R. 37 and referred to in detail in the subsequent rules and "the fund is to be applied thereto within the Municipality, subject to these rules and such further rules or special orders as the Governor-in-Council may prescribe or issue."

This makes it clear that the Government can prohibit by passing special orders the expenditure of the Municipal fund on schools of which it does not approve; it, therefore, follows that the payments made by the Municipal Chairman for defraying the expenses of these schools, subsequent to the 10th August 1921, are illegal inasmuch as they were made contrary to Government orders prohibiting such expenditure. The Auditor was, therefore, rightly entitled, under R. 60 (1) of Part II, Sch. IV of the District Municipalities Act, to surcharge the amount on the person making, or authorizing the making of, such illegal payments.

The second question for consideration is as regards the liability of the Chairman of the Municipality. Mr. Krishnaswami Ayyar's argument to show that the Chairman is not liable to be surcharged are based on Ss. 13 (c), 22, 40 (1) and R. 62 of Sch. IV of the District Municipalities Act. According to S. 13, Cl. (c):

"The Chairman of the Municipal Council shall carry into effect the resolutions of the Council."

S. 22 states that:

"The Chairman shall be bound to give effect to every resolution of the Council unless such resolution is modified, suspended or cancelled by a controlling authority."

S. 40 (1) lays down that:

"The Governor-in-Council may, by notification, remove any Chairman, if he, without an excuse sufficient in the opinion of the Governor-in-Council, omits or refuses to carry out any resolution of the Municipal Council."

These sections show that the Chairman of a Municipality is bound to carry out the resolutions of the Municipal Council and, if he refuses to do so, he is liable to be removed by the Governor-in-Council. If so, it is argued that he is not liable to be surcharged for giving effect to the resolution, dated the 13th July 1921. This argument is sought to be supported by an inference drawn from R. 62. This rule provides that:

"Every sum certified to be due from any person by auditors under this Act shall be paid by such person to the Chairman within 14 days after the intimation to him of the decision of the auditors unless within that time such person has appealed to the Court or to the Governor-in-Council against the decision; and such sum, if not so paid, or such sum as the Court or the Governor-in-Council shall declare to be due, shall be recoverable on an application made by the Chairman to the Court in the same way as an amount decreed by the Court."

It is pointed out that since this rule makes provision for the Chairman to recover from persons sums certified to be due from them by the auditor, it is to be understood that the Act does not contemplate that the Chairman is liable to be surcharged by the auditor. In reply to this argument the learned Government Pleader relies on S. 13, Cl. (e) and points out that the suggested inference of the non-liability of the Chairman does not follow from R. 62. S. 13, Cl. (e), states that:

"The Chairman of the Municipal Council shall perform all the duties and exercise all the powers specifically imposed or conferred on the Chairman by this Act, and subject, whenever it is hereinafter expressly so provided, to the sanction of the Council, and subject to all other restrictions, limitations and conditions hereinafter imposed, exercise the executive powers for the purpose of carrying out the provisions of this Act, and be directly responsible for the due fulfilment of the purposes of this Act."

The words "subject to all other restrictions, limitations and conditions hereinafter imposed," introduce the restrictions referred to in R. 37 and thus impose limitations on the Chairman's duty to carry out the resolutions of the Council. I think Ss. 22 and 13 of the Act should be read together and subject to the limitation imposed by R. 37; and, if so read, it would follow that the payments made by the Chairman in this case in carrying out the resolution of the Council, dated the 13th July 1921, in view of the special orders of the Government prohibiting the expenditure of the Municipal fund would be illegal pay-

ments, and as he was the person who made such illegal payments by issuing cheques under R. 55 (1), Sch. IV of the Act, the auditor would be entitled to surcharge him for making such illegal payments. R. 62, Sch. IV of the Madras District Municipalities Act does not warrant the inference that the Chairman is not liable to be surcharged. The rule only points out how the Chairman may recover the surcharged amount. Under that rule a Chairman may recover, in the way indicated therein, the surcharged amount from any person from whom the sum is certified to be due by the auditor under the Act including a former Chairman as in this case. I am, therefore, of opinion that the Chairman of a Municipality is liable to be surcharged under the Act for making illegal payments.

The third and the last argument addressed on behalf of the petitioner relates to the form of the Government order. The Government orders in question were issued "By order of the Government, Ministry of Local Self-Government" and signed by the "Secretary to Government." Under R. 37, Sch. IV of the District Municipalities Act, "further rules or special orders referred to therein should be prescribed or issued by the "Governor-in-Council."

It is argued that, since the Government orders in this case were issued "By order of the Government, Ministry of Local Self-Government" and not by the "Governor-in-Council," the Government orders are invalid as they do not conform to the express statutory provision contained in the District Municipalities Act. There is no force in this contention. The District Municipalities Act was passed on the 29th June 1920, and the Government of India Act came into force in Madras by notification on the 17th December 1920. Under S. 45-A, Cl. (1), sub-Cl. (*d*) of the Government of India Act, education has been made a "transferred subject." S. 46 (1) provides that the presidency of Fort St. George shall be governed, in ralation to reserved subjects, by a Governor-in-Council, and in relation to transferred subjects, by the Governor acting with Ministers appointed under the Act. S. 49 (1) of the Government of India Act lays down that:

"All orders and other proceedings of the Government of a Governor's province shall be expressed to be made by the Government of the province, and shall be authenticated as the Governor may by rule direct, so, however, that provision shall be made by rule for distinguishing orders and other proceedings relating to transferred subjects from other orders and proceedings."

The Government orders in question have been authenticated as mentioned in this section. It is stated in the same section that:

"Orders and proceedings authenticated as aforesaid shall not be called into question in any legal proceeding on the ground that they were not duly made by the Government of the province."

In view of this provision, the objection that the Government orders in this case are invalid, as they do not conform to the statutory provision of the District Municipalities Act cannot any longer be entertained in any legal proceeding and must be overruled.

In the result, I agree that this Civil Revision Petition should be dismissed with costs.

C. M. P. No. 3407 *of* 1922.—This Civil Miscellaneous Petition has been filed for the issue of a writ of certiorari to bring in and quash the certificate of surcharge made by the auditor. Reliance has been placed by the learned vakil for the petitioner on the decisions in *Rex* v. *Roberts* (1), and *Rex* v. *Roberts Ex parte Scurr* (2), to show that in England such writs are issued for quashing surcharge orders. These decisions are under the English Public Health Act, 1875, which contains provisions relating to surcharge and also provides for applications by aggrieved persons to the Court of King's Bench for writs of certiorari to remove their disallowance in the said Court: see S. 247, Cls (7), (8) and (9). The rules in the District Municipalities Act relating to surcharge seem to be framed on the analogy of the provisions of the English Public Health Act with this important difference that for the statutory remedy by way of certiorari provided for in S. 247, Cl. (8) of the English Act, the Indian Act by R. 61 substitutes application to the principal Civil Court of Original Jurisdiction, or

in lieu of such application, appeal to the Governor-in-Council as remedies of persons aggrieved by surcharge orders: (see R. 61). The English decisions, being based upon a specific provision of the English Public Health Act which provides for the making of applications for writs of certiorari, are not of much use in considering the question arising under the Indian Act which does not provide for any such applications. On the other hand, the absence of such a provision in our Act coupled with the substitution of another provision in its place rather suggests that the Legislature thereby intended that this remedy should not be open to aggrieved persons under the District Municipalities Act. Writs of certiorari are not generally granted when other equally efficacious remedies exist under the law for the satisfactory redress of the grievances complained of.

Such being the case, the petitioner is not entitled to ask for the issue of a writ. I have already shown in my judgment in the Civil Revision Petition that he has not succeeded in showing that the order of the learned District Judge is wrong. I do not say anything about the general powers of this Court to issue writs of certiorari in relation to such matters as we are now considering; nor do I express any opinion on the question whether the general power of this Court to issue the writ, if it ever existed in the present case, could be taken away by implication by the District Municipalities Act. I may also state that it has not been argued with reference to authorities whether this very ancient remedy, which is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction and which is frequently spoken of as being applicable only to "Judicial acts" and not to purely ministerial acts (see *Rex* v. *Woodhouse* (3), does exist in respect to certificates of surcharge made by auditors.

I agree that this petition also should be dismissed with costs.

Petitions dismissed.

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(3) [1906] 2 K. B. 501=75 L. J. K. B. 745=95 L. T. 399=70 J. P. 485=22 T. L. R. 603.

A. I. R. 1926 Madras 305

PHILLIPS, J.

(*Mattapalli*) *Venkataratnam* and *another*—Plaintiffs—Appellants.

v.

Veppu Sitaramayya—Defendant—Respondent.

Second Appeal No. 1800 of 1922 and Misc. S. A. No. 36 of 1922, Decided on 28th July 1925, from a decree of the Sub.-J., Cocanada, D/- 10th August 1922.

(a) *Civil P. C., O. 34, R. 7 — Decree partly final and partly preliminary—Question of mesne profits undecided—Application is competent to ascertain mesne profits.*

Ordinarily in a redemption suit there should be a preliminary decree, followed by a final decree. But where a decree is partly final and partly preliminary, that is final in so far as it was a decree for possession and preliminary in so far it left the question of mesne profits undecided, an application under O. 34 for ascertainment of mesne profits is maintainable. [P 306 C 2]

(b) *Practise—Omission to specify provision of law in an application is not a serious objection.*

Omission to specify the provision of law in an application is not a serious objection, which can deprive the plaintiff of his rights. [P 306 C 2]

K. Kumaraswami Rao—for Appellants.

P. Soma Sundaram—for Respondent.

Judgment.—The appellants in this case brought a suit for redemption and a decree was passed in 1917. The appeal against the decree was decided on 22nd February 1918. In that judgment the appellate Court passed the following order: "In a redemption suit there should be a final and complete adjustment of all the accounts between the parties up to the time of actual redemption and no claim for mesne profits can be kept outstanding or can be enforced by the mortgagor subsequently. Account should, therefore, be taken down to the date to be fixed in the decree for redemption." A fresh enquiry was, therefore, held by the District Munsif, and on 5th December 1918 he passed a decree finding that the mortgage amount deposited was in excess of the amount due to the mortgagee and that it was, therefore, unnecessary to pass decree for payment of the amount and possession to be given on payment. He accordingly gave a decree to the plaintiff for possession of the suit land and further held that the question of mesne profits was left undecided. Both the lower Courts have held that this is in itself a final decree and that this question of

mesne profits not having been decided the plaintiff is precluded from asking the Court to ascertain what those profits are. Ordinarily in a redemption suit there should be a preliminary decree, followed by a final decree. It seems to me that this decree is in fact partly final and partly preliminary. In so far as it is a decree for possession it is final, and in so far as it leaves the question of mesne profits undecided and expressly states that it was so left, it is preliminary to an ascertainment of those mesne profits. The plaintiff put in an application which purports to be under O. 21, R. 11, for delivery of possession and for attachment of moveables under O. 21, R. 35 and O. 21, R. 43 and added a prayer to ascertain the mesne profits from the date of suit. This petition was put in on 3rd November 1919 and it came before a different Munsif. He held that it was not open to the plaintiff to ask for mesne profits and, therefore, dismissed the petition. On appeal to the Subordinate Judge, his order was confirmed. If the Munsif intended by his order to have the ascertainment of mesne profits adjourned to a future date, these orders of dismissal are clearly wrong. The language of the decree saying that the question of mesne profits is left undecided is somewhat unusual and it is contended for the respondents that it must be taken to mean that the relief was refused and that no effect can be given to the order leaving the mesne profits unascertained. When we consider that the appellate judgment directly ordered the Munsif to take an account and ascertain the mesne profits and has given as a ground therefor, that the mortgagor would have no right to obtain any relief in a subsequent suit, it is hardly conceivable that the Munsif would have acted exactly contrary to the orders given by the appellate Court, even though he might have been personally of the opinion that that order was wrong. That fact has to be taken into account in considering the suggestion of the respondents. On the other hand if the interpretation put upon the decree by the appellant is correct the Munsif would not have been guilty of this disrespect of the appellate Court's order. Although this order is not strictly in accordance with the form that it should have taken, I think we must look to the circumstances which led up the decree and interpret it accordingly. I think it is clear that it was interpreted as a preliminary decree by the appellants when they put in their subsequent application. No doubt their prayer for ascertainment of mesne profits should have been put in under O. 34, but I do not think that the omission to specify the provision of law is a serious objection. If necessary, an amendment of the petition might have been ordered to bring it into conformity with strict procedure but the omission to specify O. 34, cannot deprive the plaintiff of his rights.

A large number of authorities have been cited before me in this respect but I do not think it is necessary to deal with them here because of the interpretation that I put upon this decree. I may refer to a Privy Council case *Muhammad Abdul Majid* v. *Muhammad Abdul Aziz* (1) in which the question of mesne profits was reserved when the decree was passed and although there was final disposal of one portion of the subject-matter of the suit, it was held that it was open to the Court to subsequently ascertain the mesne profits and pass further decree. It seems to me that that is in accordance with what I propose to do now. I, therefore, allow this appeal and remand the Execution Petition No. 529 of 1919 to the District Munsif for disposal according to law. The respondents will pay the appellant's costs in A. A. A. O. No. 36 of 1922 throughout. In this view the suit filed by the plaintiff to recover the mesne profits is not maintainable and, therefore, the second appeal must be dismissed. Under the circumstances I award no costs.

No. 529 *of* 1919 *allowed.*
No. 36 *of* 1922 *dismissed.*

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(1) [1897] 19 All. 155=24 I. A. 22=7 Sar. 111 (P. C.).

* A. I. R. 1926 Madras 307

PHILLIPS AND ODGERS, JJ.

(Sait) Siva Pratapa Bhattadu—Appellant.

v.

A. E. L. Mission and *others* — Respondents.

Appeal No. 382 of 1923, Decided on 19th December 1924, against the decree of the Acting Dist. J., Godavari, at Rajahmundry, in Original Petition No. 116 of 1922.

* (a) *Land Acquisition Act, S. 3 (b) — Attaching creditor is a 'person interested.'*

A person may be 'interested' within the meaning of the Act without holding any legal estate in the land. An attaching decree-holder is a person 'interested' in the land within the meaning of the Act: 37 *Bom.* 76, *Ref.* [P 307 C 2]

* (b) *Civil P. C., S. 73—Compensation under Land Acquisition Act is 'assets.'*

Compensation money awarded under Land Acquisition Act comes within the meaning of 'assets held by the Court' either from the date of receipt or at least from the date of the final award: 41 *Mad.* 616 and *A. I. R.* 1922 *Cal.* 19, *Appr*; 36 *Bom.* 156, *Expl.* [P 308 C 2]

* (c) *Civil P. C., S. 64—'Enforceable' does not necessarily mean in process of enforcement.*

The word "enforceable" in the explanation to S. 64 does not necessarily mean 'in process of enforcement.': 33 *C. L. J.* 7, *Dissent*; *A. I. R.* 1922 *Bom.* 241, *Foll.* [P 308 C 2]

G. Lakshmanna—for Appellant.

P. Chenchiah, *C. Rama Rao* and *K. Ramamurthi*—for Respondents.

Phillips, J.—This appeal relates to the conflicting claims of the parties to money awarded, as compensation for land acquired. The appellants are the fourth mortgagees of the owner of the land and the respondents are the attaching creditors of the owner and have attached the land in execution of their decrees. The fourth claimant (the first respondent) attached the land in execution of his decree on 9th October 1920. The mortgage in favour of the appellants was executed on 12th November 1921, and the attachment by the seventh and eighth claimants (Respondents 2 and 3) was in October 1922. The award of the Collector is dated 31st July 1922, but that does not decide the respective rights of the several claimants, but referred the question to the District Court for decision. The compensation money was not received in the District Court until after October 1922, as distinctly stated by the District Judge, although an attempt has been made to show that he was wrong.

The first question raised for the appellants is that the attaching decree-holders are not persons 'interested in the land' within the meaning of S. 9 of the Land Acquisition Act, and it is contended that, in order to come within the definition, it is necessary that the party should have some legal interest in the land. The definition in the Act, however, is as follows:

"The expression, 'persons interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of the land under this Act."

This definition does not seem to contemplate that a person interested need have a legal interest in the land, because it specifically alludes to interest in the compensation to be made, and it has frequently been held that a person may be interested within the meaning of the Act without holding any legal estate in the land; and in two cases, *Chhuttan Lal* v. *Mul Chand* (1) and *J. C. Galstaun* v. *Secretary of State* (2), it was held that a person who held an agreement for sale from the owner was a person interested within the meaning of the Act, although such agreement creates no legal estate; and *In re The Land Acquisition Act, In the matter of Pestonji Jehangir Modi* (3), it was held that a person may be interested in the compensation money without having any interest in the land in the legal sense of the term. Here it is clear that an attaching decree-holder who seeks to satisfy his claim out of the land is certainly interested in the compensation that has to be paid for that land, as it is a matter of considerable importance to him that a sufficient amount of compensation should be paid in order that he may be able to satisfy his decree, and I think there can be no doubt that an attaching decree-holder is a person interested in the land within the meaning of the Act.

The next objection relates to the enforceability of the claims of the decree-holders. The District Judge has held that the alienation in favour of the appellants pending attachment by the fourth claimant was void against him, and that

(1) [1917] 18 P.R. 1917=28 P.W.R. 1917.
(2) [1905] 10 C.W.N. 195.
(3) [1913] 37 Bom. 76=14 Bom. L.R. 507.

Claimants 7 and 8 are entitled to come in before the alienee as persons entitled to rateable distribution. It is quite clear that an alienation made during attachment is void under S. 64, of the Civil Procedure Code, as against all claims enforceable under the attachment, and, in the explanation to that section we find that claims enforceable under an attachment include claims to rateable distribution of assets. Under S. 73, where assets are held by a Court and more persons than one have, before the receipt of such assets made applications to the Court for execution of decree against the same judgment-debtor, the assets shall be rateably distributed among all such persons. Claimants 7 and 8 undoubtedly come within the meaning of this section and they would be entitled to share in the distribution of the assets along with the fourth claimant who made the first attachment.

The difficulty, however, arises as to whether this compensation money can be deemed to be assets held by the Court within the meaning of S. 73. Under S. 295 of the Civil Procedure Code of 1882 it was necessary that the assets should be realized by sale or otherwise in execution of a decree, but under S. 73 of the new Code there is no definite provision that the assets must be realized by sale or otherwise in execution of a decree. In the present case, it cannot be said that the money paid as compensation has, in the strict sense of the term been realized in execution of a decree, and it has been held in *Sorabji Coovarji* v. *Kala Raghunath* (4) that assets within the meaning of S. 73 must be assets held in the process of execution. This view has been dissented from in this Court in *Thiraviyam Pillai* v. *Lakshmana Pillai* (5) and this latter case has been followed in *Ghisulal Agarwalla* v. *Todarmull Agarwalla* (6). If it were necessary that the assets should be realized in the process of execution, it is difficult to understand why these words have been deliberately omitted from the new S. 73. It appears to me that it will be sufficient if the assets are held by a Court and are assets which may be allotted towards the satisfaction of the decree by the Court and that the manner in which they may have been realized is immaterial. This interpretation gives some force to the change of language in S. 73, which omits all reference to the method of realization. In the present case, the compensation money in the District Court when originally received, may be said to be money belonging to the owner in the hands of the Court in its capacity as a Court of custody, and not as Court of execution ; but when the decree-holder's claim to partake in the compensation money was decided then at least the money held must be deemed to be assets of the judgment-debtor held by the Court, for they were held from the date of the Court's award subject to the claim of the decree-holder. I am, therefore, of opinion that this compensation money comes within the meaning of 'assets held by the Court' either from the date of receipt or at least from the date of the final award. Claimants 7 and 8 are entitled to come in under S. 73, if the provisions of S. 64 are also fulfilled.

It is, however, argued that, under S. 64, an alienation made pending attachment is not void against the decree-holders claiming rateable distribution unless, at the time of the alienation, the claims were actually being enforced. This view has been taken in *Barendra Nath Mitter* v. *Martin & Co.* (7) where Mookerjee, Ag. C. J., holds that the word 'enforceable' in the explanation to S. 64, must be treated as meaning 'in process of enforcement.' With all respect it seems to me to be adding something to the Code which is not there and there is a prior authority in the Calcutta High Court in *Kali Kumar Saha* v. *Kali Prasanna Majumdar* (8) that the decree in respect of which rateable distribution is sought need not have been in process of execution at the time of the alienation. The same view has been held in Bombay in *Chunilal Devaji* v. *Karamchand Shrichand* (9) ; and in this latter case it was further held that it is unnecessary that the decree should have even been in existence at the date of the alienation. These cases follow the view taken in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia* (10). In accordance with this view, which I accept, Claimants 7 and 8 are entitled to rateable

(4) [1912] 36 Bom. 156=13 Bom. L.R. 1193.
(5) [1918] 41 Mad. 616=35 M.L.J. 150=(1918) M.W.N. 524.
(6) A.I.R. 1922 Cal. 19.
(7) [1921] 33 C.L.J. 7.
(8) [1916] 33 I.C. 492.
(9) A.I.R. 1922 Bom. 241.
(10) [1892] 16 Bom. 91.

distribution along with the fourth claimant, whose claim must be preferred to that of appellant.

The appeal must, therefore, be dismissed with costs ; separate vakil's fee for each respondent.

Odgers, J.—This appeal raises questions under the Land Acquisition Act. The Government acquired for the Imperial Bank certain lands and houses in Rajahmundry, and the question arises as to who is entitled to participate in the money paid as compensation for the acquisition. The appellants before us represent the fourth mortgagee. The first question is whether the attaching creditors represented by Claimants 4, 7 and 8 take precedence over the fourth mortgagee. The fourth claimant, as attaching creditor, was prior in time to the fourth mortgagee, but the attachments of the seventh and eighth claimants are subsequent, and the question arises whether by S. 73 of the Civil Procedure Code they are entitled to priority over the fourth mortgagee so as to give them a right to rateable distribution. It should be noted that the claims of the seventh and eighth claimants were made prior to the receipt of the assets in the lower Court, as the Acquisition Officer, by his order of the 31st July 1922, left the question of the apportionment of the compensation to the decision of the District Court and also the amount of compensation to be deposited therein. Some attempt was made to argue that Claimants 7 and 8 were not entitled to be heard as they had not appeared before the Land Acquisition Officer. In his letter, dated 25th September 1922, the Land Acquisition Officer refers the case to the District Judge for adjudication and the District Judge in his award, dated 27th January 1923, states that " the various claimants have been referred to the Court." He also states it is admitted as a fact that the attachments by Claimants 7 and 8 were prior to the date when the assets came into the custody of the District Court. There is therefore nothing in that point.

The first serious point urged for the appellants is that an attaching creditor is not a person interested under S. 3 (b) of the Land Acquisition Act. The definition of 'a person interested' includes all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act and in S. 9, sub-S. 2, notice is to be given and the notice shall require " all persons interested in the land to appear personally, etc., ... to state the nature of their respective interests in the land." In S. 10 (1) the Collector may require, etc., " a statement containing as far as may be practicable the name of every other person possessing any interest in the land." On the strength of these quotations it is argued that as an attachment of land gives no interest in the land, or what in the English Law is called real interest, the attaching creditor is not a person interested in the land within the meaning of the sections quoted of the Land Acquisition Act. It is to be observed that in the definition a person interested includes a person claiming an interest in the compensation and it is to my mind perfectly clear that an attaching creditor does this ; for it is obviously to his advantage that his debt should be paid out of the sum deposited in Court as compensation for the acquisition of his debtor's land. By S. 91 (f) of the Transfer of Property Act, a judgment, creditor of the mortgagor, who has obtained execution by attachment of the mortgagor's interest, is allowed to redeem. That is to say, he stands in the position of the mortgagor with regard to an equitable interest in the property, i. e., the right of redemption. It is urged by the appellants here that this is an exceptional right and does not thereby confer on a judgment-creditor an interest in the land. That an attaching creditor acquires no charge by his attachment, scarcely needs authority : See *Chamiyappa Tharagan* v. *Rama Ayyar* (11) and *Nachiappa Chettiar* v. *Subbier* (12). In *Chhuttan Lal* v. *Mul Chand* (1) it was held that a person who entered into a valid agreement for the purchase of land which under the Transfer of Property Act gives no interest in the land itself is a person interested within the meaning of S. 3 (b). In *In re The Land Acquisition Act, In the matter of Pestonji Jehangir Modi* (3), Macleod, J., as he then was, observed that it is quite possible that a person may be interested in the compensation money without having an interest in the land in the legal sense of the term. I, therefore, think that the

(11) [1921] 44 Mad. 232=40 M.L.J. 65=(1921) M.W.N. 53.

(12) A.I.R. 1923 Mad. 505.

objection, that an attaching creditor is not a person interested under S. 3 (b) of the Land Acquisition Act, cannot be maintained.

By S. 53 of the Land Acquisition Act the provisions of the Civil Procedure Code are to apply to proceedings under the Act save in so far as they may be inconsistent.

The next point is that S. 73 of the Civil Procedure Code does not apply, because the compensation money has not come into Court as the result of an attachment, so that there are no assets held by the Court within the meaning of the section. The words of the Code of 1882, S. 295, ran :

" Where the assets realized by sale or otherwise in execution of a decree."

These words have been omitted in the present Code and the section begins : " Where assets are held by a Court." It appears to me that if meaning is to be given to the amendment it must be taken that the Legislature meant to extend the meaning of the word " assets" in the section and they are not, therefore, now to be regarded as confined to assets realized by sale or otherwise in execution of the decree. If the word " assets" is still to be read in its narrow sense, there is no doubt that this compensation money is not " assets." If on the other hand, assets may mean any fund held by a Court to the credit of a person, then assets may include compensation money as here. In *Sorabji Coovarji* v. *Kala Raghunath* (4), it was held that the assets referred to in S. 73 are assets held in the process of execution. In this case money was paid into Court under O. 21, R. 55, and it was held that when money was paid into Court for this particular purpose it could not fall under the words of the section. This has been dissented from in *Thiraviyam Pillai* v. *Lakshmana Pillai* (5), where the facts were these : "The judgment-debtor obtained permission of the Court under O. 21, R. 83, to raise money by private alienation of the property and thus pay the amount due on one of the decrees. The money was accordingly paid into Court by the alienee. It was held that the money, having been paid into Court pending the execution application, was assets under S. 73 of the Code and liable to rateable distribution. The Bombay decision is expressly dissented from. In *Ghisulal Agarwala* v. *Todarmull Agarwala* (6), a single Judge of the Calcutta High Court held that the natural interpretation of the wide language of S. 73 would allow assets to be applied to any assets in the possession and at the disposal of the Court for the purpose of satisfying a decree obtained against the judgment-debtor. The case in *Sorabji Coovarji* v. *Kala Raghunath* (4) was referred to and the judgment in *Thiraviyam Pillai* v. *Lakshmana Pillai* (5) adopted where it says the intention of the Legislature is to afford a creditor equal opportunities of obtaining a rateable advantage in the available assets of the judgment-debtor. It, therefore, appears to me, having regard to the change in the language of the section and to the authority of the Madras ruling quoted, that this compensation money may be regarded as assets within the meaning of S. 73.

The third point is one raised under S. 64 of the Civil Procedure Code, namely, that the claims must be good and valid claims at the time when the alienation was made. The argument derives force from the judgment of the Calcutta High Court reported in *Barendra Nath Mitter* v. *Martin & Co.* (7), where it was held that a claim for rateable distribution cannot be recognized under S. 64 of the Civil Procedure Code unless it is in actual existence at the time of the alienation and it cannot ripen into such a claim unless the necessary conditions formulated in S. 73 have been fulfilled. One of the conditions laid down in the judgment is the presentation of an application for execution before the receipt of the assets. The meaning given in the same judgment to the words " enforceable claim" in S. 64, Civil Procedure Code, therefore, is that there is no claim till there is an application. Now as against this view there is a decision in *Kali Kumar Saha* v. *Kali Prasanna Majumdar* (8), also of the Calcutta High Court, where it is held that it is immaterial for the application of S. 64 whether the decree of the plaintiff had or had not been passed before the time when the transfer was effected. And in *Chunilal Devaji* v. *Karamchand Srichand* (9), the Bombay High Court held following a prior decision of the same Court in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia* (10), that under S. 64 when an attachment has been laid on property

in execution that attachment includes not only the claims of creditors attaching before a transfer but also includes the claims of any other execution creditors who may apply for attachment before assets are realized. The case referred to in *Sorabji Edulji Warden* v. *Govind Ramji, F. N. Wadia* (10), is the judgment of a single Judge, Mr. Justice Telang; but the judgment and the reasoning are extremely elaborate. There seems no reason to differ from this body of opinion on the strength of the opinion expressed in *Barendra Nath Mitter* v. *Martin & Co.* (7), and until that decision has been adopted either by the Privy Council or by this High Court, I prefer to rest my judgment on this part of the case on the other cases I have cited. I, therefore, think that the appeal fails on all points. I agree as to costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 311

SPENCER AND ODGERS, JJ.

T. K. Lakshmana Aiyar—Plaintiff—Appellant.

v.

Sankarapandiam Pillai and *others*—Defendants—Respondents.

Second Appeal No. 324 of 1922, Decided on 13th October 1925, from the decree of the Addl. Sub-J., Tinnevelly, in A. S. No. 152 of 1921.

* *Limitation Act, Art. 134—Intention of parties should be looked to, to decide whether the transferrer transfers mortgagee interest or full ownership—Transferee's knowledge of transferrer's limited right negatives intention to take full ownership.*

Where both the transferrer and the transferee knew the that transferrer was unable to confer a higher right than that of a sub-mortgagee on the transferee, and neither the transferrer nor the transferee honestly believed that the full ownership was being passed, the mere insertion of some words in the document, which might be construed as if they were the words of a person, capable of passing a title of full owner to his transferee, do not confer full ownership on the transferee: [34 *M. L. J.* 431, *Rel. on.*] The question whether the transferee from a mortgagee took an absolute interest or only a mortgagee interest is a question of intention. [P 311, C 2]

C. V. Anantakrishna Aiyar—for Appellant.

A. Swaminatha Aiyar—for Respondents.

Spencer, J.—I agree with my learned brother's construction of the document (Ex. V) which is before us. As observed by him, this is a very extraordinary document, because, if it purported to be an absolute sale and if it purported to pass the rights of a full owner, there was no occasion to recite the transfererr's enjoyment of the land under mortgages and sub-mortgages which had not been redeemed. For the respondents two cases to which I was a party have been cited: *Kannusami Thanjirayan* v. *Muthusami Pillai* (1) and an unreported case, Appeal No. 182 of 1921. [*Venku Shettithi* v. *Ramchandrayya* (2).] The principle upon which those suits were decided was that if a defendant in possession of immovable property puts forward a defence of limitation under Art. 134 against a suit for redemption, there is no onus on him to first prove that he obtained a transfer in good faith of that property, or, as stated in *Kannusami Thanjirayan* v. *Muthusami Pillai* (1):

"It was not incumbent on the purchaser to prove that he had no notice of the restricted nature of the vendor's title."

No issue was raised in the present case as to whether Kadir Mohideen Rowther acted in good faith when he took Ex. V The circumstances of the case are such that both the transferrer and the transferee must have known that the transferrer was unable to confer a higher right than that of a sub-mortgagee on the transferee, and if neither the transferrer nor the transferee could have honestly believed that the full ownership was being passed by this document, it will not be of any avail to the defendants, who derive their rights from Kadir Mohideen Rowther, to show that there are some words in that document, as altered before registration, which might be construed as if they were the words of a person possessing such right as would enable him to pass a title of full owner to his transferee, while leaving the consideration for the transfer unaltered. Under these circumstances, I do not think that it can be maintained that there was an animus to pass anything more than an assignment of the mortgage rights which were vested in the transferrer. I, therefore, agree that the appeal should be allowed and the District

(1) [1917] 5 L. W. 250=(1917) M. W. N. 5.
(2) A. I. R. 1926 Mad. 81.

Munsif Court's decree restored with costs in this Court and the lower appellate Court.

Odgers, J.—The first thing to be decided in this appeal is the character of Ex. V. The preceding documents are two undisputed usufructuary mortgage deeds, Exs. C and C (1), Ex. C being of 1873 and being effected by one Sankarapandiyam Pillai in favour of Madappa Muppan. It is in the ordinary form of a usufructuary mortgage for 3 years, the mortgagee to pay the assessment and at the end of the period the ordinary covenant to repay and redeem. Ex. C. (1) is a sub-mortgage of 1883, in favour of Shanmukham Pillai by Madappa Muppan. It recites that the usufructuary mortgage of 1873 is for a period of one year with the stipulations that the sub-mortgagee shall pay the assessment and the usual covenant to redeem. The equity of redemption on Ex. C was attached and sold in Court auction in 1875 and the predecessor-in-title of the plaintiff purchased it as evidenced by Ex. B, so that at the date of Ex. V, 1893, we have the equity of redemption outstanding on the head mortgage in the plaintiff or his predecessor-in title and we have the equity of redemption outstanding on the sub-mortgage Ex. C (1) in Madappa Muppan. In 1893, the son of Shanmukham Pillai, the sub-mortgagee in Ex. C (1), Paramasivam Pillai, executed Ex. V to the defendants. Ex. V is called a sub-mortgage deed, sets out the head mortgage Ex.C, the sub-mortgage Ex. C (1), and the consideration therefor, Rs. 1,500, and proceeds:

"And I had been enjoying it (the land in virtue thereof (i. e., the sub-mortgage.")

It further recites disputes between the executant of the document (Ex. V), to give him a neutral name, and the executees which culminated in O. S. No. 353 of 1892. Stated shortly, the defendants here set up a prior title to the mortgagors in Ex. C by virtue of a sale-deed in 1864. This was found to be a forgery and they lost the case. The document, Ex. V, further recites:

"As I have also become entitled to that land as full owner in virtue of the statement made in that suit by the sons of the original pattadar Sankarapandiyam Pillai, that they did not wish to have any right to the same and that the ottidars themselves might enjoy it as full owners."

Now that is a peculiar statement to find in a sub-mortgage deed as this document originally purported to be. To begin with, it is untrue, because, whatever the sons of the original mortgagor said in the course of Suit No. 353 of 1892, the equity of redemption which they or their father originally possessed had passed from them by the execution proceedings in 1874 or 1875. Further the statement completely ignores the equity of redemption still outstanding in Madappa Muppan, the sub-mortgagor in Ex. C (1.) It is curious to find a statement of title of that sort, particularly after he has carefully recited his title as sub-mortgagee in this document which originally purported to be a sub-mortgage and nothing else. After reciting this so-called title to full ownership he continues:

"I have sub-mortgaged to you the right belonging to me in the said land and received Rs. 1,500" which it will be noted is the amount of the original mortgage Ex. C, and also the amount of the prior sub-mortgage Ex. C (1). The executant covenants at the cost of the mortgagee to obtain and deliver to him the records connected herewith "which are in Courts and other places." Now before its registration this document was corrected and the correction states that the description of the document as a sub-mortgage is a mistake, and as to the recitals on the 4th page of the document, the proper translation runs somewhat as follows:

"As shown on the 4th page will you enjoy it in sole right. I have sold to you full rights."

Now the question arises, as I have stated at the begnining, of what exactly was purported to be passed by the transferrers by this document. That they intended something more than sub-mortgage is obvious from the alterations. But there are still two alternatives. They may have intended that the sub-mortgagee should drop out and there should be what in English Law we should call an assignment of the mortgage right; or as contended by the respondents, and as found by the Subordinate Judge in this case, the second alternative is that the parties may have intended an out and out sale of the full ownership or fee simple

of the land in question. I do not think on examining the document, that much help can be obtained by the recital as to the full ownership having been acquired by the disclaimer of the original mortgagor's sons in the suit in 1892. Why it should have been inserted in a deed which obviously at first was a sub-mortgage I cannot conceive. It was there obviously out of place. It was also, as I have pointed out, untrue. Now the question is: Did the executant of Ex. B purport to represent that he had the full ownership in the land and that he was passing it by this deed? Did the mortgagee think that he was obtaining the full ownership by means of this deed? The matter has been well put, if I may say so, in *Muthaya Shetti* v. *Kanthappa Shetti* (3), a case decided by Seshagiri Aiyar and Bakewell, JJ., where they say:

"The question whether the transferee from a mortgagee took an absolute interest or only a mortgage interest is a question of intention."

They there refer to the Privy Council case in *Radanath Doss* v. *Gisborne* (4) where their Lordships held that the burden of proving that the purchaser acquired an absolute interest in the property lay on such purchaser. And the learned Judges in the case under reference further point out that:

"If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as absolute owner of the property."

And Bakewell, J., said:

"If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention."

In *Veerabadra Tevan* v. *Veerappa Tevan* (5), Wallis and Sankaran Nair, JJ., said:

"It was for the defence to prove a purchase affirmatively to bring the case under Art. 134."

The matter has been lately considered in a case to which my learned brother was a party: Appeal No. 182 of 1921 [*Venku Shettithi* v. *Ramachandrayya* (2)] apparently not yet reported. The cases I have already referred to were referred to in their judgment and my learned brother there stated:

"I think that both seller and purchaser must have honestly believed that the entire interest of the owner was being transferred by the document."

Ramesam, J., cited the passage from Seshagiri Aiyar, J's judgment that I have already cited. Now how does the so-called purchaser in this case prove that what was purported to be transferred to him was really an absolute title? He relies on the recital in the document about the acquisition of full rights to which, for the reasons I have given, I am unable to attach any weight. He also refers to the second alteration which purports to transfer full rights. But when this is taken in conjunction with the recital which is unaltered setting out the prior transactions, Exs. C and C (1), and definitely reciting that the executant has been enjoying 'in virtue thereof, it seems to me that the transferee cannot be heard to say that under those circumstances he thought he was acquiring an absolute title to the land. The question, as I have already said in *Muthaya Shetti* v. *Kanthappa Shetti* (3), is one of intention and Seshagiri Aiyar, J., there says:

"The real test would be, did he, i. e., the transferee, ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it?"

It seems to me, on the best cosideration I can give to the terms of this document, that no reasonable man, particularly a man in the position of the defendants here, who had already fought the question of their title to this land in 1892 and failed, could possibly have supposed that this document was transferring to him or purported to transfer to him, an absolute interest in the land. The price, it will be observed, is the same as in the previous undisputed mortgage. One would have expected that if the entire interest as owner of the land were purported to be passed, the price would have been increased. As a matter of fact, the mortgage price is lessened because the Rs. 1,500 was not only the original amount of the sub-mortgage but also included costs and mesne profits. That

(3) [1918] 7 L. W. 482=34 M. L. J. 431=23 M. L. T. 291=(1918) M. W. N. 334.
(4) [1871] 14 M. I. A. 1=15 W. R. 24=6 B. L. R. 530=2 Suther. 897=2 Sar. 636 (P. C.).
(5) [1912] 15 I. C. 609.

seems to me to be a very significant circumstance against the full ownership of the land being passed. The learned Subordinate Judge, who came to an opposite conclusion reversing the decision of the District Munsif who held that Ex. V was an assignment of whatever rights the transferrer possessed and that those rights were not those of a full owner, held that it was more probable that Paramasivam Pillai wanted to treat the property absolutely as his own. I cannot agree, and in my opinion, on the grounds that I have pointed out, I think that all that was transferred by Ex. V was the full interest of the mortgagee. That is to say, Ex. V was converted from a sub-mortgage into an assignment of the rights of the sub-mortgagee. In my opinion, for these reasons the appeal should be allowed and the decree of the Subordinate Judge reversed with costs here and in the lower appellate Court, and the judgment of the District Munsif restored with his directions as to costs in that Court. Time for redemption : four months from this date.

Appeal allowed.

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* A. I. R. 1926 Madras 314

KRISHNAN, J.

Natesa Thevan—Defendant No. 1—Appellant.

v.

District Board of Tanjore—Plaintiff—Respondent.

Second Appeal No. 744 of 1921, Decided on 7th October 1924, from a decree of the Sub-J., Tanjore, in Appeal Suit No. 4 of 1920.

* *Transfer of Property Act, S. 51—Defendant bonafide taking possession of more land than that purchased from plaintiff—Defendant effecting improvements to plaintiff's knowledge—Plaintiff seeking to eject defendant from excess must pay compensation for improvements according to S. 51 as also under general principles.*

Defendant purchased a large plot of land in public auction when the District Board of Tanjore was selling certain plots of land. In being given possession of the land that he had purchased, he was given 2 acres and odd of the land more than what he purchased. Defendant was not conscious that there was any such mistake and he took possession of the whole of the land as being the land that he purchased. He made improvement on the whole land when the District Board, the plaintiff, finding that the defendant has in his possession more land than 6 acres 24 cents which he purchased, sought to eject him from the rest of the land;

Held ; that S. 51 applied, because the defendant was a transferee of the property as a whole and he believed in good faith that he was absolutely entitled to the whole and made the improvements bona fide on the property.

Held further that even apart from S. 51, on general principles of equity, his claim could be supported, more especially as the District Board knowing that the defendant was making improvements on the land, did nothing to prevent it.

[P 316, C 1, 2]

N. R. Govindachariar—for Appellant.

K. S. Ramchandra Iyer—for Respondent.

Judgment.—The first point taken in this second appeal is that the lower Courts had no jurisdiction to try the case as the plaint land is raiyati land and, therefore, governed by the Madras Estates Land Act. I think that the decision of the lower Courts is correct on the point, for they find that the land was tank-bed land and is still tank-bed land. The evidence is clear on the point and the finding come to by the lower Courts is a finding of fact, which I must accept in second appeal. Nothing turns upon the definition of the words "tank-bed" in the Estates Land Act, so far as this case is concerned. That being so, the plea of no jurisdiction fails, and must be rejected.

The next question argued before me is as regards the compensation which the defendants claim for improvements made on the land. That, no doubt, depends on the application of S. 51 of the Transfer of Property Act. The District Munsif has found that the defendant did not act bona fide in making the improvements; but the Subordinate Judge has not discussed the point at all. The Subordinate Judge has disposed of the matter by merely saying that he thinks that the learned District Munsif has dealt with the point correctly. I cannot accept that as a proper disposal of the question. I must, therefore, ask the Subordinate Judge to consider the matter on the evidence in the case and return a revised finding on the question whether the defendants are entitled to improvements and, if so, what the value of the improvements is. The finding will be on the evidence already on record, and will be returned in six weeks from this date. Objections in ten days thereafter.

[The finding of the Subordinate Judge was as follows:—]

In this case I am asked to submit a revised finding on the following issue:—

"Whether the defendants are entitled to improvements and, if so, what the value of the improvements is."

The evidence shows that the District Board sold certain plots of land by public auction (vide Ex. F.) The 1st defendant purchased 6 acres and 24 cents of land out of the total (area vide Ex. G.) In taking possession he seems to have entered also on the suit land which immediately adjoins on the south the land purchased by him. It is on this piece of land that cocoanut trees have been planted. It has been found that the suit land has been encroached upon by him and that it must be restored to the District Board. The question is whether he is entitled to the value of the improvements made by him in the shape of the cocoanut trees mentioned in the evidence.

If S. 51 governs the case the answer to the issue must be in the negative. That section deals with improvements effected on property which has been transferred to the person effecting the improvements. The language of the section is "When the transferee of immovable property makes any improvement on *the property* . . ." (The italics are mine). This makes it clear that the first pre-requisite for the application of the section is that the improvement must be made on the very property conveyed. But in the present case, the improvement has been made not on any portion of the 6 acres and 24 cents, conveyed to the 1st defendant but on land not included in the same. The case, therefore, does not come within the purview of S. 51 and if the section were to be held to be exhaustive of cases of claims for improvements by transferees there is at once an end of the 1st defendant's claim.

The facts as I find them are these. The 1st defendant after purchasing the 6 acres and 24 cents of land at the public sale by the District Board went and took possession of not only the above land but also of the land in suit. I am satisfied on the evidence that he did not deal with the additional land with knowledge that he was committing a trespass, but owing to his confusion as to the correct boundaries. The plan prepared by the District Board shows how hopeless it would be for a purchaser to identify the particular extent of land conveyed to him (vide Ex. H.) That the District Board was conscious that there was likely to be confusion and mistake in the ascertainment of the boundaries of the several plots sold by public auction is apparent from one of the conditions fixed by it for sale (Ex. F, condition IV.) The karnam states that previous to the sale the land was plotted by means of pegs driven into the land (this statement is badly misprinted in the printed record), but he was not considered to be a satisfactory witness by the trial Court and I am not prepared to accept his statement. Even if pegs had been placed I do not think in a large extent of land like that sold, the pegs would have served to dispel the confusion. The karnam also says that when 1st defendant trespassed upon the suit land he made a report to the District Board. But the report is not produced and I do not believe the karnam's testimony on this point. I take it then that the 1st defendant entered on the disputed land in the belief that it was part of the property purchased by him at the auction. That the District Board did not take steps at once to disabuse him of his mistake (as it could and ought to have done) served to confirm the 1st defendant's belief in his own right, and in this belief he proceeded to plant cocoanut trees and incurred expense.

I am further of opinion that in making the improvements it cannot be said that the 1st defendant was wanting in "good faith." This expression occurring in S. 51 has been the subject of judicial consideration in *Narayana Aiyar* v. *Sankaranarayana Aiyar* (1) and this case shows that want of good faith cannot be attributed to the 1st defendant. If the latter knew that he was committing trespass it is scarcely likely that he would have spent a large amount in making permanent improvements knowing all the time that he was liable to be turned out at any moment.

That S. 51 cannot be held to include all possible cases of the kind now under consideration appears from the fact that the Transfer of Property Act itself has not been held to be exhaustive: *Ami Bi Bi* v. *Arokiam* (2), per Seshagiri Ayyar, J., and *Subbaraya Rowther Minda Nainar* v. *Kuppusami Aiyangar* (3). I would also refer to the standard work of

(1) [1914] 1 L. W. 369.
(2) [1918] 34 M. L. J. 184.
(3) [1909] 34 Mad. 442=5 M. L. T. 278

Dr. Gour on the Law of Transfer in British India, Volume I, S. 687, wherein there is a discussion and classification of cases of improvements not coming under S. 51 of the Act.

If, therefore, the 1st defendant's claim can be considered as not coming under S. 51 but that it is governed by general rules of equity, then it appears to me that as he entered on the suit land in the bona fide belief that it formed part of the land purchased by him, and the improvements were made by him under such a belief, and the District Board did not promptly take steps to disabuse him he would be entitled to the value of his improvements. The witnesses give different figures regarding the value ranging from Rs. 200 to Rs. 1,000. Making allowances for error and exaggeration on both sides I would assess the value at Rs. 300.

On the question remitted my finding is that the 1st defendant is not entitled to any compensation for improvements if the case is governed by S. 51 and that if S. 51 be held not to cover this case he is entitled to recover Rs. 300 for the value of improvements on the principle enunciated in *Ramsden* v. *Dayson* (4).

[After the return of the finding the following judgment was delivered:—]

Judgment.—In this case a finding was called for from the lower Appellate Court on the question whether the defendant was entitled to improvements on the portion of the land from which he was being ejected and, if he was entitled, what the value of those improvements was. The Subordinate Judge has returned a finding in which he seems to think that S. 51 of the Transfer of Property Act would not apply, but he says that, on general principles of equity, the defendant would be entitled to the improvements made by him. He assesses the value of those improvements at Rs. 300.

This is a case where the defendant purchased a large plot of land in public auction when the District Board was selling certain plots of land. In being given possession of the land that he had purchased, he seems to have been given two acres and odd of land more than what he purchased; but the Subordinate Judge finds that he was not conscious that there was any such mistake and that he took possession of the whole of the land as being the land that he purchased. He made improvements on the whole land and now the District Board, the plaintiff, finding that the defendant has in his possession more land than 6 acres 24 cents which he purchased, has brought this suit to eject him from the rest of the land.

The question is whether the defendant is entitled to compensation for the improvements that he has made. The Subordinate Judge finds that he made the improvements bona fide and I accept that finding in second appeal. To my mind, this is a case to which S. 51 of the Transfer of Property Act can be properly applied; because the defendant was a transferee of the property as a whole and he believed, in good faith, that he was absolutely entitled to the whole and made the improvements bona fide on the property. When he is ejected he must, therefore, be paid compensation for the improvements. Even apart from S. 51 of the Transfer of Property Act, I think, as the Subordinate Judge states, that, on general principles of equity, his claim could be supported, more especially as the District Board, knowing that the defendant was making improvements on the land, did nothing to prevent it. I find that the defendant is entitled to the value of the improvements he has made. I accept the finding of the Subordinate Judge that their value should be assessed at Rs. 300.

Decree modified.

(4) [1866] 1 H. L. 129=14 W. R. 926=12 Jur. (N. S.) 506.

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* * A. I. R. 1926 Madras 316

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

Magam D. Venkatesham Chetty and *another*—Defendants—Appellants.

v.

Mothichand Gulabchand — Plaintiff—Respondent.

Stamp Reference Nos. 5433 and 7519 of 1925, in O. S. Appeals Nos. 88 of 1924 and 22 of 1925, Decided on 27th October 1925, against the decree of Devadoss and Waller, JJ., in Original Suit No. 376 of 1918.

* * (a) *Civil P. C., O. 41, R. 22—Original Side Appeal—Memo of objections can be filed: A. I. R. 1925 Mad. 725, Overruled.*

It is competent for the respondent in an appeal from the Original Side to file a memorandum

of objections against the decree appealed from: 48 *I. A.* 76, *Rel. on*; *A. I. R.* 1925 *Mad.* 725, *Overruled.*

** (b) *Civil P. C., O.* 41—*Order applies to Original Side appeals.* [P.318, C.1]

The provisions of O. 41, apply to Original Side appeals under the Letters Patent. [P.319, C.1]

V. Radhakrishnayya and *K. S. Narayana Aiyangar*—for Respondents.

Order of Reference.

Kumaraswami Sastri, J.—In this case the question raised is, whether a memorandum of objections can be filed in an appeal from the Original Side. The petitioner before us filed a memorandum of objections but it was returned by the office on the ground that no memorandum of objections could be filed, relying on a decision of the Chief Justice and Srinivasa Aiyangar, J., in *Bhimasena Rao* v. *Venugopal Mudali* (1). We find it difficult to see why a memorandum of objections should not be filed in an Original Side appeal. Their Lordships of the Privy Council have in *Sabitri Thakurain* v. *Savi* (2), [to which the attention of the learned Judge does not seem to have been drawn, and which overruled the view in *Sesha Aiyar* v. *Nagarathna Lala* (3)], held that the fact that Letters Patent appeals from judgments on the Original Side are not from one Court to another but from one Judge of the High Court to two or more Judges does not prevent sections of the Code as to security for costs from being applicable and the main ground given by Srinivasa Aiyangar, J., does not therefore hold. Turning to the rules of our Court and the Code, R. 1 of O. 41-A of the Civil Procedure Code which refers to appeals to the High Court from the original decrees of Subordinate Courts says that "the rules contained in O. 41 shall apply to appeals in the High Court of Judicature at Madras with the modifications contained in this order." So, except for the modifications there, the whole of the Code applies, and under this order there is provision made for memorandum of objections being filed. Then R. 1, of O. 41-B says that "the rules of O. 41-A shall apply so far as may be to appeals to the High Court of Madras under Cl. 15 of the Letters Patent of the said Court; provided that it shall not be necessary to file copies of the judgment and decree appealed from." Then R. 2 of that order says that "notice of the appeal thall be given in the manner prescribed by O. 41-A, R. 6." So that O. 41-B distinctly applies to appeals under Cl. 15 of the Letters Patent. So far as the Civil Procedure Code is concerned, S. 117 says that: "Save as provided in this part or in Part X or in rules, the provisions of this Code shall apply to such High Courts ....." Section 120 of the Code refers to the provisions which will not apply to the High Court in the exercise of its original jurisdiction. Then S. 121 refers to the rules in the body of the Code and says that those rules shall be in force until they are annulled or modified in accordance with the rule-making powers given in the Code. Section 129 gives the High Court power to make rules not inconsistent with the Letters Patent to regulate its own procedure. Order 49, R. 3 gives the rules which will not apply to the Original Side of the High Court and, so far as O. 41 is concerned, the only rule which is not applicable is R. 35 about the signing of the decrees.

Turning to the Original Side rules, we find that specific provision is made for filing memorandum of objections. Rule 351 expressly refers to the respondent's case being printed and refers to the memorandum of objections specifically. So that the rules contemplate the filing of a memorandum of objections. Article 37 of the Fee Rules provides a foe for the filing of a memorandum of objections—Rs. 75.

The only objection that can be taken is that an appeal from the Original Side to the Appellate Side is not an appeal from one Court to another but an appeal from one Judge of the High Court to one or more Judges of that Court, but this objection has been considered by the Privy Council and has been overruled, so far as it relates to security for costs, in *Sabitri Thakurain* v. *Savi* (2). Their Lordships of the Privy Council dealt with the various sections of the Code and said that the fact that the appeal was from one Judge of the Court to another under the Letters Patent is no ground for not applying the provisions of the Code.

This decision overrules the judgment of Bhashyam Aiyangar, J., in *Sesha Aiyar*

(1) A. I. R. 1925 Mad. 725.
(2) [1921] 48 Cal. 281=48 I. A. 76 (P. C.).
(3) [1903] 27 Mad. 121=13 M. L. J. 362.

v. *Nagarathna Lala* (3). Evidently Srinivasa Aiyangar, J., who delivered the judgment in *Bhimasena Rao* v. *Venugopal Mudali* (1), had in mind the decision of Bhashyam Aiyangar, J., in *Sesha Aiyar* v. *Nagarathna Lala* (3). When he speaks of an appeal under the Letters Patent as not being an appeal from one Subordinate Court to another and his attention evidently does not seem to have been drawn to the decision of their Lordships of the Privy Council in *Sabitri Thakurain* v. *Savi* (2), and to the various rules referred to above both in the Civil Procedure Code and in the Original and Appellate Side Rules of the High Court. It seems to me that the argument that an appeal under the Letters Petent from the Original Side is not governed by the Code could not be entertained after the decision in *Savitri Thakurain* v. *Savi* (2). With all respect I do not agree with the decision in *Bhimasena Rao* v. *Venugopal Mudali* (1). But in view of the fact that a Bench of this Court has held otherwise, and that the question is one of procedure which is likely to arise very frequently I think the case should be referred to a Full Bench so that there may be an adjudication once and for all on the matter. I would, therefore, refer for the decision of a Full Bench the following question: "Whether it is competent for the respondent in an appeal from the Original Side to file a memorandum of objections against the decree appealed from."

Krishnan, J.—I agree with my learned brother that the question whether a memorandum of objections could be filed in an appeal from the Original Side should be decided by a Full Bench. The practice has always been to allow such memoranda of objections. Till recently there was nothing contrary to it; but our attention has been drawn to the decision of the Chief Justice and Srinivasa Aiyangar, J., in *Bhimasena Rao* v. *Venugopal Mudali* (1), where it was held that such a memorandum of objections was not competent in the case of Original Side appeals. It seems to me that this matter requires further consideration. Order 41-A of the Civil P. C., deals with appeals to the High Court from original decrees of subordinate Courts, Rule 12 of that order refers to memorandum of objections. Order 41-B says that "the rules of O. 41-A shall apply, so far as may be, to appeals to the High Court of Madras under Cl. 15 of the Letters Patent of the said Court, provided that it shall not be necessary to file copies of the judgment and decree appealed from." This order seems to contemplate that a memorandum of objections can be filed in Original Side appeals in the same manner as in moffusil appeals for there is nothing in O. 41-B to prevent it being considered to be wide enough to include memorandum of objections. This view is supported by the practice that has been hitherto followed. The sections of the Code giving power to the High Court to make rules for regulating its own procedure have been referred to by my learned brother and I do not want to cover the same ground again. It is clear that the rules of practice referred to by my learned brother contemplate the filing of memorandum of objections to one of them which fixes the Court-fee payable. They are rules made with authority and it would, therefore, seem that a memorandum of objections is competent in the case of Original Side appeals as well.

The question regarding the taking security for costs in an Original Side appeal was considered by the Privy Council and the attention of their Lordships was drawn to the case reported in *Sesha Aiyar* v. *Nagarathna Lala* (3), in which Bhashyam Aiyangar, J., had held that the Civil Procedure Code did not apply to appeals from the Original Side and that security could not be taken in an Original Side appeal. Their Lordships dissented from that view and held that the Code applied in such a case. There are observations in that case which make it clear that the Code will apply not only to security proceedings which was the matter which was being dealt with by their Lordships, but also other matters arising in appeals under the Letters Patent. After that decision it is difficult to say that there is anything wrong in allowing a memorandum of objections to be filed in an Original Side appeal. I, therefore, with all respect think that the decision of the Chief Justice and Srinivasa Aiyangar, J., requires reconsideration and I agree to the question proposed by my learned brother being submitted to the Full Bench.

Opinion.—The judgment of the Privy Council in *Sabitri Thakurain* v. *Savi* (2),

makes it clear that the provisions of O. 41 will apply to Original Side appeals under the Letters Patent. Rule 22 of that order expressly provides for cross-objections being raised by respondents. If there were any doubt about it, it would be resolved by the provisions of our own Orders 41-A and 41-B. See also O. 49, R. 3. Had the Privy Council case been cited before the Court in the case reported in *Bhimasena Rao* v. *Venugopal Mudali* (1), it would no doubt have come to a different conclusion. We decide accordingly that the memorandum of objections in this case is competent. Courts will be costs in the cause.

Reference answered in the affirmative.

A. I. R. 1926 Madras 319

ODGERS, J.

A. Doraswami Nadar—Petitioner.

v.

Joseph L. Mother and *another*—Respondents.

Civil Revision Petitions Nos. 940 and 941 of 1923, Decided on 12th September 1925, against the orders of the Sub-J., Tuticorin, in Original Suits Nos. 7 and 8 of 1923.

(a) *Madras District Municipalities Act (5 of 1920)—Rules require nomination paper to be signed by party and not his agent.*

Object and scope of the rules require that the signature on the nomination paper should be put in by the very party concerned and not by his proxy. [P. 319, C. 2]

(b) *Jurisdiction—Court can declare an election void.*

The Court has jurisdiction to enquire into election matters and if necessary declare the election void as the sanctity of a nomination paper which has been accepted by the Chairman can be questioned after the election. [P. 320, C. 1]

(c) *Civil P. C., S. 115—Error by Court in construing rules for election in disposing of an election petition is no ground for revision.*

A mere error committed by a Court in construing the election rules while disposing of an election petition is not a ground for the High Court's interference in revision. [P. 320, C. 1]

T. R. Venkatarama Sastriar and *K. S. Sankara Iyer*—for Petitioner.

K. R. Rama Iyer—for Respondents.

Judgment.—These are revision petitions to revise the decision of the learned Subordinate Judge of Tuticorin in petitions presented to him under the Madras Municipalities Act, 1920. It appears that in an election for the Tuticorin Municipality, 8th ward, which was to be held in January 1923, a nomination paper was put in for Mr. A. Doraiswami Nadar, which was admittedly not signed by the candidate but the name of the candidate was written in the nomination paper by his son owing to his (candidate's absence) at the time. The learned Subordinate Judge has found that the son was authorized to sign his father's signature for this purpose but it has to be observed that the signature purports to be that of the candidate and there is no indication that it is written by somebody else. The learned Subordinate Judge has held that the son was in fact authorized so to sign but under the Election Rules to which reference will be made in a moment such a signature by the agent is not recognized and, therefore, the nomination paper was invalid.

For the petitioner two points are urged: (1) that not only under the Common Law but under many English Statutes signature by the agent, even orally authorized, is perfectly good and sufficient; (2) that as the nomination paper has been accepted by the Chairman no question as to its validity is now open. The learned Subordinate Judge has carefully gone into the provisions contained in the rules and he has come to the conclusion that their object and scope require that the signature should be put in by the very party concerned and not by his proxy. Rule 2 (2) runs thus:

"Every nomination paper shall be subscribed by two such electors as proposer and seconder and the candidate shall subscribe a declaration on it expressing his willingness to stand for election."

I am of opinion that it is no guide to refer to various English cases such as *In re Whitley Partners* (1), which is a case under the Companies Act or the dictum in 1 Halsbury's Laws of England page 157, that an agent may be authorized to sign for another orally, which of course cannot be disputed, nor has the case cited in *Pritchard* v. *Bangor Corporation* (2), anything to do with this matter. I am not disposed to disagree with the

(1) [1886] 32 Ch. D. 337=34 W.R. 505=55 L. J. Ch. 540=54 L.T. 912.

(2) [1888] 13 A.C. 241=52 J.P. 564=37 W. R. 103=58 L.T. 502=57 L.J. Q.B. 313.

construction placed on R. 2 (2) by the learned Subordinate Judge.

As to the second point, that once the Chairman has passed the nomination paper it is beyond question, that I think, is disproved by the rules for the decision of disputes. Government Order 1134, D/- 30th November 1920. Under R. 11 (c) "if in the opinion of the Judge the result of the election has been materially affected by any irregularity in respect of a nomination paper.....the election of the returned candidate shall be void". That must refer to a nomination paper after it has been accepted by the Chairman and what turns out to be invalid or irregular. The Judge is there given juris iction to enquire into the matter, and if necessary, declare the election void. That is a strong argument against the sanctity of a nomination paper which has been accepted by the Chairman.

Another point has been argued with reference to these revision petitions and that is that they do not lie and in the latest Full Bench decision in C. R. P. No. 541 of 1923 the Chief Justice, Phillips and Kumaraswami Sastri, JJ., in a very similar case to this, held in a decision as to the construction of rules which are similar that there was no question of jurisdiction or of acting illegally, "that the learned Judge had a point of construction before him and he decided it to the best of his ability" and "that the question of doubtful construction of a rule is not one that would enable the Court to interfere in revision." In my opinion these rules are strictly within the purview of those remarks in the latest Full Bench case. Even if they are not and civil revision petitions do lie, I am of opinion for the reasons given above, that the learned Subordinate Judge is correct in the decision that he arrived at. There is no doubt that in this case if an invalid nomination paper was in fact received and admitted the result of the election would be materially affected.

The civil revision petitions must be dismissed ; C. R. P. No. 940 without costs and C. R. P. No. 941 with costs.

Petitions dismissed.

A. I. R. 1926 Madras 320

JACKSON, J.

Sundarappier and *others*—Defendants 4 to 6—Petitioners.

v.

Krishnaswamy Iyer and *another*—Plaintiff and Defendant No. 3—Respondents.

Civil Revision Petition No. 240 of 1923, Decided on 11th September 1924, from a decree of the Small Cause Court Judge, Tanjore, in S. C. Suit No. 140 of 1921.

Provincial Small Cause Courts Act, Sch. 2, Art. 43-A—Suit to recover moveable property taken forcibly by the defendants falls within the Article.

A suit to recover value of certain sovereigns delivered by plaintiff to one of the defendant and alleged to have been illegally, forcibly and fraudulently wrested from the latter by another defendant with knowledge of plaintiff's title in them, and without any legal title or valid claim thereto falls within Art. 43-A. [P. 320, C. 2]

N. S. Srinivasa Iyer—for Appellants.

A.C. Sampath Iyengar-for Respondents.

Judgment.—This revision petition comes very late and though the case was decided ex parte, I should not ordinarily interfere ; but it appears to me that the Special Small Cause Judge has clutched jurisdiction in contravention of Art. 43-A of the Second Schedule to the Provincial Small Cause Courts Act. The plaint sets forth that the plaintiff delivered 9 sovereigns to the 1st defendant and 2nd defendant being perfectly aware of the fact, illegally, forcibly, and fraudulently, having no legal title or valid claim to be in possession of the same, wrested them from from 1st defendant. This amounts to an offence under Ch. 17. of the I. P. C.

The Court finds that it was not incumbent on the plaintiff to prefer a criminal complaint and he could not have figured as a complainant. Why he could not is not explained. In the circumstances the order of the lower Court must be held to have been passed without jurisdiction and I reverse it.

One vakil's fee is allowed in this and Civil Revision Petition No. 241 of 1923.

This case having been posted again for being spoken to the Court delivered the following

Order.—The plaint may be returned and the plaintiff is directed to present the plaint, if so advised, in the proper Court.

Petition allowed.

A. I. R. 1926 Madras 321

WALLACE, J.

Parakkat Devaswom (Trustees K. P. Veeraraghava Aiyar and *others)*—Appellants.

v.

Venkatachalam Vadhyar and *others*—Respondents.

Appeal No. 102 of 1923, Decided on 27th February 1925, from the appellate order of the Dist. J., South Malabar, in A. S. No. 523 of 1922.

(a) *Limitation Act, S. 10 — Original trustees, until ousted from possession of trust property, are the proper judgment-debtors to be proceeded against in execution.*

So long as the original trustees are not removed, and they remain in control of the property, it cannot be contended that they are not the proper judgment-debtors to be on record in the execution petition. The crucial date on which the trustees cease to be actual judgment-debtors is that on which they are ousted from the control of the trust property. [P. 322, C. 1]

(b) *Limitation Act, Art. 182—Step-in-aid—A party contending an execution application to be not bona fide must prove it.*

A bona fide application to execute a decree against a particular judgment-debtor is in accordance with law, and the parties who contend that it is not, are bound to prove it. [P. 322, C. 1, 2]

K. Muttikrishna Menon—for Appellants.

N. A. Krishna Aiyar and *T. S. Anantharaman*—for Respondents.

Judgment.—The question in this appeal is whether the execution petition is barred by time. The decree sought to be executed is the final decree in O. S. No. 36 of 1912 on a hypothecation bond executed by certain persons. The bond was executed by them as trustees or owners of a certain devaswom. At the time that the suit was pending, another suit, O. S. No. 12 of 1912, to declare that the trust was a public trust and to remove the above persons, was going on. On 9th July 1914, a decree to remove them was passed. The final decree in O. S. No. 36 of 1912,—the hypothecation decree against the property —was passed on 30th September 1914. Three execution petitions were put in to execute this final decree. The first was put in on 20th July 1915 and was dismissed, because batta was not paid. The second was put in on 26th June 1918, and was rejected for the same reason. The third was put in on 20th June 1921 and is the execution petition now under appeal.

The appellants are the present trustees who were put into office in the place of the original judgment-debtors by force of the decree in O. S. No. 12 of 1912 at some time which is not known. They contend in liminie that the decree in O. S. No. 36 of 1912 now under execution was not against the trust property at all; but I am not prepared to accept this contention for the decree clearly is in the first instance against the trust property. It is further contended that the decree is a nullity, it being pointed out that the decree removing the original trustees was passed some two months before the final decree against them. But it is clear that this contention cannot arise unless the respondents show that the judgment-debtors in O. S. No. 36 of 1912 had been, as a matter of fact, removed in consequence of the decree in O. S. No. 12 of 1912, some time prior to the final decree in O. S. No. 36 of 1912, and that some other trustees or Receiver had been appointed in their place who could have been brought on the record as the legal representatives of the original trustees before the final decree was passed. This fact the appellants have not attempted to show. It is a question of fact which ought to have been heard and decided by the first Court; and in the absence of any evidence to prove that fact it cannot be reasonably contended that the decree in O. S. No. 36 of 1912 is a nullity.

The next contention is based on very much the same argument. Appellants contend that the execution petition, dated 20th July 1915, was not in accordance with law, because the proper judgment-debtors were not on record in that petition as that petition was put in against the judgment-debtors named in the decree a year or so after the decree for their removal had been passed. It is said that a Receiver was appointed in O. S No. 12 of 1912 on 16th February 1915, some five months before the date of the first execution petition; but again the appellants have not attempted to show that this Receiver took charge or that the trustees, who were the original judgment-debtors were actually ousted by him from the property prior to the date of this first execution petition.

The lower appellate Court accepts the view that the original judgment-debtors were not the proper party respondents to the execution petition because they had

been dismissed by the decree in O. S. 12 of 1912 on the 9th July 1924; but it nevertheless held that the execution petition was in accordance with law. I do not agree with the lower appellate Court in its view that the removal of the original trustees came into operation from the date of the decree and not from the date, whatever date it be, on which the trustees were removed from actual possession. So long as they were not removed, and they remained in control of the property, it cannot be contended that they were not the proper judgment-debtors to be on record in the execution petition. Suppose, for example, that no Receiver or new trustee was appointed for some months after the passing of the decree in O. S. No. 12 of 1912. It could not be held that there was no judgment-debtor at all against whom any execution petition could be brought and that, therefore, no execution petition could be brought during that period. The crucial date on which the trustees cease to be actual judgment-debtors is that on which they were ousted from the control of the trust property. What that date is does not appear. It is clear that the duty of the appellants was to establish that date and they have not chosen to do so. It cannot, therefore, be concluded that on the date of the execution petition of 1915 the original trustees were not the proper judgment-debtors. Therefore there is no proof that this execution petition was not against the proper judgment-debtors.

Even if it were against the wrong judgment-debtors, it would not be invalid as a step-in-aid so long as the executing decree-holders bona fide believed that they were still the proper judgment-debtors. According to law, so far as laid down in this Presidency, a bona fide application to execute a decree against a particular judgment-debtor is in accordance with law, even though it is subsequently discovered that the judgment-debtor was dead at the time of the application: see *Samia Pillai* v. *Chockalinga Chettiar* (1). An unreported case of this Court, C. M. A. No. 185 of 190., has been brought to my notice which takes an opposite view. But in such cases the proper course is to follow the reported decision. The same principle has been laid down in *Balkishen Das* v. *Bedmati Koer* (2), where it was held that an application made against persons who were not the legal representatives of the deceased judgment-debtor was valid if the decree-holder bona fide believed that they were the legal representatives: see also *Ramaswami Chettiar* v. *Oppilamani Chetti* (3). The High Court of Allahabad takes a different view which this High Court so far, has not accepted: see *Gyanendra Nath Basu* v. *Rani Nihalo Bibi* (4); but compare this with *Muhammad Hussain* v. *Inayat Hussain* (5).

Now as the application of 1915 was put in against the judgment-debtors named in the decree the executing Court in the absence of evidence to the contrary, could not but decide that the execution petition was in accordance with law. It is not its business to go outside the decree and enquire whether the judgment-debtors named in that decree were still the proper judgment-debtors in 1915. The presumption is that the execution petition was in accordance with law, and it was admitted as such by that Court and notice issued thereon. The parties who now wish to contend that it was not were bound to prove it; and for that purpose they must first establish that the judgment-debtors named in the decree were no longer the judgment-debtors. That, as noted, they have not attempted to do. Unless and until they proved that fact, it was not the real business of the decree-holders to prove that they nevertheless bona fide believed that the judgment-debtors named in the decree were still really the judgment-debtors. It is not, therefore, open to the appellants who have not established the fact necessary to throw on the decree-holders the onus of proving their bona fides, to put forward now any contention that the execution petition of 1915 was not bona fide.

A further contention has been put forward that the decree under execution was a fraudulent decree come to by collusion between the mortgagee and the original trustees. But, obviously, that objection cannot be taken in execution. The real judgment-debtor is the trust; and the representatives of the trust, cannot attack it in execution proceedings. If they want to set aside the decree they must institute appropriate proceedings.

(1) [1894] 17 Mad. 70=4 M.L.J. 8.
(2) [1893] 20 Cal. 388.
(3) [1910] 33 Mad. 6=6 M.L.T. 269=19 M.L.J. 671.
(4) [1910] 32 All. 404=7 A. L. J. 512
(5) [1914] 36 All. 482=12 A. L. J. 830.

I am, therefore, of the opinion that the order of the District Judge is right, and dismiss this appeal with costs of Respondents 1 and 2.

Appeal dismissed.

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* A. I. R. 1926 Madras 323

COUTTS-TROTTER, C. J., AND

VISWANATHA SASTRI, J.

Nidavolu Atchutam and *others*—Defendants Nos. 3 to 5—Appellants.

v.

Ratnajee and *others*—Plaintiff and Defendants 1 and 2—Respondents.

Appeals Nos. 436 of 1922 and 362 of 1923, Decided on 22nd October 1925, from the decrees of the Addl. Sub-J., Rajahmundry, in O. S. No. 25 of 1920.

* *Hindu Law—Debts—Sons are liable for commercial debts of father.*

The pious obligation of sons to pay father's debts extends to commercial debts.

Per Coutts-Trotter, C. J.—The whole doctrine of the pious obligation is itself a relic of antiquity based orginally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which make it a working rule which in its actual application is neither inconvenient nor unjust.

[P 323, C 2]

A. Satyanarayana—for Appellants.

G. Lakshmanna and *Viyyanna*—for Respondents.

Coutts-Trotter, C J.—In this case the father of the appellants embarked on hardware trade in 1911 and was sued along with them in respect of debts contracted by him in the conduct of that venture. The appellants' vakil relied on a text of Gautama XII, 41 which runs as follows:

"Money due by a surety for a commercial debt, a fee due to the parents of a bride, debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons of the debtor:" and the bold contention is put forward that the pious obligation does not extend, therefore, to commercial debt. I have discussed this subject at length in paragraph 303 of the 9th Edition of Mayne on Hindu Law and I have very little to add to what I said there. This Court has held in *Thangathammal* v. *Arunachalam Chettiar* (1) that sons are liable in a case of a surety bond executed by the father for payment as distinct from obligations as surety for appearance and for honesty, and there are other decisions of the Calcutta and Patna Courts to the same effect. This appears to me to be based upon the view that the governing provision in the texts is that which excludes from the rule debts that are not Vyavaharika an expression taken from Usanas (apud Mitakshara II, 48) and Vyasa (apud Jagannadha I. V, 203). From 1874 onwards the decisions of the Privy Council have adopted this view and have crystallized the translation "as illegal or immoral." It appears in *Girdharee Lall* v. *Kantoo Lall* (2) and has been repeated in many subsequent cases. If this be correct, it will follow, as I have said, that the particular instances given in the Smrities must be treated as a mere expression of opinion on the part of the authors as to what classes of debts would fall under general words. A modern Court would, therefore, be free in interpreting the general term to consider the particular instances given as obsolete under the conditions of to-day. I am clearly of opinion that commercial debts fall into this category and that we ought to say that the pious obligation extends to them. It may well be that in the time of Gautama, it was thought that to engage in trade was degrading at any rate in the case of the higher castes. No one could pretend that that view would be entertained to-day. For these reasons I am of opinion that the sons are liable in this case and that the appeals must be dismissed with costs.

Of course the whole doctrine of the pious obligation is itself a relic of antiquity based originally on a religious and not a legal conception but it has been controlled and moulded into shape by a series of decisions which, in my opinion, make it a working rule which in its actual application is neither inconvenient nor unjust.

Viswanatha Sastri, J.—*A. S. No.* 436 *of* 1922.—Appeal by defendants 3 to 5 against the decree of the Court of the Additional Subordinate Judge, Rajahmundry in O. S. No. 25 of 1920.

Appellants are the sons of the 1st defendant and the 2nd defendant is their

(1) [1918] 41 Mad. 1071=35 M. L. J. 229=(1918) M. W. N. 673.

(2) [1873] 1 I. A. 321=24 W. R. 56=14 B. L. R. 187=3 Sar. 380 (P. C.).

maternal uncle. The suit was laid for the recovery of a sum of money (Rs. 6,898-11-6) due in respect of money dealings between Defendants 1 and 2 and plaintiff. Defendants 1 and 2 are said to have carried on in partnership a trade in hardware for the purpose of which money was being borrowed from time to time from plaintiff. It was also alleged that the 1st defendant and Defendants 3 to 5 were undivided, and that the trade was being carried on by the 1st defendant for the benefit of the family. Defendants 3 to 5 contended that as they have become divided from their father (1st defendant) they had nothing to do with the trade, that the trade was never an ancestral trade nor a joint family trade and that they were not liable. They also contended that the settlements of account alleged in the plaint, between plaintiff and Defendants 1 and 2, were false. The Subordinate Judge held that the settlements of account were true, that the partition set up was brought about to defraud creditors and he passed a decree against Defendants 1 and 2, and against the joint family properties in the hands of Defendants 3 to 5.

The contentions urged in appeal are: (1) that the trade not being an ancestral trade, and the 1st defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for the purposes of the trade; (2) that as Rs. 1,926-6-3 and Rs. 695-3-0 were due from third persons, and as the partnership took them over they (defendants 3 to 5) were in any event not liable for these sums. The contention that Defendants 3 to 5 had separated themselves from their father was not pressed before us.

Taking the second contention first, the allegation in paragraph 6 of the plaint is that on January 5, 1918, Defendants 1 and 2 "made themselves liable in the sum of Rs. 1,926-6-3 for the share of E. Venkatasubbarayudu in the khata debt due by him and another K. Venkatanarayana Row; and the promissory note debt of the said E. Venkatasubbarayudu in the sum of Rs. 695-3-0." In the case of a suretyship for payment, it may be taken as well settled that a Hindu son is liable. See *Sitaramayya* v. *Venkatramanna* (3), *Thangathammal* v. *Arunachalam Chettiar* (1), *Tukarambhat* v. *Gangaram* (4) and *Rasik Lal Mandal* v. *Singheswar Rai* (5). The decision in *Narayan* v. *Venkatacharya* (6) relates to the liability of a guardian and has no application to the case before us. The text of Gautama (Sect. 41) was referred to by the vakil for the appellants, but it appears to me that Gautama simply repeats Manu (S. 159) and that he refers only to a suretyship for appearance. In the case of a suretyship for payment, the text of Yajnavalkya recognizes the liability of a son. This contention, therefore, cannot prevail.

Coming to the first contention it was urged that the father was not continuing any ancestral trade, but was starting a new trade, and that for debts contracted for a new trade, the sons were not liable. That under ancient texts a son was under a legal obligation to pay his father's debts was the opinion held by that eminent Judge (Muthuswami Aiyar, J.), in *Ponnappa* v. *Pappuvayyangar* (7). According to Yajnavalkya if a father be long absent in a distant country or be dead the debt must be repaid by the son. It is equally well settled that the son was not under any such liability in the case of debts contracted for illegal or immoral purposes. According to Yajnavalkya, a son was not bound to pay a debt, even though hereditary, if it was contracted for the purpose of drinking, debauchery or gambling. According to Gautama a son was not bound to discharge a debt incurred by his deceased father if due by him to a wine shop or a gambling saloon.

"By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt."

See *Hunoomanpersuad Panday* v. *Mt. Babooee Munraj Koonweree* (8). In *Suraj Bunsi Koer* v. *Sheo Persad Singh* (9) their Lordships of the Privy Council refer in the appeal to the following dictum of Westropp, C. J., in the case of *Udaram Sitaram* v. *Ranu Panduji* (10).

"Subject to certain limited exceptions

(3) [1888] 11 Mad. 373.

(4) [1899] 23 Bom. 454.

(5) [1912] 39 Cal. 843=16 C. L. J. 107=16 C. W. N. 1103.

(6) [1904] 28 Bom. 408=6 Bom. L. R. 434.

(7) [1882] 4 Mad. 1 (F. B.).

(8) [1854-57] 6 M. I. A. 393=18 W. R. 81 (F. Note.)

(9) [1880] 5 Cal. 148=6 I. A. 88=4 C. L. R. 226=4 Sar. 1 (P. C.).

(10) 11 B. H. C. 76 (83).

(as for instance debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather."

In the case before us the trade the father carried on was a trade in hardware, and there was nothing illegal or immoral about it. There is not even any suggestion to this effect in the written statement, and all that is alleged is that the business was neither an ancestral nor family business; that the sons had become divided from their father; and that the business was carried on by the father for his sole benefit. The finding is that the business was carried on for the benefit of the family and that the partition was fraudulent. In *Ramkrishna Trimbak* v. *Narayan* (11) it was held that a son cannot escape liability for payment of the debts of his father contracted in fish trade. The decision in the *Official Assignee of Madras* v. *Palaniappa Chetty* (12) is no authority for the proposition that where a Hindu father starts for the first time a new trade, and for the purposes of the trade contracts debts his sons cannot be held liable for the debts so contracted. In that case the question arose in bankruptcy proceedings whether a Hindu son can be adjudicated insolvent in respect of debts incurred in a business newly started by his father during his minority, and in which he actively participated after attaining majority, and there was no question as to the liability of joint family properties for such debts.

I would, therefore, dismiss the appeal with costs.

Appeal No. 362 of 1923.—Appeal by Defendants 2 to 4 against the decree of the Court of the Additional Subordinate Judge of Rajahmundry in O. S. No. 24 of 1923.

Appellants are the sons of the first defendant, and the suit was laid for the recovery of a sum of money (Rs. 3,050) due in respect of money dealings carried on between plaintiff and 1st defendant. It was alleged that the dealings were for the purpose of financing a trade in hardware which first defendant was carrying on for the benefit of the undivided family consisting of himself and his sons. Appellants contended that they had become divided from their father; that the trade was not an ancestral trade; and that it was never carried on for their benefit. The Subordinate Judge held that the dealings were proved; that the partition was brought about to defraud creditors; and that the joint family properties were liable.

The contention urged in appeal is that the trade not being an ancestral trade, and the 1st defendant having started it only in 1914, appellants could not be held liable for sums said to have been borrowed for purposes of the trade. The contention that they had separated from their father was not pressed before us.

This appeal was heard with Appeal No. 436 of 1922, and, for reasons given in my judgment in that appeal, I would dismiss the appeal with costs.

Appeals dismissed.

(11) [1916] 40 Bom. 126=17 Bom. L. R. 955.
(12) [1918] 41 Mad. 824=35 M. L. J. 473=24 M. L. T. 216=8 L. W. 530=(1918) M. W. N. 721.

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* A. I. R. 1926 Madras 325

PHILLIPS, J.

K. Venkatanarasimha Rao—1st Defendant—Petitioner.

v.

Hemadri Suryanarayana—Plaintiff—Respondent.

Civil Revision Petition No. 1014 of 1924, Decided on 24th August 1925, against the order of the District Munsif, Avanigadda, at Masulipatam, in M. P. No. 1271 of 1923.

* *Civil P. C., O. 9—O. 9 applies to applications under O. 9 itself by virtue of Civil P. C., S. 141.*

Order 9 applies by reason of S. 141 to applications made under O. 9 itself: 17 *All.* 106 (*P. C.*) *Rel. on*; 4 *P. L. J.* 287, *Expl.*; 44 *Cal.* 950, 1 *Lah.* 339 and 18 *Bom.* 59, *Ref.* [P 326 C. 1]

P. Satyanarayana—for Petitioner.

P. Somasundaram—for Respondent.

Judgment—The only question that arises here is whether O. 9 applies only to suits or whether by reason of S. 141, it also applies to applications made under O. 9 itself. In this case an application to restore a suit was dismissed for default and a subsequent petition was filed to set aside that dismissal. The subsequent petition has been allowed and the original petition under O. 9 is now under enquiry.

The contention for the appellant is that the Court had no jurisdiction to

treat the second application as one to which O. 9 is applicable. In *Thakur Prasad* v. *Fakir Ullah* (1) it was laid down by the Privy Council that S. 647 of the Code of 1882, which is equivalent to S. 141 of the present Code, included original matters in the nature of suits, such as proceedings in probate, guardianship, and so forth, and did not include executions. The question at issue in that suit was whether execution petitions were included in that section and it was definitely laid down that they were not so included. What was held to be included were original matters in the nature of suits, but this statement is not exhaustive. It is argued that an application under O. 9 is not an original matter in the nature of a suit. It certainly is not a petition in a suit, for the suit is no longer on the file. It relates to a question quite independent of the suit and one which has to be determined on evidence as to matters which would be quite irrelevant to the suit. In this sense it seems to me to come within the meaning of the Privy Council's observations that S. 647 includes original matters in the nature of suits. This view has been taken by the Calcutta High Court in *Bepin Behari Shaha* v. *Abdul Barik* (2); by the Lahore High Court in *Abdul Rahman Shah* v. *Shahanna* (3); and by the Bombay High Court in *Lallubhai Vajeram* v. *Bai Magangavari* (4). There is one authority to the contrary, i. e., *Ramgulam Singh* v. *Sheo Deonarain Singh* (5) which purports to follow a Full Bench of that Court reported at p. 133 of the same volume; but that Full Bench ruling in effect only repeated the decision of the Privy Council in *Thakur Prasad* v. *Fakir Ullah* (1) where the question for determination was whether an execution petition would come under O. 9. The Division Bench which purported to follow the Full Bench ruling have not discussed the question at length but merely purport to follow the Full Bench, which with all respect, hardly covered the point in issue. With all respect I agree with the rulings I have mentioned above and hold that the Court had jurisdiction to entertain this petition. The revision petition must, therefore, be dismissed with costs.

Petition dismissed.

(1) [1895] 17 All. 106=22 I. A. 44=5 M. L. J. 3=6 Sar. 526 (P. C.).
(2) [1917] 44 Cal. 950=21 C. W. N. 30=24 C. L. J. 446.
(3) [1919] 1 Lah. 339.
(4) [1893] 18 Bom. 59.
(5) [1919] 4 Pat. L. J. 287.

✻✻ A. I. R. 1926 Madras 326

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

(*Diwan Bahadur*) *Govindoss Chathurbhujadoss & Co.* — Defendants — Appellants.

v,

Sukdevadoss Ramprasad—Plaintiffs — Respondents.

Original Side Appeal No. 102 of 1923, Decided on 29th April 1925, from the decree of Coutts-Trotter, J., reported in *A. I. R.* 1924 *Mad.* 378.

✻✻ *Contract Act, S. 30—Wagering contract—Court has to see real intention—Contract is wagering if differences only are intended to be paid—Appearance of the contract is not real test—That delivery could be asked for is not necessarily a test to the contrary.*

In deciding whether a contract is of a wagering nature, what the Court has to see in each case is the real nature of the transaction. However, legal and genuine may be the appearance of the contract on the face of it, it is still wagering contract if it was intended by both the parties that differences only were to be paid and that the contract was not to be performed by delivery of goods or payment of price. If a contract is a wagering contract in its inception, the mere fact that in certain contingencies delivery could be asked for would still render the contract unenforceable as a wagering contract. (*Case Law discussed.*)

[P 329, C 2; P 331, C 2; P 332, C 2]

A. Krishnaswami Aiyer and *T. L. Venkatarama Aiyer*—for Appellants.

S. Srinivasa Aiyangar and *V. C. Gopalaratnam*—for Respondents.

Kumaraswami Sastri, J.—The appeal arises out of suit filed by the respondents against the appellants for the recovery of Rs. 65,255-2-3 claimed in respect of 135 bales of Japan twist alleged to have been sold and delivered by the plaintiffs to the defendants.

The case for the plaintiffs is that the bales of twist mentioned in the schedule and amounting to 135 in number were sold and delivered to the defendants on the dates and at the prices mentioned in the schedule, that Rs. 9,115-5-0 was paid for 15 bales and that the balance of Rs. 65,255-2-3 claimed is due.

The case for the defendants is that

there was no sale and delivery as alleged in the plaint and that the contracts were merely wagering contracts and as such are unenforceable. They state that they, the plaintiffs, and certain other merchants formed a group and it was agreed between them that the transactions had among them should be on the footing that no deliveries should be required but havala chits passed on, that patta patties or delivery orders should be issued to the respective purchasers, that after the delivery orders were sent round and the same ultimately reached the hands of the original vendors, patta patties should be settled and that accounts should be taken on the footing of differences in prices. They state that the goods covered by the delivery orders were ultimately purchased by various persons from whom the plaintiffs purchased the identical goods covered by the delivery orders and that in no case were the goods actually delivered nor was it ever intended that actual delivery of goods should take place, but that it was distinctly agreed between the parties that only the differences in prices should be adopted after the exchange of patta patties.

The learned trial Judge decreed the plaintiffs' claim on the ground that there was no proof that the contracts were wagering contracts. He states in his judgment that it was not contended that the actual goods contracted for were delivered and that it was admitted that documents purporting to be deliverey orders on which delivery of goods could be demanded passed between the various parties. He also finds on the evidence that the goods after passing from the plaintiffs to the defendants and going through other hands ultimately reverted by purchase to the plaintiffs and states that "however much one may suspect that the speculative element entered into these transactions, as no doubt it did" the evidence is insufficient to prove that the contracts were wagering contracts. As regards the explanation for the goods ultimately coming back to the plaintiffs after passing through various hands the learned Judge says :

" A buyer may sell with the knowledge that the person to whom he sells will pass on the goods, and if the market is rapid and transfers take place quickly he may very well contemplate that the person who ultimately claims the goods may be the last of a long chain of buyers, and if the market were against him when he is called upon to deliver he might well think it to be the wisest course to buy back the goods at the end of the circle and wait for an advance in the market price. Thus it may happen that a perfectly legitimate series of transactions take place without the goods having physically left his possession and it may well be that the state of the market was such that the documents of title to the goods, in this case called patta patties, changed hands so rapidly that the seller in each particular case may have thought it extremely improbable that he would ever be called upon to give delivery to his immediate buyer."

This is the chief explanation which the learned Judge gives for the bales passing back within a week to the plaintiffs and to hold that the transactions were not wagering contracts. There is, however, no evidence to suppport any of the assumptions made by the learned Judge. Although the goods passed through nearly ten hands, no witness suggests that the reasons given by the learned Judge were the reasons for not asking for or taking delivery of any of the goods. Mr. Srinivasa Aiyangar who appeared for the respondents stated that he did not rely on any of these facts to explain the fact of the goods coming back to plaintiffs within so short a time. The other reason given by the learned Judge is that all the defendants' witnesses negative the supposition that there was any understanding that the difference in price should be paid and he states that all the defendants' witnesses agree that they would have been compelled to take, or entitled to ask for, delivery as the case may be, unless and until they had passed a patta patti, which was in fact a document of title to the goods to their sub-purchaser. Here again the learned Judge seems to have fallen into an error as it is clear from the evidence that all the defendants' witnesses are not agreed on this point. There are only two witnesses called for the defendants who state that if delivery was demanded it ought to have been given whereas the other witnesses for the defendants state that no goods could, according to the agreement between the parties, be demanded at all. These are the two points emphasized by the learned Judge in his judgment for coming to the conclusion that the contracts were not wagering

contracts and unfortunately both these points cannot be supported.

The appeal is mainly concerned with 100 bales which were agreed to be sold by the plaintiffs to the defendants. The contract for 100 bales was entered into on the 21st of November 1922, and Ex. VII is the contract. The goods agreed to be sold under this contract are 100 bales 4,000 bundles of No. 40s. Japan any ticket without "Warship" November Vaida, delivery from 21st November 1922 to 30th November 1922 at Rs. 15-4-6 per bundle. There are other terms mentioned in the contract which it is not necessary to consider. On the face of it this contract no doubt like all wagering contracts cannot be differentiated from contracts for supply of goods so far as the terms on the paper go. The price of these 100 bales, according to the contract, would be the large sum of Rs. 61,125. It is conceded that as regards these bales there was no delivery given or taken of the goods though patta patties or delivery orders in respect of the bales passed through several hands and in the short space of seven days all the 100 bales which passed through various hands came back to the plaintiff.

So far as patta patties or delivery orders are concerned, it is common ground before us in appeal that these 100 bales in smaller lots passed through several hands before they ultimately came to the hands of the plaintiffs. As regards 20 bales, they passed through the hands of A. K. Jusub, Amruth Lal, the plaintiffs and the defendants. As regards 5 bales they passed through the hands of Seshachalam Chetti, Amruth Lal, the plaintiffs and the defendants. As regards 10 bales they passed through the hands of Ragavayya Chetti, Chota Lal, Amruth Lal, Kapurchand, the plaintiffs and the defendants. As regards 5 bales, they passed through the hands of Umedmal, the plaintiffs and the defendants. As regards 15 bales, they passed through the hands of Jusub, Raghavayya Chetti, the plaintiffs and the defendants. As regards 20 bales, they passed through the hands of Raghavayya Chetti, the plaintiffs and the defendants. As regards another 20 bales, they passed through the hands of J. Hussain, Raghavayya Chetti, the plaintiffs and the defendants. As regards 5 bales, they passed through the hands of Goculdass Moganlal, Raghavayya Chetty, the plaintiffs and the defendants. It appears that, though in some cases contracts relating to a few bales were entered into before the 21st November 1922, when the patta patties and adjustments were made, the bales relating to the earlier contracts were appropriated towards the 100 bales which are the subject matter of the agreement of the 21st November 1922. It is clear from the documentary evidence that before disputes arose as regards the contract of the 21st November what was done was that each of the above parties simply passed on delivery orders and an unstamped bill for the alleged price of the goods--nobody paid any money or delivered any goods—and these in turn passed on to the intermediate persons. (The judgment then dealt with the oral evidence in the case and came to the following conclusion.)

I think it is difficult on this evidence to come to the conclusion that as regards 100 bales there was any intention actually to deliver the goods and receive actual cash payments. On the contrary, I think, the evidence makes it clear that the intention of the parties was simply to adjust the differences. I have given the names of the various persons who were interested in these various bales. It is significant that from the 21st to the 30th November (the period during which the contract had to be performed) nobody makes delivery of a single bale and nobody receives a rupee in cash. Delivery orders are passed on, orders for payment are passed on and we find ultimately that what was done was that patta patties were made. It is significant also that the havala chits which are supposed to represent the amount of the actual cash payable under these contracts are not even stamped as hundies when passed ; they are not even endorsed so as to negotiate them; they are not so drawn up that they could be negotiated ; and they are not stamped probably to prevent any action being brought on them but are merely passed on from hand to hand to facilitate adjustment of differences. This shows to my mind that these were drawn up simply for the purpose of adjusting differences and lending an air of reality to the transaction. The parties must have known that these memoranda would be very useful ; but it is hardly likely that the large sums which, if the plaintiffs' case was true, represented

the actual value of the goods which were sold would have been made payable in this manner if the agreement was that the goods should be actually delivered and the payments should be made in cash. There is no reasonable explanation why although so many persons were concerned in these 100 bales, these 100 bales ultimately came to the hands of the plaintiffs according to the chits and patta patties, and why it is that not one of these persons wanted a single bale or rupee out of these various transactions, but were content to pass havala chits and to make patta patti settlements.

A great deal was said by Mr. Srinivasa Ayyangar for the respondents about three other transactions which are referred to in paragraph 3 of the defendants' written statement. The case for the plaintiffs was that they sold to the defendants 135 bales, that out of these bales 15 bales were adjusted by setting them off against the 15 bales which the defendants had to deliver to the plaintiffs, and that the balance of 120 bales were actually delivered either by delivering the goods or by the passing and acceptance of delivery orders. The defendants' case was that there four contracts : (1) Contract No. 153, dated 9th October 1922, for 25 bales at Rs. 15-5-6 per bundle in respect of which 15 bales were set off as aforesaid and 10 bales were adjusted by the exchange of patta patties : (2) Contract No. 154 dated 9th October 1922, for 10 bales at Rs. 15-6-0 per bundle in respect of which all the bundles were delivered ; (3) Contract No. 157, dated 20th October 1922, for 10 bales in respect of which 5 bales were delivered and the balance of 5 bales were adjusted by making patta patties ; and (4) Contract No. 172, dated 21st November 1922, for 100 bales which I have referred to. The plaintiffs, in order to give colour to their case, have clubbed together other contracts and claimed for the whole after giving credit for what they have received. The defendants, in order to support their case as regards 100 bales have attempted to show that all the four contracts referred to were wagering contracts. Both the plaintiffs and the defendants and the other intermediate merchants are in fact dealers in yarn and they are not purely speculators gambling in differences. It is not uncommon among merchants who do real business also to enter into gambling contracts and the fact that in respect of some of the contracts goods were actually delivered is no ground for assuming that the other contracts were real transactions, and not mere agreements to adjust differences. What the Court has to see in each case is the real nature of the transaction. In *Kong Yee Lone & Co.* v. *Lowjee Nanjee* (1), Lord Hobhouse observes :

"Two parties may enter into a formal contract for the sale and purchase of goods at a given price, and for their delivery at a given time. But, if the circumstances are such as to warrant the legal inference that they never intended any actual transfer of goods at all, but only to pay or receive money between one another according as the market price of the goods should vary from the contract price at the given time, that is not a commercial transaction, but a wager on the rise or fall of the market."

I do not think that as regards the 100 bales the transaction was one where goods intended to pass, but was really one for adjustment of differences.

A number of cases were cited on both sides but I think that beyond laying down certain principles which guide Courts in arriving at a conclusion as to whether a contract is a wagering contract or one for actual delivery of goods the cases are not of much help. As observed by Batchelor, J., in *Motilal* v. *Govindram* (2), each case must depend on its own evidence and a study of the reported decisions can afford little help except as indicating the classes of facts upon which the Courts have based their judgments.

As in the case of benami transactions up to a certain point there can be no distinction in form or in the recitals which would differentiate a wagering contract from a bona fide agreement to sell and deliver goods. The parties scrupulously keep up to the forms. There is a contract to sell which is couched in the usual terms relating to forward contracts for sale and delivery of goods. The concern of the parties in the case of wagering contracts is to give such appearances as would enable people to gamble in such a way as to evade the provisions of the law. In this connexion the observations of Lord Herschell in *Universal Stock*

(1) [1902] 29 Cal. 461=28 I.A. 239=5 C.W.N. 714=3 Bom. L.R. 476=8 Sar. 101 (P.C.).
(2) [1906] 30 Bom. 83=7 Bom. L.R. 385.

Exchange v. *Strachan* (3), are instructive. Dealing with the terms of business which the customers were called upon to sign and which were to constitute the contractual relations between the parties, the learned Judge observes as follows:

"The proposition amounts to this: that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a Court of justice to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency: the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction and enable them to sue one another for gambling debts."

In such cases great ingenuity is exercised to make it appear that there was a real transaction when there was none. In *Doshi Talakshi* v. *Shah Ujamsi Velsi* (4), the merchants, to give an air of reality to the transaction, framed rules which were to govern the contracts made between them and which provided with an unqualified emphasis that cotton must be delivered, that all gamblers in differences should be excluded and that they were to find no place among the cotton dealers of Dhobra. All the contracts which were entered into contained these rules. Sir Lawrence Jenkins, C. J., observes:

"Now, if only we could stop at this convenient spot, look only to the contracts and the rules, all would be well, for they repel the idea of anything that savours of a wager. Unfortunately, however, that cannot be; for the law says that we must find, as best we can, the true intentions of the parties; we must not take them at their written word, but we must probe among the surrounding circumstances to find out what they really meant. This I take to be the result of the decision of the House of Lords in the case of *Universal Stock Exchange, Limited* v. *Strachan* (3), which has since been followed in the more recent case of *In re Gieve* (5). We are not and we must not be, bound by the mere formal rectitude of the documents, if in fact there lurks behind them the common intention to wager, and parties cannot be allowed to obtain from the Courts any sanction for their wagers merely because they use a form which is not a true expression of their common purpose and intentions.

The formality of the various transactions and the passing of chits providing for payments of money and passing of delivery orders purporting to cover the goods which were sold and which passed through various hands until they came back to the plaintiffs cannot by themselves show that the transaction as to 100 bales was not a wagering contract. As I said before, we find that the 100 bales, the price of which according to the contract would be a very large sum, were contracted to be sold by the plaintiffs to the defendants on the 21st of November 1922 under the contract Ex. VII delivery to be given on any date between the 21st and the 30th of November 1922. The plaintiffs did not have these goods to deliver. To keep up appearances a telegram was sent to Calcutta to despatch 75 bales, but the plaintiff's agent admits that these 75 bales were never despatched and that they could not reach Madras in time to be delivered. We find that ultimately these 100 bales came back to the plaintiffs and that not one of these several merchants ever delivered one bale of these 100 bales or received one pie in cash for the price in respect of the various transactions entered into. It was all a question of passing on delivery orders and havala chits. I do not think that this was merely a coincidence, each party having a real contract for sale and delivery and each party accepting mere delivery orders and unstamped havala chits for large sums of money without receiving a rupee. I am clearly of opinion that all that the parties intended was to settle differences. In all these cases the real question is whether there was any intention to deliver goods. No doubt, as pointed out by their Lordships of the Privy Council in *Bhagwandas Parasram* v. *Burjorji Ruttonji* (6), even if one party to a contract were a speculator who never intended to give delivery, and that

(3) [1896] A C. 166=60 J.P. 468=65 L.J., Q.B. 428=74 L.T. 468=44 W.R. 497.

(4) [1900] 24 B m. 227=1 Bom. L.R. 786.

(5) [1899] 1 Q.B. 794=15 T.L.R. 251=6 Manson 136=47 W.R. 441=80 L.T. 438=68 L.J., Q.B. 509.

(6) [1918] 42 Bom. 373=45 I.A 29=23 M.L.T. 203=34 M.L.J. 305=4 P.L.W. 220=16 A.L.J. 241=27 C.L.J. 358=(1918) M.W.N. 315=11 Bur. L.T. 211=7 L.W. 577=20 Bom. L.R. 561=22 C.W.N. 625 (P.C.).

fact was known to the other party, yet in the absence of any bargain or understanding, express or implied, that the goods were not to be delivered, that would not convert a contract, otherwise innocent, into a wager : nor would the mere fact that as to the greater part of the goods there was no delivery but an adjustment or claims vitiate the transaction, but the question remains " whether an actual delivery was contemplated or a mere adjustment of differences." Great reliance was placed by the respondents' vakil on the evidence of two witnesses whom I have already referred to, that if one party insisted on the goods being delivered, delivery should be made ; but they state that in these cases nobody wanted delivery but that everybody was satisfied with chits. If the contract was a wagering contract in its inception, the mere fact that in certain contingencies delivery could be asked for would still render the contract unenforceable as a wagering contract : see *Universal Stock Exchange* v. *Strachan* (3) and *In re Gieve* (5).

As regards the plaintiffs' claim for the price of the goods, I find it difficult to see how on the evidence they can sue for the price of the goods unless there was actual delivery or tender, or unless it is proved that the defendants agreed to accept the delivery orders on third persons as equivalent to delivery so as to exonerate the plaintiffs from delivering the goods and limiting the recourse of the defendants to the persons on whom delivery orders were drawn up. A delivery order is merely an authority to the buyer to take possession of the goods in the hands of a third party and ordinarily at the back of the delivery order there should be goods which could be delivered under it. In this case I am satisfied on the evidence that there were no goods in the possession of the plaintiffs which could be delivered or tendered and it was not seriously disputed before us in the arguments that the actual goods never existed with the plaintiffs for delivery. Nor is the evidence sufficient to support the view that the defendants accepted these delivery orders as equivalent to the actual delivery of the goods and undertook to pay a large sum of about Rs. 70,000 without getting delivery of a single bale. In the absence of anything that may be equivalent to a novation and the discharge of the plaintiffs from the obligation to deliver, and the acceptance of an equivalent obligation by third persons to deliver goods, the plaintiffs would not be entitled to sue for the price. In this case I do not think that any such facts have been established. Even assuming, therefore, that the contract was not a wagering contract, the plaintiffs can only get the difference between the contract rate and the market rate on the date of the performance and this, it is admitted, would be a very small sum of about Rs. 600 or 700. I am of opinion that the plaintiff's claim in respect of the 100 bales fails as the contract was merely a wagering contract and that they are only entitled to any sum that may be due in respect of the first three contracts referred to in the defendants' written statement. As regards these contracts, as pointed out already, patta patties were made in respect of 10 bales of Contract No. 153. As regards Contract No. 154, all the bales were delivered. As regards Contract No. 157, five bales were delivered on 14th November 1922, and patta patties were exchanged in respect of five bales on 27th November 1922. All that the plaintiffs will be entitled to is the amount due on the bales delivered. There will be a decree only for Rs. 2,325-4 0 with interest at 6 per cent. from date of decree in favour of the plaintiffs. We allow the appeal in so far as it relates to 100 bales and dismiss the plaintiffs' suit as regards the balance. As the appellants have succeeded substantially the respondents will pay the appellants' costs here and in the Court below.

Krishnan, J.—The question for decision in this appeal is whether the suit transactions are wagering agreements not enforceable in law or whether they are proper commercial dealings.

The plaintiff and the defendants are both merchants who carry on business in Madras of various kinds including trade in yarns and cotton goods. The plaintiff's case in the plaint is that he sold and delivered to the defendants 135 bales of 40 bundles each of Japan yarn of 40 counts under 3 contracts—the 1st, dated 9th October 1922, for 25 bales at Rs 15-5-6 a bundle, the second, dated 20th October 1922, for 10 bales at Rs. 14-4-0 a bundle, and the third, dated 21st November 1922, for 100 bales at Rs. 15-4 6 a bundle, and he sues for the price of these goods. Contracts were forward contracts

for delivery at the end of November. He also mentions another contract of 24th October 1922, whereby he purchased from the defendants 15 bales of similar goods deliverable at the same date at the end of November at Rs. 14-15-0 a bundle. He states that this last contract was settled between the parties by being set off against 15 bales of the first contract above mentioned and he claims in this suit as one of the items due Rs. 243-12-0, the calculated difference between the buying and selling prices. As regards delivery of the balance of 120 bales, the allegation in the plaint is that they were delivered partly by actual delivery of the goods and partly by "the passing and acceptance of delivery orders."

The defendants pleaded that there was a practice among certain merchants in the Madras market of making contracts ostensibly for sale and purchase of yarn, but with no intention whatever of performing them by delivery of goods or payment of price, the sole intention being to pay differences on the due date. No deliveries were to be asked for, but to keep up appearances what are called "patta patties" in the form of delivery orders were given to the buyers by the sellers addressed to their own vendors and "havala chits" in the form of orders for payment were given thereafter by the buyers for the prices and where a man had a havala chit given by a previous buyer from him he merely handed it over to his seller as equivalent to the amount mentioned in it. On the due date fixed for performance, contracts would have been so made that patta patties would have ultimately reached the hands of the original vendors and a completed ring of dealers formed; the parties will then meet together and compare their havala chits and settle the differences payable and will pay and receive amounts due by or to each on that footing.

It is stated in the defendants' written statement that there was a "local usage or custom in the market" as above described and that neither delivery of goods nor payment of price was made, but only differences were paid. The defendants pleaded that the suit contracts were all contracts of the above character and were, therefore, unenforceable in law being wagering agreements. As regards the 15 bales which were actually delivered, they pleaded that those bales had nothing to do with the suit contracts but were delivered towards other contracts which were ordinary commercial transactions between the parties.

The question raised has obviously to be decided on the evidence as to the exact nature of the contracts and the understanding between the parties when they were made. The law on the point is fairly clear as it has been laid down in numerous cases which have been cited to us. All authorities are agreed that however legal and genuine may be the appearance of the contract on the face of it, it is still a wagering contract if it was intended by both the parties that differences only were to be paid and that the contract was not to be performed by delivery of goods or payment of price. It is then clearly a gamble on the fluctuations of the market price of the particular goods dealt with. While no doubt the Court should exercise great care in discriminating between mere speculative transactions in trade and gambling transactions, it should not be misled by mere appearance of things, but must look beneath the surface and find out, if it can, the real nature of the transactions. In the first case cited to us which is the leading case on the point, namely: that of *The Universal Stock Exchange* v. *Strachan* (3), their Lordships pointed out that in such cases the whole transaction has to be looked to to find out its true nature. Lord Herschell said at p. 175:

"The proposition amounts to this that parties who intend to gamble with one another, but wanted to have the security against one another of being able in a Court of justice to recover their bets, could compel a Court of justice to adjudicate and secure to them their bets by a judgment if only they inserted in their contract a provision which might in certain events become operative to compel the goods to be delivered and received, although neither of them anticipated such a contingency, the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction and enable them to sue one another for gambling debts. The proposition contended for by the learned counsel for the appellants would really lead to that result, and I should require much consideration before I gave my assent to a proposition involving such consequences."

This case was followed in *In re Gieve* (5), where the Court held that in spite of an alternative arrangement that stock was to be actually delivered on payment of a small extra price, the main contract was one to pay differences and the whole transaction was vitiated as a wagering agreement. These two cases were followed by Sir Lawrence Jenkins, C.J., and Candy, J., in the case of *Doshi* v. *Shah Ujamsi* (4), where their Lordships referred to the previous Bombay cases of *J. H. Tod* v. *Lakhmidas Purshotamdas* (7) and *Perosha Cursetji* v. *Manekji Dossabhoy* (8), which were both cases which dealt with speculative but real commercial transactions as the learned Judges found that the intention to gamble was not established on the evidence. The learned Chief Justice says:

"We are not and we must not be bound by the mere formal rectitude of the documents if in fact there lurks behind them the common intention to wager."

And again observes:

"They (that is, the surrounding circumstances) and the position of the parties and the history of dealings of this class are legitimate though not exclusive matters for our investigation into the true intention of the parties."

In the case next cited of *Kong Yee Lone & Co.* v. *Loujee Nanjee* (1), their Lordships of the Privy Council held that the suit contracts were wagering transactions as from the evidence it appeared that the parties could not have intended purchase and delivery of goods, but only the payment of differences though between them there were other contracts of a real commercial character which were performed by delivery of rice and they reversed the decree of the Court below which had held that these were not wagering contracts "having regard to the fact that the rice was in certain instances delivered and paid for."

In Madras a case arose in 1895 regarding dealings in Government promissory notes, *Eshoor Doss* v. *Venkatasubba Rau* (9). It was held that as the intention of parties was that no delivery of the stock should be made, but only differences were to be paid, the agreement was void as a wagering one under S. 30 of the Contract Act.

The question had to be considered again by the Privy Council in the case of *Bhagwandas Parasram* v. *Burjorji Ruttonji* (6). In that case their Lordships point out that speculation does not necessarily involve a contract by way of wager and that to constitute such a contract a common intention to wager is essential. They also point out that even where one party is a speculator and did not intend to deliver and the other knew it, yet in the absence of a bargain or understanding, express or implied, that the goods were not to be delivered, a contract otherwise innocent will not become a wager and that the mere fact that as to the greater part of the goods there was no delivery but only an adjustment of claims will not vitiate the transaction. This case lays down what should be considered to be only a speculative bargain as distinguished from a wagering one and is in a line with the cases in *J. H. Tod* v. *Lakhmidas Purshotamdas* (7), *Perosha Cursetji* v. *Manekji Dossabhoy* (8), *Ajudhia Prasad* v. *Lalman* (10), *Joshi Narbadashankar* v. *Mathuradas* (11) and *Manilal Dharamsi* v. *Allibhai Chagla* (12).

The only other case that need be referred to is the case of *Manilal Raghunath* v. *Radhakisson Ramjiwan* (13). In that case the learned Judges held that the contract was a wagering one. That case was referred to principally for the discussion in it of the Privy Council decision in *Bhagawandas Parasram* v. *Burjorji Ruttonji* (6) above cited. We are, however, bound to follow the Privy Council. The question for us in the present case is whether on the evidence it falls within the class of cases dealt with in *Bhagwandas Parasram* v. *Burjorji Ruttonji* (6) and similar cases above cited or under *Strachan's* case and other cases of wagering agreements.

Before considering the evidence as to the nature of the suit transactions it will be convenient to state what I understand to be the meanings of the two expressions "patta patti" and "havala chits" which are frequently used in this case. "Patta patti" is a Gujarati word recently introduced into Madras from the north; it means literally "adjustment" or "settlement." Ex. VI series which are some of the patta patties filed in the case show

(7) [1892] 16 Bom. 441.
(8) [1898] 22 Bom. 899.
(9) [1895] 18 Mad. 306 (F. B.).
(10) [1903] 25 All. 33=(1903) A. W. N. 178.
(11) [1910] 34 Bom. 519=12 Bom. L. R. 1058.
(12) A. I. R. 1922 Bom. 408.
(13) [1921] 45 Bom. 386=22 Bom. L. R. 1018.

what they are like. They are in the form of delivery orders given by the seller to the buyer for the goods mentioned in them, on some third party who has made a contract to sell the same goods to the seller. Ex. VI is a patta patti with one K. G. Raghava Chetti which plaintiff gave to the defendants for 10 bales of the 100 bales contract he made. The defendants accepted the patta patti for those bales and it is signed by their agent, Trimbak Lal. Although called delivery orders these patta patties are not really delivery orders but are merely what may be called token delivery orders as no goods are delivered under them They are used only as a settlement or adjustment of delivery. As in these transactions where patta patties are used the original seller becomes the ultimate buyer before the "vaida" or the date fixed for performance no actual delivery is contemplated or is necessary. Witnesses have been asked about the meaning of patta patti and there is a body of evidence on the point. The defendants' second witness Rupsingh has explained what he understands by patta patties. He says that it is not intended that goods should be delivered under a patta patti. In fact it is issued when there are no corresponding goods available for delivery. The evidence of Raghavalu Chetti, D. W. 4, further explains how patta patties are utilized. D. W. 7, a clerk of one of the merchants who took part in the sales and purchases in this case says that "patta patti "means" sending round delivery order to several persons without goods." Plaintiff's own agent Govinda, P. W. 1, says "patta patti" means "adjustment of deliveries" and that if all parties agree patta patties are made. P. W. 2 says "patta patti "means" if a person sells and the same contract is sold to different persons and again it comes to the seller and if the parties agree then to save labour patta patti is made." Plaintiff's vakil naturally tries to make out that the issue of "patta patti" is merely an adjustment of delivery in an ordinary commercial transaction if the parties agree to it at or before the "vaida" date. But I am inclined to think on the evidence that patta patties are not generally used unless the contract in its inception was understood as not requiring performance by delivery. It may be that in exceptional circumstances a real contract is subsequently settled by the issue of patta patties and payment of difference. Plaintiff has shown one such case but one may safely infer that the giving of patta patties by the seller, at any rate, where the seller does not get the permission of the buyer to do so beforehand but gives it as a matter of course, indicates that the parties did not intend to give or receive delivery of the goods.

Havala chits are given in such transactions by the buyer to the seller for the price just as patta patties are given for goods. It is in the form of a letter by the buyer to the seller addressed to the former's buyer to pay a certain sum of money representing the price of goods to the addressee of the letter, and to debit the amount in the former's account. They are not promissory notes as the learned trial Judge seems to have thought but are in form orders to pay to a named person. They are not ordinary hundies and they are not negotiable instruments in form. Ex IV is a sample of them. They are written on pieces of paper and are issued, according to the evidence in the case, in connexion with patta patties when money is not intended to be paid. They are also really mere tokens. The fact that they are written often on dirty and torn pieces of plain paper without any stamp or any other formality would seem to indicate that they did not represent money but were mere tokens to show the price agreed to, so as to enable the parties to calculate the differences afterwards.

There is a good deal of evidence in the case which there is no reason to distrust that some of the merchants in Madras did enter into contracts ostensibly for the purchase of goods but in reality only to pay or receive difference on the "Vaida" date and in connexion with such transactions patta patties and havala chits were exchanged without any idea of delivering the goods or paying the price. There can be no doubt on the authorities that such transactions are wagering transactions unenforceable in law as they are really a form of gambling on the fluctations of prices in the market. The defendants contended that all the three plaint transactions were of this nature but plaintiff asserted them to be real and valid commercial transactions. The main dispute between the parties is, however, as regards the third contract of 100 bales. As regards

the balance of 20 bales, 15 bales were settled by exchange and plaintiff claims Rs. 246-14-0 as due on that account. Plaintiff also claims the price of five bales actually delivered which defendants admit. The defendants admit in all Rs. 2,325-4-0 as due and plaintiff has not attempted to prove more is due. The 20 bales are thus accounted for and the dispute is thus confined to the 100 bales' contract. It is not, therefore, necessary to consider the other two contracts except perhaps in so far as they have a bearing on the nature of the last contract.

With regard to the 100 bales' contract what happened is this. Plaintiff made an agreement with defendants on 21st November 1922, for sale of 100 bales to him at Rs. 15-4-6 a bundle, Vaida being at the end of November. No goods were delivered by the plaintiff in pursuance of this contract but plaintiff gave patta patties for the whole lot. There was some confusion raised in this connexion with reference to a lot of five bales which plaintiff actually delivered because of a mistake made by defendant's clerk Rupsingh who entered these goods in defendants' book as having been delivered towards the 100 bales' contract. The goods were sent by plaintiff for one of the other contracts as appears from his books and Ex. XVI. The delivery, it is clear, was not made by the plaintiff for this contract and the entry in defendants' book is purely a mistake as explained by Rupsingh I do not think that this mistake can properly be relied on as showing that the 100 bales' contract was to be performed by actual delivery of goods as was attempted to be done by the plaintiff's vakil before us. I have no doubt that whole of 100 bales' contract was settled by delivery of patta patties. Plaintiff had no goods to deliver except some nine bales in his godown as shown by his stock book Ex. E. Plaintiff's agent says he sent two telegrams, D-1 and D 2 for goods from his Calcutta branch but it is very doubtful whether they refer to the goods of the 100 bales' contract. In any case it is admitted that he could not have got the goods from Calcutta in time by the "Vaida" date which was the end of November. When plaintiff made the contract he had not sufficient patta patties with him to make up the 100 bales. He had patta patties only for 25 bales with him and he proceeded, therefore, to make contracts with other dealers for 75 bales. He arranged to get from Raghavalu Chetti patta patti for 60 bales for this contract, ten bales from Kapurchand and five bales from Umedmal who were all dealers who had similar contracts with the defendants through intermediaries. The defendants filed before us a list of these contracts the general correctness of which was admitted by the plaintiff's vakil. Of the patta patties for 25 bales which plaintiff had in hand when he made the 100 bales' contract, 20 of them he got from Amritlal Mangaldas who got them from one A. K. Jusub who got them from the defendants. The remaining five also he got from Amritlal who got them from one V. C. Seshachellam Chetti who got them from defendants. He obtained all these in October. The 60 bales he obtained from Raghavalu Chetti after he made his contract with defendants; the latter had got 20 from defendants directly, 20 from one J. Hoosain to whom defendants had sold, 15 from A. K. Jusub who had got them from defendants and five from one Maganlal who had got them from defendants. The ten bales patta patti which plaintiff got from Kapurchand, he got from Amritlal who had got them from Chotalal who got them from Raghavalu Chetti who had them from defendants. The remaining five bales he got from Umedmal who got them from defendants. Not one of these men had any goods corresponding to the contracts. Several of them who have been called say that they had no idea of delivering goods at all or paying the price. Havala chits were given in token by all these dealers, the plaintiff having refused to take them when tendered to him by the defendants under Ex. XX. Plaintiff's agent does not say that the defendants agreed with him to take patta patties for the 100 bales before he proceeded to provide himself with such patta patties. He did it as a matter of course and when they were tendered to the defendants they accepted them without any demur. It is only when plaintiff refused to take havala chits and the amount of the differences tendered by the defendants but insisted on payment of price that trouble arose.

The plaintiff's conduct in buying up patta patties from men who had them directly or indirectly from the defendant

and thus completing the ring, without obtaining defendants' consent beforehand that they would accept such patta patties, and in tendering them to defendants in lieu of the goods and the conduct of the defendants and of the various dealers who are involved in these transactions, who gave patta patties and received havala chits and who had none of them any goods to deliver and who say they had no intention to do so or to pay the prices show clearly to my mind that the defendant's version is true, that the contract for 100 bales was a mere wager and the only idea was to settle differences on the Vaida date. Plaintiff was not playing the game when he turned round and refused to accept the havala chits and insisted on the payment of the price. It is explained that he did so because Raghavalu Chetti, from whom he got patta patties for 60 bales and to whom he would owe about Rs. 30,000 if prices were to be paid, had become his debtor to the extent of Rs. 60,000 or Rs. 70,000 on account of other dealings, and was in an insolvent condition. If he could get the price from defendants he could set-off this Rs. 30,000 against the Rs. 70,000 and thus reduce his claim against Raghavalu and reduce to that extent the loss he may suffer by Raghavalu's insolvency. In fact he has brought a suit claiming such a set off. Plaintiff has attempted to give a colour of reality to his dealings after disputes arose by tendering the purchase money to some of the persons from whom he got patta patties. One of them is Amritlal; his gumastah D. W. 5 says plaintiff sent a cheque for Rs. 14,795-5-0 on 4th January 1923, and when asked whether his master had paid Seshachellam and Joosaf from whom he had got patta patties he said they would not receive the money but wanted havala chits. D. W. 8, the agent of Kapurchand, was also paid the price Rs. 6,064-6-0 on 16th December 1922. D. W. 9, Umedmal says that plaintiff forced him to take money Rs. 3,031 on 4th January 1923, and he put it in the suspense account. No inference in favour of the plaintiff can be drawn from these payments; if anything they show the plaintiff's anxiety to make a wagering transaction look real.

On the whole of the evidence, I have come to the conclusion that it is proved that the contract in question here is a purely wagering one and is unenforceable. The suit so far as it refers to it must be dismissed. There will be a decree in plaintiff's favour for the amount admitted Rs. 2,325-4-0 and further interest at 6 per cent. from date of decree. The rest of the plaintiff's suit is dismissed with defendant's cost in both Courts.

By Court.—By consent of both parties the figure in the decree which is given as Rs. 2,325-4-0 will be altered into Rs. 2,975-15-0. To this will be added Rs. 243-12-0 the sum which is admitted to be due in paragraph 3 of the written statement.

Decree modified.

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* A. I. R. 1926 Madras 336

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

K. G. Muhammad Hussain Sahib and *others*—Defendants—Appellants.

v.

P. Baba Sah and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 112 of 1923, Decided on 10th March 1925, from a decree and judgment of Courts-Trotter, C. J., D/-12th July 1923.

* *Tort—Nuisance—Building of temple or mantapam is itself not an actionable nuisance.*

In the absence of evidence the mere fact that a temple is built would not justify an assumption that the temple, if built, would be an actionable nuisance to the neighbours of the locality; much less can it be held that the building of a mantapam annexed to a temple would be such a nuisance. [P.337, C.1]

K. Narasimha Iyer—for Appellants.

G. Krishnasamy Iyer—for Respondents.

Kumaraswami Sastri, J.—This is an appeal against the judgment of the Chief Justice restraining the defendants by an injunction from preventing the plaintiffs from building upon their lands. The plaintiffs are Dharmakarthas of the Balasubramaniswami temple in Pudupet situte in Narayara Naicken Street. The defendants are interested in a mosque which was separated from the temple by three houses and a road which was about 16 feet broad where it took off from Narayana Naicken Street and was tapering off. It was about 13 feet broad by the time it reached the end of the mosque. The temple originally was in

a small building, but subsequently the Dharmakarthas acquired three houses which brought the temple property to the street which separated the mosque from the three houses. Having purchased the property the Dharmakarthas wanted to erect a mantapam after demolishing the three houses which adjoined the original temple. In this they were obstructed by the Muhammadans who were interested in the mosque. There were police proceedings and the plaintiffs had to go to Court because they were restrained by the order of a Magistrate from building upon the temple property. The suit was originally tried by Mr. Justice Bakewell who thought the plaintiffs had no cause of action and dismissed it. On appeal it was remanded by Justices Ayling and Odgers and the suit finally came on for trial before the Chief Justice. There was no evidence let in on remand and, so far as the evidence in the case goes, there is no evidence that the building proposed to be erected would necessarily be a nuisance. In the plaint which was filed in the suit all that is said in para. 10 is "with a view to meet the essential requirements of the temple and its worshippers, the plaintiffs demolished the house marked B just next to the temple with a view to build on its side a mantapam to be used for various purposes connected with the temple". I said before there was no evidence to show that this building, if erected, would necessarily amount to a nuisance so as to entitle the Court to prevent the building in anticipation of a nuisance that was likely to be caused. Mr. Narasimha Iyer argues that the very fact that a temple is going to be built necessarily would be a nuisance to the adjacent inhabitants owing to the music and the tom-tom and other accompaniments of a temple. I do not think we can hold in the absence of evidence, that the mere fact that a temple is built would justify us in assuming that the temple, if built, would be an actionable nuisance to the neighbours of the locality; much less can we hold that the building of a mantapam annexed to a temple would be such a nuisance. The temple according to the plaintiffs, and it is not found against, was an old temple which existed for several years. It was about three houses off this mosque and any tom-tom must have been a nuisance for several years. There is no objection now to the worship which is conducted in the temple, but it is complained that the building of that mantapam will create such an actionable wrong as to justify its prevention. As I said before, I do not think we can hold, in the absence of any evidence, that it will be a nuisance. Several cases were cited by Mr. Narasimha Iyer, but they were all cases where there was evidence that there was a nuisance or that the proposed building was of such a character as necessarily to amount to a nuisance if completed; but in the case before us those elements are wanting. We think that Justice Coutts-Trotter has correctly defined the rights of the parties. He says in his judgment: "the Dharmakarthas are entitled to alter and extend the present temple building marked A in any lawful manner they choose and to erect on the sites marked B, C, D and E any buildings which shall conform to the requirements of the municipal law now or hereafter to be in force, and that the defendants are not entitled to interfere in any way with such acts of the plaintiffs." This is the sole declaration which the learned Judge says he makes. As regards the argument that it may be a nuisance later on, the Judge observes: "I am not going to make any declaration touching the user of the building, and when I restrain the Muhammadans from interfering I mean from interfering by physical acts." It is difficult to see how any objection can be taken to the injunction as actually granted by the learned Judge or to the decree in which that injuction is embodied unless we can hold that the mere building would be such act as necessarily to amount to a nuisance, as to which there is no evidence whatever. In these circumstances I do not think there is any reason for interfering with the judgment of the learned Judge who has confined the injunction to legitimate limits so far as the plaintiffs' rights are concerned. The appeal, therefore, fails and is dismissed with costs.

The plaintiffs have filed a memorandum of objections, but I do not think there is anything in it. So far as the orders of the Magistrate are concerned, the learned Judge was right in saying he could not interfere with those orders. They were passed by the Government and the Magistrate in the exercise of their discre-

tion. So far as the costs are concerned I do not see any principle which the learned Judge violated. The plaintiffs expressly asked in their plaint, prayer C, to set aside the orders, and the learned Judge held that he had no power to do so. To that extent the claim failed and the learned Judge was right in giving the defendants some benefit in respect of the reliefs which the plaintiffs asked infructuously. The memo. of objections fails and is dismissed with costs.

Krishnan, J.—The facts of this case are all set out in the judgment of the learned Chief Justice and also by my learned brother who has just delivered his judgment. The appellants' argument is based on the contention that the building of a temple is in itself a nuisance to the neighbourhood as there is likely to be some music and other noises emanating from the temple when the worship in the temple goes on. The appellants' vakil, therefore, wanted us to hold that the building of a temple, particularly in a street in a city like Madras, must be treated as in itself a nuisance and be prohibited by an injunction order. I am entirely unable to agree with the learned vakil for the appellants that the building of a temple can be treated as in itself a nuisance. If afterwards, in the way in which the temple authorities use the temple an actionable nuisance is committed by them, it will be time enough for the appellants then to take action. The declaration that has been given by the learned Judge in this case will not prevent their rights being put forward in any Court if they do have any such rights resulting from the action of the plaintiffs. So far as I can see the declaration that has been given to the plaintiffs is one that cannot be objected to at all. The learned Judge declares that plaintiffs are entitled to build in a lawful manner whatever building they like to put upon the site they have acquired and that is a right which every owner of property has got. It is not pretended that the building in this case will in any way interfere with the light and air or other rights of any neighbouring owners. There is no ground whatsoever for objecting to the declaration granted. The learned Judge says expressly in his judgment that he was not going to make any declaration touching the user of the building and, as I say, if the user proves to be a nuisance, it will be time enough for the defendants to take action.

In the memorandum of objections, it was urged by the plaintiffs that nothing is said in the decree about their right to build a gate. Although there may be nothing expressly in the decree the learned Judge has stated in his judgment that "the plaintiffs can build what they like; they can build a gate if they like." Evidently the right to build a gate is included in the right to build given by the decree. There was no object in filing the memo of objections on that point. As regards the costs I agree that this is not a case in which we can properly interfere with the discretion exercised by the trial Judge. The appeal fails as also the memorandum of objections, and they are dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 338

DEVADOSS AND WALLER, JJ.

(Bohisetti) Mamayya—Appellant.

v.

The Official Receiver, Guntur—Respondent.

Appeal No. 450 of 1923, Decided on 25th August 1925, against the order of the Dist. J., Guntur, D/- 19th April 1923, in Insolvency Appeal No. 32 of 1922.

Provincial Insolvency Act (5 of 1920), S. 54—Fraudulent preference—Official Receiver need not make out undervaluation of the property, but only the intention of the insolvent—Intention of transferee is immaterial.

In a case of fraudulent preference, it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully. In such cases the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the transferee is immaterial. Even if the creditor has taken a bona fide sale from the insolvent in discharge of a debt to him that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others. [P 339, C 1, 2]

S. Varadachariar, K. Ramamurthi and *K. Kameswara Rao*—for Appellant.

N. Rama Rao—for Respondent.

Judgment.—This appeal is against the order of the District Judge of Guntur setting aside the alienation in favour of the appellant made by the insolvent on the 29th September 1918 under Ex. I. Mr. Varadachariar for the appellant contends that the sale is a bona fide sale for adequate consideration. The learned Judge has attached importance to the fact that the properties sold were undervalued. In a case of fraudulent preference, it is not necessary for the Official Receiver to make out that the property alienated was undervalued. The gist of fraudulent preference lies in preferring one creditor to another when the insolvent is unable to meet his liabilities fully. In this case, the creditor presented a petition to adjudicate the insolvent on the 19th December 1918, and on the 10th March 1919, the insolvent presented an application for being adjudicated an insolvent. It is also in evidence that the insolvent alienated almost all the properties in his possession between the date of Ex. 1 and the date on which the petition for adjudication was filed by the creditor. The appellant is a relation of the insolvent, his wife being the niece of the insolvent's wife, and, as the learned Judge remarks, there was no pressure by the appellant on the insolvent for the payment of his debt. The consideration for Ex. 1 is partly a debt due to the appellant and partly a debt due to the Bank which the appellant was asked to pay. As a considerable portion of the consideration was a debt due to the appellant, the sale to him of the insolvent's property was with a view to prefer him to other creditors. There is another circumstance which also goes to show that the sale was not a bona fide sale. The insolvent who sold his dwelling-house to the appellant is now in possession of the same under a rental agreement, Ex. IX, taken in the name of his son. A person in embarrassed circumstances, who has a number of liabilities to meet, does not think of selling his dwelling-house first unless it be to put it out of the reach of his creditors. The insolvent sold not only the dwelling house, but also about 21 acres of land and bricks, about 50,000, and the standing crops which the learned Judge values at Rs. 750. All these are circumstances going to show that the object of the insolvent was only to prefer the appellant to other creditors. In cases of fraudulent preferences the Official Receiver has only to make out the intention of the insolvent. The intention or motive of the appellant is immaterial Even if the creditor takes a bona fide sale from the insolvent in discharge of a debt to him that does not make the transaction a valid transaction if the intention or the view of the insolvent is to prefer that creditor to others.

We agree with the learned Judge in holding that the transaction is void as being fraudulent and we dismiss the appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 339

DEVADOSS, J.

V. S. R. Rajagopala Iyer—Defendant—Petitioner.

v.

V. S. K. Muthuramier—Plaintiff—Respondent.

Civil Revision Petition No. 525 of 1924, Decided on 4th March 1925, against the order of the Dist. Court, Madura, D/- 1st February 1924.

* *Civil P. C., O. 7, R. 10—Defendant objecting that plaintiff's claim is purposely overvalued by including item without any title Court cannot investigate and decide the issue for considering whether it has jurisdiction.—Jurisdiction.*

The Court for the purpose of considering whether it has jurisdiction or not cannot decide a a material issue in the case. In order to find out whether the claim of the plaintiff is bona fide or not, when a plaintiff claims two items of property and the defence is that there is some dispute as regards one item of the property and the other item has been included in the plaint only to give jurisdiction to a higher Court, the Court would not be justified in deciding whether the plaintiff has a title to the other item, and whether the Court would have jurisdiction if the other item was excluded. The mere fact that the claim to the other item is untenable is not a sufficient reason for the Court to say that the claim is an inflated claim and the suit should have been filed in a Court of lower monetary jurisdiction; 21 *Mad.* 271, *Rel. on*: 8 *Bom.* 31: *Dist.* [P. 340, C 1, 2]

B. Sitarama Rao and *S. R. Muthusamy Iyer*—for Petitioner.

K. Rajah Iyer—for Respondent.

Judgment.—This is an application to revise the order of the District Judge of Madura, who reversed the order of the

Subordinate Judge of Madura directing the plaint to be returned to the plaintiff to be filed in a Court having jurisdiction to try the suit. The plaintiff valued his claim at Rs. 3,078 and filed it in the Subordinate Judge's Court at Madura. The defendant contended that the suit was overvalued and the Court had no jurisdiction to entertain it. In support of his contention he produced a letter of demand written by the plaintiff to the defendant on 21st November 1922 claiming interest at 12 per cent. per annum in case the defendant was not willing to transfer the 20 shares alleged to have been contracted to be sold to the plaintiff. Relying upon this, the Subordinate Judge held that the claim for interest at 18 per cent. was not a bona fide claim and that the suit was purposely overvalued for the purpose of giving jurisdiction to the Sub-Court. On appeal the District Judge held that the plaintiff had a right to value the suit at any figure he liked and the question whether the interest claimed was legitimate or not was one of the issues in the case and should not have been decided for the purpose of considering the question of jurisdiction. It is urged by Mr. Muthuswamy Iyer that the plaintiff purposely overvalued the suit in order to give jurisdiction to the Sub-Court. It looks as if the plaintiff claimed 18 per cent. interest in the plaint in order to bring the suit within the cognizance of the Subordinate Judge's Court of Madura. But the question is whether the Court, for the purpose of considering whether it has jurisdiction or not, could decide a material issue in the case. In order to find out whether the claim of the plaintiff is bona fide or not, when a plaintiff claims two items of property and the defence is that there is some dispute as regards one item of the property, and the other item has been included in the plaint only to give jurisdiction to a higher Court, would the Court be justified in deciding whether the plaintiff has a title to the other item, and whether the Court would have jurisdiction if the other item was excluded? When a plaintiff comes into the Court claiming damages he can put the amount of damages at any figure he likes. The mere fact that the claim is untenable is not a sufficient reason for the Court to say that the claim is an inflated claim and the suit should have been filed in a Court of lower monetary jurisdiction. The observations of the learned Judges in *Koti Pujari* v. *Manjaya* (1) apply to this case. The learned Judge observed:

"These are the very questions connected with the proper valuation of the subject-matter of the suit. Very grave inconvenience and confusion would result if pleas raised by the defence as to the right of the plaintiff to portions of the relief sought by him, and which he would be entitled to on establishing the allegations of the plaint, were allowed to be treated as preliminary questions affecting the valuation of the suit, and which ought to be determined in order to ascertain the Court in which the suit should be brought."

The facts in *Lakshman Bhatkar* v. *Babaji Bhatkar* (2), are distinguishable from the facts in *Mirza Hyder Alli Sahib* v. *Hussain Raza Sahib* (3). In *Lakshman Bhatkar* v. *Babaji Bhatkar* (2) it was held that the plaintiff had intentionally valued the claim too high in order to bring the suit within the higher jurisdiction. In *Mirza Hyder Alli Sahib* v. *Hussain Raza Sahib* (3) a certain relief was asked for which was neither incidental nor necessary to the main relief in the case. Mr. Justice Bakewell held that that relief was purposely put in to oust the jurisdiction of the City Civil Court. In this case it cannot be said that the claim for interest at 18 per cent. is on the face of it a false claim. It may be an untenable claim. It may be that the plaintiff will not be able to substantiate his claim for interest at that figure but that should not weigh with the Court in determining whether the plaint is properly valued or not. I, therefore, consider that the order of the District Judge is correct, and there is no reason to interfere with his order.

The petition is dismissed with costs.

Petition dismissed.

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(1) [1898] 21 Mad. 271.
(2) [1884] 8 Bom. 31.
(3) [1914] 1 L. W. 398.

* A. I. R. 1926 Madras 341

KUMARASWAMI SASTRI, J.

(B. Raja Rajeswara) Muthuramalinga Sethupathi Avergal—Plaintiff-Petitioner.

v.

Secretary of State and *another*—Defendants—Respondents.

Civil Revision Petition No. 607 of 1924, Decided on 12th March 1925, from the order of the Dist. Munsif, Ramnad, D/-15th August 1924.

* (a) *Civil P. C., O. 1, R. 10—Suit compromised—Court cannot add party thereafter—Civil P. C., O. 23, R. 3.*

Under O. 23, R. 3, the Court is bound to pass a decree in terms of the compromise if it is legal and valid and it cannot add a party to the proceedings if the original parties terminated the suit by such a lawful compromise. [P 341 C 2]

(b) *Madras Local Boards Act, S. 38—Contracts based on resolution subsequently set aside—Contracts are not in valid.*

Quaere: S. 38 by necessary implication do not necessarily render all contracts invalid where such contracts are based upon the resolution which has been set aside by the Government. [P 342 C 2]

A. Krishnaswami Aiyar — for Petitioner.

Govt. Pleader—for Respondents.

Judgment.—This is an application to revise the order of the District Munsif of Ramnad directing the Secretary of State for India in Council to be made a party to the suit which was filed by the Rajah of Ramnad against the Union Board of Ramnad for a declaration that certain streets around his palace belong to him and are not vested in the Union Board. Trouble seems to have arisen from the fact that during the survey under the Survey Act these roads were classified as public streets. The suit, however, as appears from the note of the District Munsif, was not a suit under the Survey Act but was a suit by the plaintiff to establish his title to the roads. There was a compromise entered into between the Rajah of Ramnad and the Union Board and this compromise was entered into after a resolution of the Union Board. A joint petition was put in under O. 23, R. 3 of the Civil Procedure Code on the 26th of April 1924, where it was stated that the parties had come to an agreement and that a decree should be passed in terms of the razinamah. By that razinamah the defendant Board recognized the ownership of the plaintiff over the lanes A, B and C mentioned in the commissioner's plan; the plaintiff was to allow the public free use of the lanes from 5 A. M. till 9 P. M. for ever; and the plaintiff was given the right to close the lanes except during the hours when the public were allowed access; each party was to bear its own costs. It was prayed that a decree be passed in terms of this razinamah. This petition was put in on the 26th of April but no order was passed on it. It appears from the affidavit filed on behalf of the Secretary of State for India in Council that the Government on the 4th of July 1924, long after this petition was presented, and purporting to act under S. 38 of the Local Boards Act rescinded the resolution of the Union Board to enter into a compromise. On the date the petition to record the compromise came on for hearing, the Secretary of State for India in Council put in a petition to be made a party to the suit and the District Munsif without deciding the petition already filed to record the compromise passed an order making the Secretary of State for India in Council a party to the suit. The present revision petition is filed against that order.

The contention of Mr. Krishnaswami Aiyar for the petitioner is that, under O. 23, R. 3, Civil Procedure Code, the Court was bound to pass a decree in terms of the compromise, such compromise being legal and valid, and that it was not competent to the Court to add a party to the proceedings where the original parties terminated the suit by a lawful compromise. O. 23. R. 3 runs as follows :—

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

It seems to me to be clear that if this compromise between the Union Board and the plaintiff was a lawful and valid one, the District Munsif had no power to add any party but he had only power to pass a decree in terms of the compromise.

Sankaralinga Nadan v. *Raja Rajeswara Dorai* (1) has no application. In that case the defendants, who were Shanars, were sued as representing their community. The High Court found that the compromise after decree passed in favour of the trustee by the Subordinate Judge was a breach of trust on the part of the trustee and that third parties interested were entitled to intervene. Their Lordships of the Privy Council upheld the order of the High Court. In the present case there is no such charge and the suit is not filed by or against either party in a representative character.

The fact that the petitioner claims a right or interest in the matter cannot, if the suit was terminated lawfully by the original parties thereto, allow third parties to agitate their rights in the suit. If third persons have any interest in the matter, their remedy is to file a separate suit. The District Munsif has passed no orders on the validity of the compromise and I think that the order which he has passed making the Secretary of State for India in Council a party is clearly premature. The first question to be determined was whether the compromise was legal. On this part of the case I have heard the arguments both of Mr. Krishnaswami Aiyar for the petitioner and of Mr. Anantakrishna Aiyar for the Secretary of State. Mr. Krishnaswami Aiyar argues that the Local Boards Act constitutes the defendant, the Union Board of Ramnad, as a corporation with all rights of suing or being sued, or acquiring, holding or transferring property, moveable or immovable or to contract and do all other things which it considers proper or expedient for the purpos s for which it was constituted. The streets vested in the Board under the Act and that Board was, having regard to the allegations in the plaint, the proper party to be impleaded. The contract therefore which resulted in the razinamah was a contract entered into by a body which had authority to enter into the contract. Such being the case there could be no question of the contract not being enforceable. It is contended by him that the provisions of S. 38 of the Act, which gives the Government the power to suspend or cancel any resolution of the Local Board, can only be exercised so long as the matter rests in the stage of a mere resolution which as between the Board and the Government, the Government can interfere with, and that so long as the rights of third parties are validly created under a contract which cannot be impeached on the ground of fraud or misrepresentation or ultra vires, the contract is enforceable irrespective of what the Government may do under S. 38. Reference has been made to the decisions in *Allen* v. *Gold Reefs of West Africa* (2), *British Murac Syndicate, Ltd.* v. *Alperton Rubber Company, Ltd* (3) and *Baily* v. *British Equitable Assurance Company* (4) and to Vol. VIII of Halsbury's Laws of England, p. 381. It is argued by Mr. Anantakrishna Aiyar that S. 38 by necessary implication renders all contracts invalid where such contracts are based upon the resolution which has been set aside by the Government; in other words, that all contracts which are entered into by Local Boards will, by virtue of S. 38, be of no effect if the Government later on rescind the resolution by virtue of the powers vested in them under that section which gives no time within which the contract may be rescinded. This would really mean that all contracts are liable to the risk of being cancelled at any period irrespective of the rights of the parties. As at present advised, I am not prepared to concede so wide a proposition, but it is unnecessary for me to give any decision on the point at this stage of the proceedings especially as any decision passed by me on this point would not be subject to an appeal. If the case goes to the District Munsif for adjudication as to the validity of the compromise and should he pass any order one way or the other, it would be subject to an appeal. As it is, it is difficult to uphold the order of the District Munsif who adds a party without determining whether the compromise has put an end to the suit. There is no question about the effective addition of parties. I also refrain from saying whether should he hold that the compromise is invalid, this is a case in which the

(1) [1908] 31 Mad. 236=35 I.A. 176=12 C.W.N. 946=4 M.L.T. 101=8 C.L.J. 230=10 Bom. L.R. 781=18 M.L.J. 387 (P. C.).

(2) [1900] 1 Ch. 656=16 T.L.R. 213=7 Manson 417=48 W. R. 452=82 L. T. 210=69 L. J. Ch. 266.

(3) [1915] 2 Ch. 186=84 L.J. Ch. 665=31 T.L.R. 391=59 S.J. 494=113 L.T. 373.

(4) [1904] 1 Ch. 374=73 L.J.Ch. 240.

Secretary of State for India in Council should be made a party.

The result is that the order of the District Munsif is set aside and the case remanded for disposal in the light of the observations made above. Costs will abide and follow the result.

Case remanded.

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* A. I. R. 1926 Madras 343

DEVADOSS, J.

(Kakaraparti) Punnayya—Defendant No. 2—Appellant.

v.

Chilakalapudi Venkatappa Rao—Plaintiff—Respondent.

Second Appeal No. 1471 of 1922, Decided on 7th November 1924, against a decree of the Dist. J., Kistna, Masulipatam, in A. S. No. 101 of 1921.

*(a) *Transfer of Property Act, S. 3—Material of standing house sold—Sale is one of immovable property—Registration Act, S. 2 (6).*

A house which is built on a site with foundations laid in it is immovable property. A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, is immovable property for the purposes of the Transfer of Property Act. In the case of a sale or any other contract it has to be seen in what state the property sold or dealt with under a contract was at the time of sale or contract. What the parties intended should be done with the property after the sale or contract should not be taken into consideration in deciding whether the sale or contract is of moveable property or of immovable property : 3 *L. W.* 341, *Dist.* [P. 344, C. 1 ; 2]

(b) *Transfer of Property Act, S. 66—Purchaser of mortgaged property demolishing structure thereon and removing materials is liable to the mortgagee for the mortgage debt—Limitation Act, Art. 132—T. P. Act, S. 79.*

Even if the purchasers of the mortgaged property pulled down the house and utilized the materials for other building or otherwise dealt with them, they cannot escape their liability as vendees of the mortgaged property. The mere fact that mortgaged property exists in a different shape from that in which it was at the time of mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own uses either in the shape of money or in the shape of materials he would still be liable as a mortgagor, and the period of limitation in such cases is the usual period of limitation applicable to the case of a mortgage. [P. 345, C. 1]

V. Krishna Menon—for Appellant.

K. Krishnamachariar—for Respondent.

Judgment.—The plaintiff's suit is on a hypothecation bond executed by the 1st defendant on the 16th May 1908. The 2nd defendant is impleaded on the ground that he purchased the hypothecated house after the date of the hypothecation bond. Both the lower Courts have given a mortgage decree in favour of the plaintiff against both the defendants. The 2nd defendant pleaded in his written statement that the 1st defendant sold only the house to his father and not the site for a debt due by the 1st defendant to his father. It is unnecessary for the purposes of this case to consider whether the purchase of the house was by the 2nd defendant or by his father.

The contention of Mr. Krishna Menon for the appellant is that the suit is barred by limitation inasmuch as it is brought more than three years from the date of the sale to the 2nd defendant's father. His argument is that the 2nd defendant's father purchased only the materials of the house and that Art. 36 of the First Schedule of the Limitation Act is the proper article applicable to the case. Before considering the contention it is necessary to make it clear what was it that was actually sold by the 1st defendant to the 2nd defendant's father. Exhibit 1 is the document under which the sale was effected. It is dated 12th January 1910. It is headed "Sale deed of moveable property for a sum of Rs. 500" What was conveyed under the document was the site and "all the wood materials, brick, walls, foundation etc., belonging to the house of 14 full gadees built of brick-walls herein and the different kinds of materials belonging to the said house." In the body of the document the recital is: "Therefore, henceforward you, your heirs and representatives may enjoy the said property as you please and we, our heirs and representatives will never raise any dispute in respect of the same." Reading the document as a whole it is quite clear that which was conveyed under it was the house and not the materials of the house after it was pulled down. It is admitted that when the sale deed was executed, the house was standing on the site. The 2nd defendant's contention is that it was pulled down after the purchase and the materials were sold or utilized by him. When the house was sold,

granting that under the document this, superstructure alone was sold, the sale was a sale of immovable property; for the house was built on foundations laid in the earth and the house, therefore, is immovable property even though it was conveyed apart from the site on which it stood. The expression immovable 'property' is defined in the General Clauses Act thus: "Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." According to the Indian Registration Act XVI of 1908 immovable property includes land, buildings ..... and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass." In the Transfer of Property Act immovable property does not include standing timber, growing crops or grass. It is clear from the definition of the expression "immovable property" in the three Acts that a house which is built on a site with fondations laid in it is immoveable property. A house which is sold for the purpose of enjoyment as a house with an option to pull it down if the vendee likes, is immovable property for the purposes of the Transfer of Property Act.

Mr. Krishna Menon's argument is that the object of the sale was for the purpose of allowing the vendee to remove the materials of the house by pulling it down and, therefore, the sale is of moveable property. I am not satisfied that that was the intention of the parties to Ex. 1. Granting for argument's sake that the intention of parties was that the house should be pulled down and the materials should be removed by the vendee even then, what was sold was the house and not the materials and, therefore, the property that was sold was immovable property at the time of the sale. In the case of a sale or any other contract we must see in what state the property sold or dealt with under a contract was at the time of the sale or contract. What the parties intended should be done with the property after the sale or contract should not be taken into consideration in deciding whether the sale or contract is of moveable property or of immovable property. Mr. Krishna Menon relies upon the decision in *Surapudi Muniappa* v. *Nookala Seshayya* (1) as supporting his contention. The facts in that case were, 1st defendant mortgaged certain immovable property with casuarina plantation on it. After some time the casuarina trees became fit for cutting and they were cut and sold. Defendants Nos. 12 and 13 were impleaded on the ground that they purchased the casuarina plantation. It was held in that case by Coutts-Trotter and Srinivasa Ayyangar, JJ., that so far as Defendants Nos. 12 and 13 were concerned, the suit was barred after 3 years from the date on which the casuarina trees were cut. This case has no application to the present case. In that case it was found that the casuarina trees were grown for the purpose of being cut, and Srinivasa Aiyangar, J., held that the mortgagor had a right to fell the casuarina trees for they were planted and grown only for the purpose of being cut for fuel. The finding was that the land was mortgaged and not the trees. Though in the case of a mortgage of land trees also are included, yet it was held there was no separate mortgage of the trees. The provisions of the Transfer of Property Act do not apply to a sale of casuarina trees, for, according to the definition of the expression "immovable property" in the Act standing timber, growing crops or grass are not immovable property. It was also held in that case that Defendants Nos. 12 and 13 were in no sense alienees of the security of a portion of it and the learned Judges were of opinion that what the Defendants Nos. 12 and 13 did, only amounted to a tort and the proper period of limitation was the one applicable to the case of a tort. Srinivasa Ayyangar, J., was of opinion that Art. 36 was the more appropriate article applicable to the facts of the case. The principle of the decision is that, if trees which are not the subject of a mortgage are sold and the vendee cuts them down the mortgagee cannot proceed against him on the ground that he is the alienee of the mortgage property. The case is distinguishable from the present. In the first place the trees were not mortgaged and in the second place Defendants Nos. 12 and 13 were not the alienees. In this case the 2nd defendant's father was the

(1) [1916] 3 L. W. 341.

alienee of the property and the property which was sold was immovable property at the time of the sale.

If the 2nd defendant or his father pulled down the house and utilized the materials for other building or otherwise dealt with them, they cannot escape their liability as vendees of the mortgaged property. The mere fact that the mortgaged property exists in a different shape from that in which it was at the time of the mortgage would not extinguish the mortgagee's right against the property in its converted state, and if the person who has converted it has appropriated it to his own use either in the shape of money or in the shape of materials he would still be liable as a mortgagor. Supposing a person mortgages his house without mortgaging the site on which it stands, if he pulls it down and sells the materials, can he reasonably contend that the mortgagee should only sue the mortgagor as a tortfeasor? S. 66 of the Transfer of Property Act prohibits a mortgagor from committing waste or from injuring the mortgaged property. But the period of limitation available to the mortgagee to proceed against the mortgaged property is not reduced to 3 years by reason of the mortgagor pulling down the house, and selling the materials. The mortgagor would be liable for the mortgage debt if he destroys the mortgaged property, and the period of limitation is not in any way curtailed by the mere fact that the mortgagor wilfully destroys the mortgaged property. If the vendee from a mortgagor destroys or pulls down the mortgaged property, the liability will still attach to him, and the period of limitation in such cases is the usual period of limitation applicable to the case of a mortgage.

I have held in a recent case, *Krishnaswami Bhagavathar* v. *Thirumalai Iyer* (2), that a person who attached and realized in execution of a money-decree the surplus sale proceeds in Court was liable to pay back the amount in order to satisfy the claim of the subsequent mortgagee who was not a party to the mortgage decree in execution of which the sale proceeds were realized. As observed by Sir John Edge in delivering the judgment of their Lordships of the Privy Council in *Barhamdeo Prasad* v. *Tarachand* (3). "The surplus moneys of that sale represented the security which the plaintiffs had under their mortgage of the 19th September 1887 and did not cease to represent that security owing to the fact that Ram Barhamdeo Prasad and Rama Sumran Prasad had wrongfully and in fraud of the plaintiffs drawn them out of the Court in which they had been deposited." In this case the mere fact that the 2nd defendant or his father pulled down the house, sold the materials or used the materials for building another house would not take away the right of the plaintiff to proceed against the 2nd defendant as being in possession of the mortgaged property. The proper article of the Limitation Act applicable to such a case is Art. 142.

The direction in the decree that the sale-proceeds of the hypothecation in the hands of the 1st defendant should be applied in discharge of the mortgage-debt and the balance, if any, should be recovered by the plaintiff from the 2nd defendant's property, is a proper direction.

In the result the second appeal fails and is dismissed with costs.

Appeal dismissed.

(2) A. I. R. 1926 Mad. 101.

(3) [1914] 41 Cal. 654=41 I. A. 45=26 M. L. J. 243=(1914) M. W. N. 38=16 Bom. L. R. 89=19 C. L. J. 132=18 C. W. N. 345=12 A. L. J. 82=15 M. L. T. 62 (P. C.).

A. I. R. 1926 Madras 345

MADHAVAN NAIR, J.

Mahalakshmi Ammal—Petitioner.

v.

Venkata Naicker and *another*—Respondents.

Civil Revision Petition No. 216 of 1925, Decided on 18th August 1925, against the order of the Principal Sub-J., Coimbatore, in Insolvency App. No. 234 of 1925.

Civil P. C., O. 26, R. 4—Witness residing beyond jurisdiction—Party is entitled to issue of commission.

Where a witness who is material to the case resides outside the trying Court's jurisdiction, the party citing him is entitled to have a commission issued for his examination. [P. 346, C. 1]

M. Krishna Bharathi—for Petitioner.

K. S. Desikan—for Respondents.

Judgment.—The plaintiff-petitioner asked the lower Court to issue a commission for examining one Srinivasa Aiyar on the ground that the witness was residing in Madras.

The application was supported by an affidavit stating this fact. A counter affidavit was filed, wherein it was stated that the witness was understood to be in the Coimbatore District, where the suit had been instituted. The learned Subordinate Judge says: "It is not clear that the witness is a resident of Madras"; on that ground, as well as on the ground that the application was vexatious, he dismissed it. The Subordinate Judge has not distinctly found whether the witness resides in Madras or not; and there is nothing to show that the application is vexatious. I set aside the order of the Subordinate Judge and remand the application to the lower Court. It is not denied that the witness is a material one. The Subordinate Judge is at liberty to take fresh evidence if he is requested to do so as regards the residence of the witness. If he is satisfied that he resides in Madras, then the plaintiff is entitled to the issue of a commission. I do not make any order as to costs.

Order set aside.

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* A. I. R. 1926 Madras 346

JACKSON, J.

Kandasami Chetty—in re.

Criminal Revision No. 431 of 1925 and Cr. Rev. Petition No. 357 of 1925, Decided on 22nd July 1925, from the order of the Sub-Divl. Mag., Pollachi, D/- 28th April 1925.

* (a) *Criminal P. C., S. 488—Healthy and able-bodied husband is a person with "means" within S. 488.*

The word "means" in S. 488 does not signify only visible means, such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife. [P. 346 C. 2]

(b) *Criminal P. C., S. 488—Persons aggrieved by order under, should go to civil Courts.*

Persons aggrieved by the magisterial orders under S. 488 are expected to take their case to the civil Courts. S. 488 provides a speedy remedy and safeguards a deserted wife or child from starvation; but when other issues are raised they should be settled in the civil Courts, and not by protracted litigation in the criminal Courts. [P. 346, C. 2]

S. T. Srinivasagopalachari—for Petitioner.

Order.—Petitioner seeks to revise the order of the Subdivisional Magistrate, Pollachi, under S. 488 of the Code of Criminal Procedure, by which he is directed to pay Rupees ten (Rs. 10) per mensem as maintenance to his first wife. The order contains no clear issues or findings and the Magistrate should understand that vituperation adds nothing to the force of a judicial pronouncement.

Apparently, upon the evidence of counter-petitioner and her three witnesses the Magistrate finds that she was driven out of her home, not allowed to come back, and refused maintenance. He rejects the defence evidence to the contrary because he thinks the plea of enmity "rather *mamool*," meaning presumably that it is a false plea often advanced. He finds that though slightly lame the counter-petitioner is able to work, and accordingly he orders him to provide for his wife at the rate of Rupees ten (Rs. 10) per mensem, not an extravagant rate for people in decent circumstances. He also hopes that the family will assist the husband to find the money.

Of course, maintenance can only be levied from the husband and in expressing this hope the Magistrate passes no order against the husband's family. The point most strenuously pressed by petitioner is that since the husband is only 19 years old and unemployed, he has no means to support his wife. I do not take "means" in S. 488 of the Code of Criminal P. C to signify only visible means such as real property or definite employment. If a man is healthy and able-bodied he must be taken to have the means to support his wife. I therefore find no absolute ground for interference; but I agree with the petitioner that this order is not altogether satisfactory. It should have been more clearly set forth whether the wife has merely left the house upon the arrival of the second wife or has been actually driven out. If petitioner's remedy were concluded, there might be reason for reopening the matter. But it is obvious from the statute itself that persons aggrieved by these magisterial orders are expected to take their case to the civil Courts. S. 488 of the Code of Criminal Procedure provides a speedy remedy and safeguards a deserted wife or child from starvation; but when other issues are raised they should be settled in the civil Courts, and nothing is to be gained by

protracted litigation in the criminal Courts. Doubtless it is with that intention that no appeal has been allowed from orders under S. 488.

Therefore, I decline to interfere, and petition is refused.

Petition dismissed.

A. I. R. 1926 Madras 347

JACKSON, J.

Chidambaram Chettiar—1st Defendant—Petitioner.

v.

Parvathi Achi—Plaintiff—Respondent.

Civil Revision Petition No. 108 of 1925. Decided on 21st August 1925, from the order of the Sub-Judge, Mayavaram, D/- 5th February 1925.

Civil P. C., O. 13, Rr. 1 and 2—"First hearing" means day of framing issues—Trial Court's discretion in allowing documents after that date is final and not revisable.

The first hearing in O. 13, R. 1 means the day on which the issues are framed 12 *C. W. N.* 312 and *A. I. R.* 1924 *Patna* 517, *Ref.*

Documents can only be produced after that date on good cause being shown under O. 13, R. 2. Under that rule the Court of trial is judge of the fact whether the cause shown is good and there is no ground for revision after the finding that the cause is bad. [P. 348, C. 2, P 349 C 1]

K. S. Jayarama Aiyar—for Petitioner.

C. A. Seshagiri Sastri—for Respondent.

Judgment.—Petitioner is defendant in O. S. No. 29 of 1923 on the file of the Sub-Court, Mayavaram. Plaintiff is suing in forma pauperis for maintenance due to her as a Hindu widow after the lapse of 20 years, for her husband died in 1902. The petitioner contended in his written statement that she had gone to the home of her own people at the time of her husband's death, and they came to an oral arrangement that she should keep her jewels in lieu of maintenance. Issues were framed on 30th October 1923 and the suit was posted for hearing to 11th December 1923, and adjourned to 29th January 1924. In the interval, on 9th January 1924, the petitioner applied to file certain documents which he swore he had been unable to find earlier. The Subordinate Judge observing that the reason could not be accepted rejected the application. This Court ordered a rehearing, as the Subordinate Judge had not apparently directed his mind to the truth of the statement. Accordingly the application has been re-heard, and again rejected, and petitioner once again comes up in revision.

The learned Subordinate Judge has stated as the points for determination:

Whether the reason given by the petitioner for his failure to produce the documents on the date of first hearing is true: and

Whether it is sufficient within the meaning of O. 13, R. 2, Civil Procedure Code.

He finds that the reason is untrue, and that concludes the matter. No one supposes that a deliberate falsehood is a good cause under O. 13, R. 2, and the question whether supposing the story had been true, it would be acceptable as good cause becomes merely academic.

But of course the question of fact is only concluded as regards this revisional case; it may come up again on appeal, and the counter-petitioner must bear in mind that by refusing to allow these documents, to go in at this stage, she may be jeopardizing her whole suit, and may find herself, after she has obtained a decree, referred back for a fresh trial. The admission of these documents is not disputed because they are possible forgeries, or because they establish a new case for the defendant, but because they are entirely irrelevant to the defence. If so it would seem simpler and would certainly have been quicker to have allowed them to go in for what they are worth. But if, after all, they are relevant to the defence it will certainly be argued that they were wrongly rejected, and what reasons for the objection have been adduced? The learned Subordinate Judge propounds the question whether the statement that a party was searching for documents and was unable to find them earlier is credible and finds it to be incredible. Apart from the possibiliy of forgery which is not now in question, only two things are likely to have happened; either the party found the documents before the issues were framed, and owing to some negligence failed to produce them or he found them after the issues were framed. Neither version seems incredible and ordinarily one story would serve as well as the other for, as this Court has already pointed out, in remanding the previous petition no one was prejudiced by the delay, and it is the

sort of negligence which in the circumstances is usually condoned. Therefore there seems to be small room for assuming either incredibility or mendacity, and the reason which the learned Subordinate Judge gives for making this assumption is curious. He says that parties who have failed to produce documents at the first day of hearing have often pleaded before him that they were searching for them and could not find them. That might ordinarily be supposed to point to credibility and truth. It is usually then a Judge hears a thing for the first time in his experience, that he is inclined to be incredulous. No doubt the learned Subordinate Judge regards this case as belonging to the category of those where a person charged with some fault, resorts to a familiar and discredited excuse as for instance the alibi in a criminal trial, But here there is no charge and no substantial proof of another version of the facts. It is not as though it were proved that the petitioner for his own purposes deliberately kept back these papers till January. So he has nothing to excuse ; only something to explain : and if the explanation is familiar it would only seem to point to the fact that several Indians bundle up and stow away their papers in an unmethodical manner and find difficulty in laying their hands on the right paper by the right time. However, I am not prepared to find that the Subordinate Judge has committed any material irregularity in approaching the facts of this case in his own way, and I merely comment on his finding in order to put the counter-petitioner upon her guard. Neither she nor anyone else wants time to be wasted by a re-trial, but of course it rests entirely with her and her advisers. It would be open to her, if so advised to arrange to put the documents in herself subject to proof.

The judgment concludes with an inquiry based on various authorities, whether O. 13, R. 2, can apply to documents which are neither public nor registered and the learned Subordinate Judge finds that it cannot so apply. No doubt in several cases having regard to particular facts, it has been found advisable not to admit unregistered private documents at a late stage, but this circumstance cannot be taken as creating an absolute restriction upon the Judge's discretion under O. 13, R. 2. If the statute allows a discretion, not one jot or tittle can be taken away or added to the plain and express provisions of the Legislatures by any decision of the Court: *An Attorney, In re* (1). There may be cases where good cause is shown for admitting an unregistered, and there may be cases where no good cause is shown for admitting a registered, document. The Court acting under O. 13, R. 2 has full discretion in every case.

Finally Mr. Jayarama Aiyar has pleaded that in law the documents were produced by the due date, and the provisions of O. 13, R. 2, are not attracted. O. 13, R. 1 enjoins production at the first hearing of the suit, and it is argued, the defendant then waits for the Court acting under R. 64, Civil Rules of Practice either to call for the production of the documents or to direct him to file a list of documents to be produced at a later date. By January 1924 no such list had been ordered and, therefore, the petitioner did not file his documents too late. This plea might be arguable if it were the petitioner's case that he did produce his documents at the first hearing and, misled by R. 64, did not file them, as he was awaiting the Court's action. But it was never suggested that he produced the documents before January 1924, which was after issues had been framed, and after the case had been posted for trial in December 1923, and adjourned. Petitioner is then driven to his last position that the first hearing of the suit means the first time that witnesses are examined. A Bench of the Calcutta High Court has held the first hearing to mean the day on which the isues are framed. *Talewar Singh* v. *Bhagwan Dass* (2), and a Patna High Court Bench has held the same, *Taibunnissa Begum* v. *Jagdip Pandey* (3) and I should infer that Rr. 63 and 74, Civil Rules of Practice, were framed on the same assumption. A single Judge in Calcutta has held [*Taran Mandal* v. *Ram Chandra Mandal* (4)] that the first hearing means when the case is really gone into and the case then in question (on previous occasions) had not been gone into at all. 'Gone into' is rather a vague phrase which may refer to the framing of issues

(1) [1914] 41 Cal. 446.
(2) [1908] 8 C. L. J. 147=12 C. W. N. 312.
(3) A. I. R, 1924 Patna 517.
(4) [1919] 50 I. C. 296.

or to the examination of witnesses, and this case does not shake the authority of those already quoted.

I find that 'first hearing' in O. 13, R. 1, means framing of issues and documents can only be produced after that date on good cause being shown under O. 13, R. 2, for Rr. 63 and 64 have not in my experience led to any confusion. Ordinarily a Court should frame issues, and on that day if any party wants the immediate discovery of a document it should be filed. Otherwise the Court shall order a list to be filed and give a date for the production. The reason for having all the documents produced on the day when the issues are framed is mainly to prevent misguided parties fabricating documents to suit the issues. The other side has its preventive by being able to call for the document at once. The reason for not finding all the documents on the day when the issues are framed is that it is only after the framing that the parties can accurately decide which documents are essential, and unessential documents if filed in a case are a nuisance to every one concerned. In the present case there was no question of calling for documents or of listing them, for the defendant at the time when the issues were framed did not profess to have any. His subsequent application proceeded, and could only proceed under O. 13, R. 2. Under that rule the Court of trial is judge of the fact whether the cause shown is good and there is no ground for revision after the finding that the cause is bad. The aggrieved party must abide his remedy by appeal. Accordingly I dismiss this petition with costs.

Petition dismissed.

A. I. R. 1926 Madras 349

DEVADOSS, J.

Abdul Ali Sahib and *another*—Accused Nos. 1 and 2—Petitioners.

v.

Amiruddin — Complainant — Respondent.

Criminal Revision Case No. 592 of 1924, and Criminal Revision Petition No. 494 of 1924, Decided on 16th April 1925, from the judgment of the Sub-Divl. Mag., Cuddalore, in C. S. No. 6 of 1924.

Penal Code, Ss. 447 and 352—Purchase of land from ostensible owner—Person in possession under a bona fide claim of right does not commit an offence under either section if he objects to an assault.

When a person who has an ostensible title sells land to another and that man goes and ploughs it, it cannot be said that he commits criminal trespass, and it is a bona fide claim of civil right on the part of the accused and their act in ploughing the field is not an offence under S. 447; nor is it an assault if the person objects to an assault in maintaining possession of the land. [P 349, C 2, P 350, C 1]

Ethiraj and *T. E. Ramabhadrachari*—for Petitioners.

K. Ramaswami Goundan—for Respondent.

Order.—This is an application to revise the order of the Sub-Divisional Magistrate of Cuddalore. The petitioners have been convicted of trespass and assault under Ss. 447 and 352, Indian Penal Code, and sentenced to pay fine. The contention of Mr. Ethiraj for the petitioners is that the petitioners acted in the bona fide exercise of their civil right in ploughing the field in question and that their act does not amount to an offence. There is a good deal of evidence on both sides, but there is the outstanding fact that the property belonged to Kathifabi under the sale-deed executed by Hatiz on 29th September 1886, which is marked Ex. I. The petitioners claim under Kathifabi; she executed a sale-deed on 11th December 1922, Ex. 7, to one Mali Hasan Saheb. The complainant's case is that he got an oral sale from his mother-in-law Kathifabi of the whole property and has been enjoying the property for forty years. It may be that his case is true; but when a person who has an ostensible title sells a land to another, and that man goes and ploughs it, it cannot be said that he commits criminal trespass. There is a bona fide claim of civil right on the part of the petitioners, and their act in ploughing the field in question is not an offence under S. 447.

If the land was the land of Kathifabi then the act of the accused would not amount to an offence. In the state of evidence it cannot be said for certain that the complainant is the owner of the land and, therefore, the conviction of criminal trespass is bad.

As regards assault, that also depends upon the question whether the com-

plainant was entitled to the land or the petitioners. If the petitioners were entitled to the land they have a right to plough it, and if a person objects to it, an assault of the kind now in question would be justified in maintaining possession of the land.

I set aside the conviction and sentence and direct the fines, if paid, to be refunded.

Conviction set aside.

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* A. I. R. 1926 Madras 350

DEVADOSS AND WALLER, JJ.

Muthuvenkatarama Reddiar and *others* —Appellants.

v.

Official Receiver of South Arcot and *others*—Respondents.

Appeal No. 1 of 1925, Decided on 24th September 1925, from the order of the Dist. J., South Arcot, at Cuddalore, D/- 17th November 1924.

* *Provincial Insolvency Act* (5 *of* 1920), *S.* 28—*Large landed proprietor is not agriculturist and his house is not exempt from attachment under S.* 60 (*c*), *Civil P. C.—Such house does vest in Receiver—Civil P. C., S.* 60 (*c*).

The term 'agriculturist' is not used in Cl. (c) in its etymological sense, but it is used to denote a person making his living by tilling the soil. It means and includes a small holder of land who tills the soil and cultivates it; but a large landed proprietor, e. g., one owning 300 acres of land, even though his sole income is from land, is not an agriculturist within the meaning of Cl. (c). The word 'agriculturist' in the clause must be interpreted in a strict sense; 12 *Bom.* 363 *Appl.*

The expression "and occupied by him" gives the clue to the meaning of Cl. (c), i. e., that the houses for which exemption is claimed are occupied by the agriculturists as such. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by Cl (c); nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land: 7 *Bom.* 530, *Rel. on.* [P 350 C 2, P 351 C 1.2]

S. T. Srinivasagopalachari—for Appellants.

C. Padmanatha Aiyangar and *T. D. Srinivasachari*—for Respondents.

Devadoss, J.—The appellants were adjudicated insolvents on their own petition in 1922. They applied to the District Court on 24th July 1924, for a declaration that the two items of property, a terraced house and a cattle-shed, did not vest in the Official Receiver. The District Judge dismissed their petition, and they have preferred this appeal.

The contention of the appellants is that they are agriculturists and the two items which are buildings which they occupied are exempt from the operation of the Insolvency Law by reason of S. 28, Cl. 5, of the Provincial Insolvency Act. The appellants are large landed proprietors owning about 300 acres of land worth nearly a lakh and their debts amounted to Rs. 1,35,000 and odd. The two items are valued by the appellants themselves at Rs. 6,000 and Rs. 1,000 respectively. Under S. 28, Cl. 5, all properties which are exempt by reason of S. 60 of the Code of Civil Procedure, or by any other law, from liability to attachment and sale in execution of a decree do not vest in the Official Receiver and are therefore not liable to be sold to satisfy the claims of the creditors. The question for determination is whether the two buildings come within S. 60, Cl. (c) of the Code of Civil Procedure. Cl. (c) is in these terms:

"Houses and other buildings (with the materials and the sites thereof and the land immediately appurtenant thereto) and necessary for their enjoyment belonging to an agriculturist and occupied by him."

In order to claim exemption under S. 60, Cl. (c), two points should be found in favour of the appellants: (1) the appellants are agriculturists within the meaning of Cl. (c); and (2) the house and cattleshed are such as are mentioned in Cl. (c).

The term 'agriculturist' means etymologically one versed in agriculture and is not used in Cl. (c) in its etymological sense, but it is used to denote a person making his living by tilling the soil; in other words, one whose sole means of livelihood is gained by cultivating land; and does not necessarily mean only a person who works with his hands. But it means and includes a small holder of land who tills the soil and cultivates it. Cl. (c) has to be read in the light of Cls. 1 and 2. What is exempt from attachment is what is absolutely necessary to enable a person to live, such as wearing apparel, cooking vessels, bedding, etc., tools of artisans, implements of husbandry, etc.

A large landed proprietor, even though his sole income is from land, is not an agriculturist within the meaning of Cl. (c). Mr. Srinivasagopalachariar's contention is that a man whose sole income is from land, whatever its extent may be, whether he cultivates the land himself or leases it is an agriculturist. If this is the correct meaning of the word "agriculturist," a man owning, say 1,000 acres of wet land is an agriculturist provided he has no other source of income. It could not have been the intention of the Legislature to give protection to such people. The protection is given to small owners of lands as well as actual tillers of the soil. The word "agriculturist" must be interpreted in a strict sense. In *Jivan Bhaga* v. *Hira Bhaiji* (1), West, J., observes :

"It was for agriculturists in the strictest sense and for an agriculturist in that sole character that the protection of S. 266 (c) of the Civil P. C. was intended."

We hold that the appellants are not agriculturists within the meaning of Cl. (c) of S. 60.

Even if the contention of the appellants that they are agriculturists is upheld, they would not succeed in the appeal unless they make out that the house and cattleshed are houses and buildings within the meaning of Cl. (c). In order to make out that the house and cattleshed come within the meaning of Cl. (c), they must be shown to have been occupied for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate land. The expression "and occupied by him" gives the clue to the meaning of Cl. (c), i. e., that they are occupied by the agriculturists as such, such as houses or buildings as are necessary for pursuing the occupation of agriculturists—a shed in a field or a house in the midst of fields which is occupied so that the agricultural occupation may be carried on effectively and without loss of time, or, in other words, without such buildings and houses the agricultural operations would suffer. A mansion in a large village in which the owner lives, even though he has no other source of income except that from land, is not such a house as is contemplated by Cl. (c), nor is the house of an ordinary agriculturist situated at a considerable distance from the land which he cultivates and which is not necessary for effective or convenient cultivation of the land. A man may have a house in a town and a small holding at a considerable distance from the income of which he maintains himself. As the house in the town is not occupied by him for purposes of agriculture, it is not exempt from attachment and sale under Cl. 6.

We are glad to find that the view that we hold is in accordance with the view expressed by West and Nanabhai Haridas, JJ., in *Radhakisan Hakumji* v. *Balvant Ramji* (2). The learned Judges observe at page 531 :

"The exemption is of a house or building occupied by an agriculturist, and this, we think, means a house dwelt in by an agriculturist as such and the farm buildings appended to such dwelling. It does not include other houses, which in one sense may be occupied ; what is meant is a physical occupation by an owner of his house as a dwelling appropriate or convenient for his calling."

The house and cattleshed are in the midst of a village containing, it is said, about 300 houses and cannot be said that they were occupied by the appellants for purposes of agriculture, and they do not come within the meaning of "houses and other buildings belonging to an agriculturist and occupied by him" within the meaning of S. 60, Cl. (c), of the Code of Civil Procedure.

The decision in *Devare Hegde* v. *Vaikunt Subaya* (3), does not help the appellants. The learned Judges cite with approval the passage in *Radhakisan Hakumji* v. *Balvant Ramji* (2) extracted above, and hold that if the building came within the exemption given by S. 60, Cl. (c) at the time of the attachment, the benefit thereof would not be lost by the death of the judgment-debtor.

That the present contention is an afterthought is clear from the fact that the appellants mention the two items in their schedule as assets available for distribution among the creditors and delivered possession thereof to the Official Receiver two years before they made the application to the lower Court.

In the result the appeal fails and is dismissed with costs.

Waller, J.—I do not consider that appellants can any longer be described as agriculturists. Their land has vested in

(1) [1887] 12 Bom. 363.

(2) [1888] 7 Bom. 530.

(3) [1917] 41 Bom. 475=19 Bom. L. R. 281.

the Official Receiver and there is nothing to show that they cultivate any other land as labourers or tenants. A house, to be exempt from attachment under S. 60 of the Code of Civil Procedure, must belong to or be occupied by an agriculturist as such, i. e., for the purpose of agriculture. Apart from that, appellants placed the Official Receiver in possession of goods before the adjudication and I do not think that they should now be allowed to plead exemption. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 352

VISVANATHA SASTRI, J.

Seetharama Naidu--Plaintiff — Appellant.

v.

Govindasami Chettiar and *another*--Defendants--Respondents.

Second Appeal No. 566 of 1923, Decided on 25th September 1925, from the decree of the Sub-J., Tanjore, in A. S. No. 43 of 1922.

Madras Estates Land Act (1908), *S.* 189—*Real owner can sue in civil Court to have a rent sale set aside.*

The real owner of a ryotwari holding can sue in a civil Court for a declaration that certain lands belong to him and that the registered holder is only a benamidar: *A. I. R.* 1923 *Mad.* 6, (*F. B*) *Rel. on.*

S. Muthiah Mudaliar—for Appellant.

A. Kuppuswami Aiyar— for Respondents.

Judgment.--The question in this second appeal is whether the real owner of a ryotwari holding can sue in a civil Court for a declaration that certain lands belong to him, and that a sale under the provisions of the Estates Land Act was "fraudulent, illegal, invalid and not binding on him." Plaintiff, who is the appellant in second appeal, alleging that he was the real owner of the lands, and that the registered holder Rangasami Naidu was only a benamidar, sued to have a rent sale, held at the instance of the first defendant, at which the second defendant became the purchaser, set aside on various grounds. The District Munsif found as a fact: (1) that the notice Ex. X did not specify the holding in respect of which the arrear was due; and (2) that a large number of fields and a larger extent than necessary were sold in contravention of the provisions of S. 126 of the Estates Land Act. On these findings he held that the sale was invalid and gave the declaration asked for. The second defendant appealed and the appellate Court allowed the appeal on two grounds: (1) plaintiff, not being the ryot who was liable to pay rent on the holding, could not maintain the suit; and (2) no suit, as contemplated by S. 112 of the Estates Land Act having been filed, the validity of the sale cannot be disputed.

Both the Courts have found that plaintiff had failed to get his name registered as a pattadar; and this finding has to be accepted. But the question is whether the circumstance prevents him from impeaching the sale in a civil Court. That such a suit will lie in a civil Court at the instance of a ryot (pattadar) has been held by a Full Bench of this Court in *Rajah of Ramnad* v. *Venkataramiyer* (1). No case has been referred to in which it has been held that such a suit will not lie at the instance of a person who claims to be the real owner of a ryotwari holding. I am of opinion that such a suit is equally open to him.

The contention that S. 189 of the Estates Land Act barred the suit is sought to be supported by the ruling in *Irulappan Servai* v. *Kaluvandan Servai* (2). In that case it is stated that: "to allow a person who has not takenaction under S. 146, to ignore a rent sale at the time it was held, and subsequently to dispute its validity in a civil suit would run counter to both these principles. S. 189 does not seem to me to allow of such a construction." If a ryot who has not instituted proceedings under S. 112 can come in with a suit in a civil Court, as has been held in the Full Bench case above referred to, it is difficult to see why a person in the position of plaintiff cannot be allowed to do so. The case in *Irulappan Servai* v. *Kaluvandan Servai* (2) does not appear to have been brought to the notice of the learned Judges who decided the Full Bench case; but nevertheless it appears to me that the ground on which the

(1) A. I. R. 1923 Mad. 6 (F. B.).
(2) [1921] 15 M. L. W. 99=42 M. L. J. 113=(1922) M. W. N. 67=31 M. L. T. 71.

decision proceeded is no longer tenable, having regard to the Full Bench ruling.

I would, therefore, allow the second appeal and remand the case to the lower appellate Court for decision upon the other issues raised in the case. Appellant will get a refund of the Court-fee paid on the memorandum of appeal. Appellant will have the costs of the second appeal, and the other costs will abide and follow the result.

Appeal allowed.

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* A. I. R. 1926 Madras 353

PHILLIPS. J.

(*Banjoisi*) *Narasamma*—2nd Defendant—Appellant.

v.

Banjoisi Sarasamman and *another*—Plaintiff and 1st Defendant—Respondents.

Second Appeals Nos. 543 and 1067 of 1922, Decided on 24th March 1925, from the decree of the Dist. J., Bellary, in A. S. No. 94 of 1921.

* (a) *Civil P. C., O. 21, R. 97—Rule applies to decrees for possession under Specific Relief Act, S. 9.*

There is nothing in R. 97 which prevents its being applicable to a decree for possession under S. 9 of the Specific Relief Act : 25 *Bom.* 478 and *A. I. R.* 1924 *All.* 804, *Cons.* [P. 353, C. 2]

(b) *Partition—Suit for—Shares of all parties may be defined but a decree in favour of all cosharers need not be given.*

Although ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly, it is nowhere laid down that in all circumstances must a decree be given in favour of all the cosharers : 31 *Bom.* 271, *Ref.* [P. 354, C. 1]

S. Doraiswami Aiyar and *A. Raghunatha Rao*—for Appellant,

V. S. Narasimhachar and *B. Somayya*—for Respondents.

Judgment. — *S. A. No.* 1067 *of* 1922 The plaintiff and Defendants 1 and 2 are sisters, and plaintiff brings this suit to recover her one-third share in the suit house which has been found to belong originally to plaintiff's father. In 1918 the first defendant, who appears to have been in possession of the suit house, brought a suit under S. 9 of the Specific Relief Act against her sister, the 2nd defendant. In executing the decree she obtained obstruction was caused and she came into Court with an application under O. 21, R. 97, Civil Procedure Code, in which the plaintiff and her alleged tenant were counter-petitioners. An enquiry was held and finally an order was passed in E. A. No. 599 of 1918 which runs as follows :

" The obstructor did not intervene in that suit. Now she has been evidently set up by her defeated sister. Remove obstruction and deliver."

The obstructor can only refer to the plaintiff, the second counter-petitioner and by the use of the word " obstructor " the District Munsif must be deemed to have found that she was the person who caused obstruction ; otherwise the word would be meaningless. It would appear, therefore, from his order that he held that the plaintiff caused obstruction and he passed an order which would appear to be under O. 21, R. 98. As the plaintiff has failed to bring her suit within one year from the date of that order the lower appellate Court has dismissed it as barred by limitation.

In appeal it is urged that the order directing removal of obstruction was not passed under O. 21, R. 98, because the plaintiff did not actually obstruct but obstructed through her tenant who was the first counter-petitioner in the application. There is no evidence to support the contention. I think, in the face of the order defining the plaintiff as the obstructor, it is unnecessary to consider that question here.

It was then contended that the order could not have been passed under O. 21, R. 98, because the decree passed under S. 9 of the Specific Relief Act is not a decree for possession within the meaning of R. 97. Reliance is placed upon an old case, *Gobind Chunder Bagdee* v. *Gobind Ghose Mundul* (1), but that case was not one under the Specific Relief Act nor under the present Civil Procedure Code. I can see nothing in R. 97 which prevents its being applicable to a decree for possession under the Specific Relief Act. That decree for possession undoubtedly declared the plaintiff's possessory right. It did not purport to decide that title but it confirmed the lesser right in the plaintiff and it was a conclusive determination of that right. I see no reason why O. 21 should not be applied in this case ; consequently it must be held that the

(1) 7 W. R. 141.

order of the District Munsif was passed under R. 98 and, therefore, the plaintiff's present suit is barred by limitation.

There are observations in *Mancharam* v. *Fakirchand* (2) and in *Santi Lal* v. *Raj Narain* (3) which go to show that the person obstructing under O. 21, R. 97 must be physically present on the spot. In neither of the cases was this observation necessary for the determination of the suit, and in one case there was a conflict of opinion. Reading O. 21, Rr. 97 and 98 etc., we find no reference to the present obstructor, but only reference to the person obstructing or resisting execution. With all respect, therefore, if these two cases intended to lay down that O. 21, R. 97 is inapplicable to a case in which the obstructor was not actually present, I think it goes too far but, in view of the finding in this case that the plaintiff did obstruct, it is not really necessary to determine the question.

The plaintiff's appeal (S. A. No. 1067 of 1922), therefore, fails and is dismissed with costs of the first defendant.

S. A. No. 543 *of* 1922—The first defendant also filed an appeal against the portion of the decree which declares that the 2nd defendant is entitled to one-third share in the suit property. Ordinarily in partition suits it is the practice to declare the shares of all the parties to the suit and to give a decree accordingly. This is to avoid multiplicity of litigation and that is the reason why all the sharers have to be made parties in such suits but I do not think that it is laid down anywhere that in all circumstances must a decree be given in favour of all the cosharers. *Ashidbai* v. *Abdulla* (4) is a clear authority to the contrary; but reliance is placed on a decision of this Court in S. A. No. 1493 of 1920. The point was not really considered in that case but the suit was remanded for fresh disposal on the ground that the parties to the suit were entitled to obtain their shares although they were not members of a Joint Hindu family. The question whether the circumstances must justify a refusal of such reliefs to the defendant was not considered at all. In the present case the plaintiff's claim to one-third share has been dismissed, and apparently there are now only two other sharers entitled to the property; and it is not clear what their respective shares are. The 2nd defendant in filing a written statement only claimed one-third share on the assumption that one-third of the property would be allotted to the plaintiff. That not having been done, the right of the other two sharers may be altered. I think, therefore, that there should be no decision of this question in this suit because the question has not been put in issue and there has been no determination of the share of the two remaining sisters. I would, therefore, allow the appeal and set aside that portion of the decree leaving the 2nd defendant to establish her right in a fresh suit if so desired.

In the circumstances I make no order as to costs in this appeal (S. A. No. 543 of 1922.)

Appeals allowed.

(2) [1901] 25 Bom. 478=3 Bom. L. R. 58.
(3) A. I. R. 1924 All. 804.
(4) [1907] 31 Bom. 271=8 Bom. L. R. 652.

A. I. R. 1926 Madras 354

DEVADOSS, J.

Dyta Seetharamayya—IN RE.

Criminal Revision Case No. 908 of 1924 and Criminal Rev. Petition No. 759 of 1924, Decided on 20th March 1925, against an order of the S. J., Guntur, D/- 4th September 1924, in Criminal Revision Petition No. 14 of 1924.

Criminal P. C., S. 15—Chairman of Bench differing from majority—One of the other Magistrates should write judgment.

In cases wherever the Chairman of the Bench Magistrates is opposed to the majority, and where he is not prepared to write a judgment for the majority, one of the Magistrates ought to be asked to write the judgment which should form part of the record. [P. 355, C. 1]

K. Ramaswami Gounder for *N. Balasundaram*—for Petitioner.

Public Prosecutor—for the Crown.

Order.—This is an application to revise the order of the First Class Bench Magistrate of Bapatla. Two of the Magistrates found the accused guilty under S. 352, Indian Penal Code, but the Chairman of the Bench wrote a dissenting judgment holding that the accused was not guilty. No reasons were given for finding the accused guilty and, therefore, there is no judgment as required by law,

I think, the conviction ought to be set aside and seeing it is a petty case, it is not worth while sending the case back for a re-trial. The fine, if paid, will be refunded. I must here indicate my view, that, in cases wherever the Chairman of the Bench Magistrates is opposed to the majority and where he is not prepared to write a judgment for the majority, one of the Magistrates ought to be asked to write the judgment. Otherwise the Chairman, if he happens to differ from the majority would write only his view of the case, whether it be for conviction or acquittal; and the rest of the Magistrates would not be in a position to place on paper their reasons for their opinion. In such cases the rule ought to be that, where the Chairman is opposed to the majority of the Bench, one of the majority ought to be asked to write the judgment and that should form part of the record so that the Court in revision may know the reasons for the opinion of the majority.

Conviction set aside.

A. I. R. 1926 Madras 355

WALLACE and MADHAVAN NAIR, JJ.

Lingam Veera Raghava Rao—Defendant—Appellant.

v.

Mallapragada Gurunatha Rao—Decree-holder—Respondent.

Appeal No. 233 of 1923, Decided on 7th January 1925, against an order of the Dist.-J., Ganjam, at Berhampore, in E. A. No. 166 of 1922.

(a) *Civil P. C., O. 21, R. 58—Enquiry under—Rule applies only when property is claimed as not belonging to judgment-debtor.*

The enquiry under R. 58 is designed to cover cases where a third party comes forward with a claim to the property on the ground that it is not attachable as the property of the judgment-debtor or liable for the decree. [P. 356, C. 2]

(b) *Civil P. C., S. 47—Appeal on plea of want of notice in execution—Prejudice must be shown.*

In considering whether an appeal from an order under S. 47 should be allowed merely on the ground of want of notice in the execution petition, the Court must consider whether that want of notice has in any way prejudiced the appellant. [P. 356, C. 2]

C. Sambasiva Rao—for Appellant.

T. Suryanarayana—for Respondent.

Judgment.—This is an appeal against the order of the District Court, Ganjam. in a claim petition under O. 21, R. 58, The circumstances briefly are as follows :

The plaintiff sued in 1903, for the recovery of certain lands, the chief defendant being one Subba Rao, the second defendant in the case. He got a decree which was confirmed by the High Court on appeal in 1909. He got delivery in 1911 and in 1913 he filed E. P. No. 67 of 1913, for mesne profits due under the decree. Subba Rao died while the appeal was pending and his mother was brought on record as his legal representative. She died before the execution petition was filed. In the execution petition, the brothers of Subba Rao were added as legal representatives and the father of Subba Rao, the third defendant in the suit was also made a counter-petitioner. The assets of Subba Rao, in their hands were attached. On 3rd November 1914, this execution petition was struck off the file with directions to the decree-holder to renew it after the appeal against the first Court's order was disposed of finally by the High Court. On 16th November 1915 the decree-holder put in another E. P. No. 59 of 1915 against the same parties. In that execution petition the brothers claimed the property as the joint family property of themselves and Subba Rao. This claim was dismissed by the District Judge and by the High Court also on 23rd January 1920 and those decisions declared unequivocally that the property was Subba Rao's separate property. This execution petition was dismissed on 18th November 1921 as the decree-holder elected to proceed with a fresh execution petition which he had filed. This was E. P. No. 16 of 1920 put in on 28th April 1920 for the same relief against the same property and the property was attached as the property of the judgment-debtor, Subba Rao, in the hands of the counter-petitioners on 25th July 1922. To this execution application, for some reason or other, the third defendant, the father of Subba Rao, was not made a party. Taking advantage of this, he put in a claim petition against the attachment on the ground that he had had no notice. The hearing of this claim petition went on pari passu with a petition by the decree-holder to add the third defendant as a party in the execution

petition. The District Judge dismissed the claim petition and added the third defendant as a party to the execution petition on 23rd April 1923. Against the order dismissing the claim petition the present appeal is filed. He has not appealed or moved in revision against the order adding him as a party to the execution petition, although in the course of the hearing before us, he contended that that order was contrary to law because the Court could not bring him on in the execution petition more than 12 years after the date of the decree. We are here, however, strictly confined to dealing with the appeal against the order on the claim petition.

Now, the High Court's judgment on 23rd January 1920 made it clear to both parties that the true legal representative of Subba Rao was his father the third defendant. The third defendant does not deny that the property attached is the estate of Subba Rao in his hands and that it is liable to be proceeded against in execution for the decree amount. His claim, therefore, is not that he holds this property in any right of his own, but only as the legal representative of the judgment-debtor and the ground on which he put in his claim petition E. A. No. 166 of 1922, was not that the property was not that of the judgment-debtor and not liable for the decree, but the purely technical one that the holder of the assets of the judgment debtor had not been brought on record in the execution petition and given notice therein.

The District Judge went elaborately into the case and dismissed the claim petition on two grounds, first that the third defendant had already in a counter put in by him in E. P. No. 67 of 1913, on 18th December 1924 as guardian of two of the brothers of Subba Rao, Defendants Nos. 36 and 37, declared that he had no right to the property, and was, therefore, estopped from now putting forward the contrary; and second, that the estate of Subba Rao was sufficiently represented in the execution petition for purposes of execution by the brothers of Subba Rao even though thay were not the true legal representatives.

As to the first point, it was disclosed during the course of the argument before us that the District Judge was in error in supposing that the counter of Defendants Nos. 36 and 37 was put in by the third defendant. They were then actually majors and put in their counter as such. The statement therein that their father has no right whatever to the property, therefore, was not made by the father at all and cannot form an estoppel against him.

As to the second point, the question whether the placing on record of a wrong legal representative will bind the estate in such execution proceedings was gone into to some extent before us, but we stopped the argument on that point as it seemed to us unnecessary to go into it further for the decision of the case.

We are of opinion that the third defendant's present petition was unsustainable under O. 21, R. 58. The enquiry under that order is designed to cover cases where a third party comes forward with a claim to the property on the ground that it is not attachable as the property of the judgment-debtor or liable for the decree. Now, the third defendant has all along admitted and admits now that this property is the property of the judgment-debtor in his hands and liable for the decree. In such an enquiry the Court can release the property from attachment only if the conditions of R. 60 are found, and that is not the present case at all. The Court could not then in law under this enquiry allow the third defendant's claim.

The petition of claim, however, was put in also under S. 47 of the Civil P. C., and possibly the question of want of notice might fall to be considered if it is taken to be a case under that section; but, in considering whether an appeal from an order under that section should be allowed merely on the ground of want of notice in the execution petition, the Court must consider whether that want of notice has in any way prejudiced the appellant. In the present case we cannot conceive how it has prejudiced the appellant, nor is he able to suggest to us of what benefit it would bave been to him if he had got the notice. He admits that the property is liable for the decree and has admitted it all along. He has been a party to two previous execution proceedings in which the property, which was in his possession all along, was attached as the assets of Subba Rao and he raised no objections to that, because he obviously could not, and has never denied that these assets were liable for the decree. So far back as 23rd April

1923, he was added as a party to this execution petition and he has not yet sought to have that order set aside. He is obviously now endeavouring merely to take advantage of a mistake made by the decree-holder in omitting his name from the execution petition—a mistake which, in view of his attitude throughout, cannot in any way profit him or get rid of the cardinal fact that the property attached is liable for the decree, unless the decree-holder's claim is barred by time. His own claim, therefore, is obviously unsustainable, for, even if he was on record in E. P. No. 16 of 1920 no plea which he could raise would avail him. The only object of putting him on record and giving him notice is to give him an opportunity to put forward any claim which he has in his own right to the property or any question of limitation barring the execution petition. As to the former he was in no better position than he had been when he was on record in the two previous execution petitions; and as to the latter, there is no question of E. P. No. 16 of 1920, being time-barred.

No question of the continuance of attachment in E. P. No. 67 of 1913, for the benefit of E. P. No. 16 of 1920, need be raised here. In E. P. No. 16 of 1920 there was a valid fresh attachment on 25th July 1922 and E. P. No. 16 of 1920, was not time-barred.

We can therefore, see no reason to interfere with the order of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 357

JACKSON, J.

O. S. Ramachandra Aiyar—Petitioner.

v.

Sankara Aiyar and *others*—Respondents.

Civil Revision Petition No. 7 of 1925, Decided on 2nd October 1925, from the order of the Dist. J., West Tanjore, D/-23rd October 1924.

(a) *Civil P. C., O. 21. R. 89—Interim receiver cannot make deposit—Provincial Insolvency Act (5 of 1920), S. 20.*

The interim Receiver by virtue of his appointment under S. 20 of the Provincial Insolvency Act, has no power to act under O. 21, R. 89, Civil P. C., in absence of the Court's order authorising him to so act: *A. I. R. 1922 Mad.* 51 and 28 *Mad.* 157, *Dist.* [P 357 C 2; P 358 C 2]

(b) *Practice—Precedents—Indian Act clear—English cases need not be referred.*

Where the Indian Statute is clear and sufficient nothing is to be gained by a reference to English case law. [P 358 C 1]

(c) *Civil P. C., O. 40, R. 1—Receiver put in possession under O. 40, R. 1 (c)—It is doubtful whether he can arrogate powers under R. 1 (d).*

It is doubtful whether in India a Receiver put into mere possession under O. 40, R. 1 (c) can arrogate to himself powers to be conferred under O 40, *R.* 1 (*d*). [P 358 C 2]

C. V. Ananthakrishna Aiyar — for Petitioner.

S. Varadachariar, K. Balasubramania Aiyar and *A. V. Viswanatha Sastri*—for Respondents.

Judgment.—The petition is to revise the order of the District Judge of West Tanjore in C. M. A. No. 29 of 1924.

One V. Mahadeva Aiyar was judgment-debtor in O. S. No. 407 of 1923 on the file of the Court of the District Munsif of Mannargudi. On 7th April 1924, a creditor applied to have him adjudicated insolvent. On 8th and 9th April property of his was sold in execution of the decree. On 24th April the Official Receiver was appointed interim receiver under S. 20 of the Provincial Insolvency Act. On 9th June the interim receiver deposited moneys under O. 21, R. 89, Civil Procedure Code, to have the sale set aside and the District Munsif of Mannargudi set it aside. The District Judge reversed the order of the District Munsif. Hence the petition.

The point for determination as correctly stated by the learned Judge in his second paragraph is whether the interim receiver by virtue of his appointment under S. 20 of the Provincial Insolvency Act, had power to act under O. 21, R. 89 Civil Procedure Code. He was appointed after the sale and, therefore, cannot be said by his appointment to have been vested in an interest by virtue of a title acquired before such sale. He can only come in under O. 21, R. 89, Civil Procedure Code if he is held to be "owning such property," if, that is to say, by virtue of his appointment under S. 20 of the Provincial Insolvency Act, he stands in the place of the owner.

Section 20 of the Provincial Insolvency Act attracts the provisions of O. 40 of the Code of Civil Procedure. R. 1 of which provides (a) that the Court may appoint a receiver, (c) commit the posses-

sion, custody or management of such property to the receiver (d) confer upon the receiver certain powers including the protection of the property.

In the present case the Court appointed the Official Receiver, receiver of the properties with no other provision except that he should take steps to see that the properties were not sold for Government kist. It is difficult to see how this order could possibly make the receiver a quasi owner of the property. It is argued that that some one had to protect the property, and since it had been taken out of the owner's hands, the receiver must be presumed to have been the proper person to act. Even assuming that the owner had been removed from the possession and had no right to protect the property and the receiver considered it his duty to act, his proper ordinary course would be to apply to the Court for power to act, and as a matter of fact this is exactly what he did. He wrote on 28th May 1924, requesting sanction to move the Munsif to set aside the sale. This letter was mislaid by the Judge till 26th June Meanwhile the receiver had informed the Judge on the 9th June that he was about to file his application under O. 21, R. 89. Civil Procedure Code, in anticipation of sanction; and on 10th June he filed such application with an affidavit asserting that he was entitled to present it as the interest of the judgment-debtor had vested in him. It does not appear from the record that any *expost facto* sanction was ever accorded by the Judge. In these circumstances, it is impossible to hold that the receiver's action was authorized. The statute entirely provides for the contingency, and he attempted to obtain sanction as contemplated by the statute ; and there is no room for assuming that inherent power vested in the receiver from the mere fact that he had been appointed as such.

Where the Indian Statute is clear and sufficient nothing is to be gained by a reference to English Case Law. *Official Receiver of Coimbatore* v. *Kanga* (1) is not directly in point for there the receiver whose powers are discussed is one appointed after adjudication under Act III of 1907. Petitioner relies upon the phrase " the obtaining of leave is a matter between the receiver and the Court " The receiver had the power vested in him under S. 18 of that Act and he was in the position of a receiver under S. 28 of the present Act ; he had in himself the power to sue, and whether he obtained permission of the Court was a matter between him and the Court.

In the present case without the order of the Court he has not the power.

In *Akula Paradesi* v. *Dhelli Jagannadha Row* (2), it is held " apart from any express power to sue conferred by the Court, receivers would have a right of action by virtue of mere possession." This is an obiter dictum following upon a consideration of English authorities with little bearing upon the point actually in question in that case.

The word " confer " in sub-Cl. (d) of O. 40, R. 1 would seem to suggest that until the Court made specific provision the receiver is not inherently endowed with a right to sue. But even if it is held that " mere possession " gives such a right, it is doubtful if it would extend to making an application under O. 21, R. 89, Civil Procedure Code. At any rate, in this case the receiver can only apply qua owner and mere possession cannot be said to put the receiver in the position of the owner. If he were claiming an interest by virtue of title acquired before the sale his mere possession would more easily support such a claim, but I confess to considerable doubt whether in India a Receiver put into mere possession under O. 40, R. 1 (c) can arrogate to himself powers to be conferred under O. 40, R. 1 (d).

Nor do I think that he can be invested with such powers by operation of S. 56 of the Provincial Insolvency Act. This section provides for the appointment of a receiver for the property of the insolvent at the time of adjudication or afterwards. Such property shall thereupon vest in the receiver and the section allows the Court to demand security from such receiver and to provide for his remuneration: it also allows the Court to eject a trespasser, and also to mulct a receiver for malfeasance. There comes the fifth sub-clause on which the petitioner relies: " The provisions of this section shall apply, so far as may be, to interim receivers appointed under S. 20." It can hardly be argued from this that under S. 56 the property vests in the interim receiver with all the incidents of S. 28.

(1) A. I. R. 1922 Mad. 51.

(2) [1905] 28 Mad. 157.

S. 20 is still the section governing the interim receiver's powers and he shall only have such of the powers conferrable on a receiver appointed under the Code of Civil Procedure as the Court may direct.

Accordingly there is no ground for revision. The petition is dismissed with costs of the 1st respondent.

Petition dismissed.

A. I. R. 1926 Madras 359

SRINIVASA IYENGAR, J.

Mula Naramma—Petitioner.

v.

Mula Rengamma—Respondent.

Civil Misc. Petition No. 4052 of 1924, Decided on 19th January 1925, praying for a transfer of the case.

Civil P. C., S. 24—Prejudice of Judge against party's pleader is no ground for transfer unless it is likely to affect judicial attitude of Judge towards the party or the case.

It may possibly be that it would be incumbent on a higher Court to transfer a case from the file of a particular tribunal to another tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication could not reasonably be expected even though such a state of things has been brought about by the conduct of the very party applying for the transfer; but it cannot, however, be assumed that prejudice against a particular pleader is or will operate as prejudice against the party or his case. It may no doubt, and perhaps often does, and one can only do his best to form his own judgment taking that and all other circumstances into consideration. It would be a dangerous principle to establish that the moment a Judge falls out with a pleader or vice versa the case should be transferred from that Judge to some other; but if, on the other hand, there is any reasonable ground for supposing that the prejudice against the pleader has in any manner or measure affected the judicial attitude towards the petitioner or his case, transfer would certainly be ordered. [P 359 C 2, P 360 C 2]

B. S. Narain Rao—for Appellant.

S. T. Srinivasa Gopalachariar and *R. Gopalaswami Iyengar*—for Respondent.

Order.—After taking time to consider my order, and giving the matter my very careful consideration, I have come to the conclusion that this petition for transfer should be dismissed.

The transfer that has been applied for is of Original Petition No. 30 of 1922 on the file of the District Court of Anantapur to another District Court. That original petition was filed under the Guardians and Wards Act more than two years ago and has been pending all this time and is now part-heard. The most curious feature about the application for transfer is that the affidavit in support thereof has been filed not by the petitioner, who is also the petitioner in the lower Court, or any agent or relation of hers, but by her vakil who has been appearing for her in that original petition. In the view that I have taken of this case it is unnecessary for me to deal in detail with the various allegations made and denied on one side or the other. It is sufficient to state that the application for transfer and the grounds alleged therefor, are due entirely to several regrettable passages and incidents in the course of the hearing of the petition between the learned vakil for the petitioner and the present learned District Judge of Anantapur.

Having regard to all the circumstances, there is reason to believe that the present petition for transfer was itself not the act and motion of the party, but was largely prompted by that very vakil. In spite of it, I should have been disposed to order a transfer if I were satisfied that on the merits and in the interests of justice it was a proper case for transfer. But I am not so satisfied. When a transfer is applied for on the ground that an impartial hearing of the case and proper adjudication could not be obtained because the Judge hearing the case has shown himself as prejudiced against or in favour of one side or the other, all that has to be ascertained is whether the allegation of the absence of an unprejudiced judicial mind is true in fact there and then and any enquiry into the causes that brought about such a state of things would, in my view, be not only irrelevant but be calculated to misdirect. The hearing of the application is not an occasion for the apportionment of an blame or any enquiry about the origin and causes, and it may possibly be that it would be incumbent on a higher Court to transfer a case from the file of a particular tribunal to another tribunal the moment it is clear that some prejudice has been created and that a fair hearing and an impartial adjudication could not reasonably be expected even though such a state of things has

been brought about by the conduct of the very party applying for the transfer. In the present case there is, no doubt abundant evidence of a great deal of prejudice in the mind of the District Judge not against the petitioner or her case, but against her pleader, due altogether, as I cannot help thinking, to proceedings and incidents in this very case. I cannot, however, assume that prejudice against a particular pleader is or will operate as prejudice against the party or her case. It may no doubt, and perhaps often does, and one can only do his best to form his own judgment taking that and all other circumstances into consideration. It would be a dangerous principle to establish that the moment a Judge falls out with a pleader or vice versa the case should be transferred from that Judge to some other. If, on the other hand, in this case there was any reasonable ground for my supposing that the prejudice against the pleader has in any manner or measure affected the judicial attitude towards the petitioner or her case, I should certainly have given effect to it by ordering a transfer even at the risk of such an order being supposed to establish a wrong precedent. But no such reasonable ground or apprehension has been made out to my satisfaction, and, what is more, I should not let myself under the guise of doing justice to the petitioner perpetrate an injustice against the respondent. Further, the petitioner would appear to have on the record another pleader also appearing for her. If, therefore, even after the lapse of all this time the temporary heat and irritation of the moment should not have subsided so as to allow of the learned Judge and the learned pleader resuming their normal functions and proceed with the hearing of the case even then any difficulties that the petitioner may in consequence be put to would not be of such a nature as to warrant my ordering a transfer of the case on that ground.

I have, therefore, come to the conclusion that the transfer applied for should not be ordered and the petition is, therefore, dismissed with costs.

Petition dismissed.

A. I. R. 1926 Madras 360

DEVADOSS AND WALLER, J.

(*Akella*) *Ramasomayajullu* and *others*—Appellants.

v.

Official Receiver, Godaveri, at Rajahmundry—Respondent.

Appeal No. 434 of 1924, Decided on 29th September 1925, against the order of the Dist. J., Godaveri, at Rajahmundry, D/- 28th October 1924.

Provincial Insolvency Act (5 of 1920), S. 4—Insolvent's title to property questioned by his sons—Property should not be sold before deciding the objection.

Where the sons of the insolvent object to the sale of insolvent's property by the Official Receiver on the ground that they were divided from the insolvent, and that their shares should not be sold, the property should not be sold before deciding the question under S. 4. [P. 360, C.2

P. Somasundaram—for Appellants.

D. Appa Rao—for Respondent.

Devadoss, J.— The appllants are the sons of the insolvent. They applied to the lower Court for stay of sale advertised to be held on 29th August 1924 by the Official Receiver of Godaveri, on the ground that they were divided from the insolvent and that their shares should not be sold. The learned Judge has not considered the question whether the shares of the appellants are liable to satisfy the debts of the insolvent. He has allowed the Official Receiver to sell the insolvent's interests in the property leaving to future litigation to determine the rights of the parties. We consider, in a case like this, it is not proper that the insolvent's property should be sold when there is a cloud on the title which could be removed by a proper proceeding under S. 4 of the Provincial Insolvency Act. We, therefore, set aside the order and direct the District Judge to restore the application to file and treat it as an application under S. 4 of the Act and dispose of it according to law. The Official Receiver has the power under the Act to sell the shares of the sons of the insolvent, and it would be for the sons to make out that their shares are not bound to liquidate the debt contracted by their father.

Costs of this appeal will abide the result.

Appeal allowed.

A. I. R. 1926 Madras 361

DEVADOSS, J.

Selvamuthu—Accused—Petitioner.

v.

P. K. Chinnappan Chettiar — Complainant—Respondent.

Criminal Revision Case No. 687 and Criminal Revision Petition No. 578 of 1924, Decided on 20th March 1925, against the judgment of 1st Class Bench Mag. Palghat, in Summary Case No. 395 of 1924.

* *Criminal P. C.*, (1923), *S.* 244 (2) — *Magistrate is not bound to re-issue summons — It is in his discretion under the Code as amended.*

The Magistrate is not bound to re-issue the summons if a witness summoned by him does not care to appear. It is in the discretion of the Magistrate to issue fresh summons if he likes, but the Code does not compel him to issue fresh summonses to the witnesses to whom summonses have once been sent: 30 *Cal.* 121, *Dist.* [P 361, C 2]

T. M. Krishna Nambiar — for Petitioner.

Order. — This is an application to revise the order of the First Class Bench of Magistrates, Palghat. The point raised by Mr. Nambiar is that the Bench of Magistrates ought to have sent fresh summonses to the witnesses cited by the petitioner. The petitioners cited the Extra Assistant Conservator of Forests and a forester as two of his witnesses to prove the evidence of alibi set up by him. The Bench Magistrate did issue sommonses to them, but they refused to accept service, as the summonses had not been sent through their superior officer. The petitioner applied to the Bench at a late stage for issuing fresh summonses but the Bench refused the request. It is contended before me that the Bench had no discretion to refuse to issue fresh summonses for the witnesses. Reliance is placed upon a decision in *Daulat Singh* v. *Brinda Belder* (1). There, the learned Judges held, that if a Magistrate sent summonses to the witnesses in a summons case the Magistrate had no discretion afterwards to refuse to issue fresh summons if the witnesses did not appear in obedience to the summons. This decision was based under the old Code. In the old Code the words were :

"The Magistrate may, if he thinks fit, on the application of the plaintiff or the accused issue process to compel the attendance of any witness or the production of any document or other thing."

There has been a change in this paragraph in the new Code which reads thus :

"The Magistrate may, if he thinks fit, on the application of the plaintiff or the accused, issue summons to any witness directing him to attend or produce any document or other thing."

Under the old Code there was the phrase "Compel the attendance of any witness or the production of any document," but in the present Code, the words used are : "Summon any witness directing him to attend or produce any document." Under the present Code evidently, the Court cannot compel a witness to appear before it, if the witness refuses to appear. If the witness refuses to appear, probably, he may be liable for disobedience of summons, but the question is whether a party, complainant or accused, is entitled to ask the Court as a matter of right, to compel attendance of any witness, who does not care to attend in obedience to a summons. In the Calcutta case the witnesses summoned had received the summonses and failed to appear and the learned Judges held that the Court had no discretion under S. 244 to refuse to compel attendance of a witness to whom the Court had already issued process. It cannot be said that under the present Code, the Magistrate is bound to compel the attendance of a witness who has received the summons. Considering the change in the wording of sub-S. (2) of S. 244, I think the present case is distinguishable from the Calcutta decision. I hold that the Magistrate is not bound to re-issue the summons if a witness summoned by him does not care to appear. It is in the discretion of the Magistrate to issue fresh summons if he likes, but the Code does not compel him to issue fresh summonses to the witnesses to whom summonses have once been sent.

The petitioners must have known that the officers to whom he wanted summons were subordinate to some other officer and it was his duty to have informed the Magistrate of that fact when he asked for summonses for the two witnesses. He not having done so, the Magistrate's declining to grant time and convicting him is correct.

The petition is dismissed

Petition dismissed.

(1) [1903] 30 Cal. 121.

A. I. R. 1926 Madras 362

PHILLIPS, J.

Nomula Ramayya—Plaintiff—Appellant.

v.

Nadipineni Appayya and *another*—Defendants 2 and 3—Respondents.

Second Appeal No. 1771 of 1922, Decided on 5th August 1925, against the decree of the Addl. Sub.-J., Guntur, in A. S. No. 23 of 1922.

Registration Act, S. 49—Unregistered document seeking to prove a previous sale deed to be nominal is admissible.

An unregistered document which seeks to prove that a prior sale deed is not a real transaction is admissible in evidence though unregistered : 26 *M. L. J.* 151 (*F.B.*), *Dist.* [P. 363, C. 1]

A. C. Sampath Aiyangar—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—The main question at issue in this appeal is whether a document marked as Ex. J., is admissible in evidence. The District Munsif rejected the document, but it has been admitted by the Subordinate Judge. On the 9th October 1918, the 2nd defendant executed a sale-deed, Ex. H. in favour of the plaintiff. The plaintiff claimed the lands sold in some execution proceedings but his claim was dismissed, and therefore, he had brought this suit to declare his right under the sale-deed. Defendants 2 and 3 contend that the sale to the plaintiff was a purely nominal transaction which was not intended to take effect and in order to prove this, they rely on this document Ex. J. The plaintiff says, amongst other things : "I am entitled only to money not to lands." This recital was made almost immediately after the sale-deed for the lands had been executed in plaintiff's favour. I cannot possibly conceive that, if the plaintiff had really purchased those lands, he would have made this statement immediately afterwards. It was, I think, clearly made in order to protect the 2nd defendant's interest, the sale-deed having been executed for the same purpose, namely, to protect the 2nd defendant against his creditors who were then pressing him. I agree with the learned Subordinate Judge that Ex. J is very strong evidence of the nominal character of Ex. H, and I most certainly think that there is no reason to set aside his finding on this question of fact, as it is justifiable on the evidence of Ex. J. If he is entitled to rely on Ex. J., his finding that the sale was only nominal would be justified and must be accepted. As regards the admissibility of Ex. J, the appellant-plaintiff relies on the Full Bench decision reported in *Pyinda Venkatachelapathi* v. *Muthe Venkatachelapati* (1). He relies on the following passage :

"Assuming the plaintiff is entitled to sue for possession on the ground that no title passed to the defendants under the sale-deed (Ex. A.), in order to succeed he must show that by virtue of the unregistered letter the sale-deed does not affect the immovable property which is comprised both in the sale-deed and in the unregistered letter, in the way in which the sale-deed purports to affect the property, if the unregistered letter had never been written. This being so, it seems to us the unregistered letter is relied on as evidence of a transaction affecting immovable property and, being unregistered, is inadmissible in evidence."

The facts of the case are not given in the report, but on reference to *Muthe Venkatachelapathi* v. *Pyinda Venkatachelapathi* (2), the judgment of the Division Bench shows that the conflict in that case was whether the document evidenced a sale or merely a mortgage. There was no suggestion that the transaction was wholly nominal, the case on one side being that it was an outright sale and the case on the other, that it was only a mortgage. In Mr. Justice Miller's judgment he cites the Full Bench case in *Raja of Venkatagiri* v. *Narayana Reddi* (3), which he summarizes as follows :

"It does not matter that the document may have the effect of proving a transaction affecting immovable property if it is used for the purpose of proving a transaction which does not affect immovable property in any way then it may be received in evidence."

If the summary of the Full Bench judgment is correct, and I see no reason to think it is not, then it must be applied to the present case where the facts are similar. What the defendants seek to do is to prove that there was a transaction, namely, the execution of a document which does not affect immovable property

(1) [1914] 26 M.L.J 151=1 L.W. 157=(1914) M.W.N. 178 (F.B.).
(2) [1912] 23 M.L.J. 652=12 M.L.T. 579.
(3) [1894] 17 Mad. 456=4 M.L.J. 198 (F.B.).

because it was the intention of the parties that it should not do so. Therefore, in order to prove that fact or that transaction, this unregistered document, Ex. J, would be admissible in evidence. The other case of this Court relied on by the plaintiff is that reported in *Putti Sesha Aiyar* v. *Kuppachar* (4), where again there was a dispute as to the nature of the interests that passed and no question of the nominal character of the transaction was raised. There is a case exactly in point reported in *Yerraguntla Seshacharlu* v. *Mukkumalla Chinniah* (5), where it was held that an unregistered document purporting to be a sale-deed was admissible in evidence, because it was thereby sought to prove that a prior sale-deed was not a real transaction. That is the very point at issue in this case, and if that is correct, and it is nowhere dissented from, Ex. J. is clearly admissible in evidence.

I have already found that if Ex. J. is admissible in evidence, the Subordinate Judge's finding that the sale-deed was merely a nominal transaction is justifiable and consequently this second appeal must fail and is dismissed with costs.

Appeal dismissed.

(4) [1919] 10 L.W. 1=(1919) M.W.N. 87=26 M.L.T. 291.
(5) [1914] 25 I.C. 721.

* A. I. R. 1926 Madras 363

DEVADOSS AND WALLER, JJ.

Chittammal and *another*—Appellants.

v.

Ponnuswamy Naicker and *another*—Respondents.

Appeal No. 438 of 1924, Decided on 22nd September 1925, against the order of the Dist, J., Tinnevelly, D/- 4th November 1924.

* *Provincial Insolvency Act* (5 *of* 1920), *S.* 56 (3)—*Title adverse to insolvent set up — Court cannot pass order under S.* 56—*Issue of title may be tried under S.* 4 *if application is made* —*Provincial Insolvency Act* (1920), *S.* 4.

Under S 56 (3) an order cannot be passed against persons who claim adversely to the insolvent. The Court cannot, acting under S. 56, direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under S. 56. The Court, however, may on a proper application being made under S. 4 of the Act, try the issue whether the insolvent is entited to the property or not. But, in order to enable the Court to do that a proper application ought to be made under S. 4, and the other side should be asked to plead thereto. When an order is passed under S. 56 (3), it does not determine the rights of the parties, and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined.

[P. 363, C. 2, P. 364, C. 1,2]

K. Bashyam Aiyangar and *S. Rajagopalachari*—for Appellants.

K. R. Rangaswami Aiyangar and *R. Krishnaswami*—for Respondents.

Devadoss, J.—This appeal is against the order of the District Judge of Tinnevelly directing the appellants to hand over possession of the property in their possession to the Official Receiver and his lessee. The 1st respondent herein is the lessee of the property from the 2nd respondent who is the Official Receiver of Tinnevelly. The appellants were in occupation of the property in dispute from the year 1897. The respondents applied to the District Judge for an order under S. 56 of the Provincial Insolvency Act directing the appellants to hand over possession of the property in dispute to the respondents on the ground that the property was the property of the insolvent. The learned Judge has passed an order under S. 56 (3) in favour of the respondents. The question for consideration is whether such an order can be passed against persons who claim adversely to the insolvent. S. 56, Cl. 3, second para is in these terms :

"Provided that nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

An application under S. 56 is made for the purpose of realization of the property of the insolvent. If a person is in possession of the property on behalf of the insolvent, or claims under the insolvent, possession of such property may be taken under the orders of the Court by the Official Receiver. But where the person in possession claims adversely to the insolvent, or where he is able to show that the insolvent is not entitled to present possession, the Court has no power to proceed under S. 56 ; for the second paragraph of Cl. 3 specifically says that :

"Nothing in this section shall be deemed to authorize the Court to remove from the possession or custody of property any person whom the insolvent has not a present right so to remove."

The corresponding provision in the Presidency Towns Insolvency Act is S. 58 and Cl. 2 of that section puts the matter beyond doubt. It is as follows:

"The Official Assignee shall, in relation to and for the purpose of acquiring or retaining possession of the property of the insolvent, be in the same position as if he were a Receiver of the property appointed under the Civil Procedure Code, 1908, and the Court may, on his application, enforce such acquisition or retention accordingly."

The position of the Official Assignee is, therefore, the same as that of a Receiver apppointed under the Civil Procedure Code. O. 40, R. 1 (2) is as follows:

"Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

The power of the Court under the Provincial Insolvency Act, S. 56, is not any higher than the power of the High Court under the Presidency Towns Insolvency Act, S. 58. The Court, therefore, cannot, acting under S. 56. direct any person to deliver up property in his possession to the Official Receiver unless the insolvent is entitled on the date of such application to the possession of such property. If a title, however flimsy, is set up by the person in possession, the Court should not act under S. 56. It is open to the Court on a proper application being made under S. 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not. But, in order to enable the Court to do that, a proper application ought to be made under S. 4 of the Provincial Insolvency Act, and the other side should be asked to plead thereto.

In this case, it is suggested for the respondents that, though the application was made under S. 56, it must be deemed that the enquiry was held under S. 4 and the order was made under that section. But it is clear from the 6th paragraph of the District Judge's order that he passed the order only under S. 56 (3), and we cannot import into it something which is not there. If the application was one under S. 4, the 1st respondent should not have been made a party. Nobody other than the Official Receiver can move under S. 4 unless the Official Receiver is unwilling to act and the Court authorizes a creditor or any other person intersted in preserving the insolvent's estate to act under that section in the name of the Official Receiver.

It is again urged that the question of the title of the appellant has been gone into and has been found against, and, therefore, it is unnecessary that there should be a fresh proceeding under S. 4. When an order is passed under S. 56 (3), it does not determine the rights of the parties and though the Judge may incidentally determine the question, yet it cannot be said that the question is finally determined. It would not be right to allow a loose procedure to obtain in insolvency proceedings. The law of insolvency is not properly understood in the mofussil, and it would not be right on the part of the Court to adopt a loose procedure for the purpose of realizing the estate of the insolvent. Such a procedure would lead inevitably to hardship and to an unsettled state of the law.

In regard to the merits it is unnecessary to say much. The appellants were in possession of the property from 1897. They claim to have been in possession of the property by virtue of an arrangement in the family. It is urged by Mr. Bashyam Aiyangar that no registered document is necessary for a family arrangement. If the appellant could show that there was a proper arrangement, they would be entitled to retain possession of the property against the insolvent and against the Official Receiver.

On behalf of the respondents, it is urged that the 1st appellant is dead and therefore, the 2nd appellant, the daughter of the 1st appellant, has no right to be in possession of the property. This question again will have to be gone into fully, and in the absence of an investigation into the title of the 2nd appellant it would not be right to deprive her of the possession of the property and drive her to a suit. If the order is to be construed as an order under S. 4, a suit would be barred; if it is construed as an order S. 56 (3), the order is

illegal in as much as the insolvent is not entitled to present possession of the property.

In a recent case it was decided by Spencer, J., and myself that the power given by S. 4 of the Insolvency Act is subject to the provisions of the Act, one of which is the proviso to S. 56 (3) which is in the way of the Court removing any person from the possession of property, whom the insolvent has no present right to remove.

The appeal is allowed and the order of the lower Court is set aside with costs throughout.

Waller, J.—I agree that, where there is a dispute as to the insolvent's title, S. 56 cannot be invoked. For, in order that that section may be resorted to, the insolvent must have an immediate right to remove from possession. Proceedings, therefore, should have been taken under S. 4.

Appeal allowed.

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* A. I. R. 1926 Madras 365

DEVADOSS AND WALLER, JJ.

K. Kaliba Sahib and *others*—Plaintiffs.

v.

Subbaroya Aiyar—Defendant.

Reference No. 12 of 1924, Decided on 1st September 1925, made by the District Munsif of Negapatam in S. C. S. No. 159 of 1924.

* *Provincial Small Cause Courts Act, S. 28—Order of District Court passed on appeal from revenue Court is not binding on District Munsif acting as Small Cause Court Judge.*

The District Munsif acting as a Small Cause Court Judge is subject to the administrative control of the District Court under S. 28, but he is not bound by an order of the District Judge, holding that a certain suit is not triable by a revenue Court, and passed in his judicial capacity on an appeal from the revenue Court.

[P. 365, C. 2]

R. Kuppusami Aiyar—for Plaintiffs 1, 3 and 7.

V. K. Srinivasa Aiyangar—for Defendant.

Judgment.—This is a reference by the District Munsif of Negapatam under O. 46, Rr. 1 and 6 of the Code of Civil Procedure, and the question referred is in these terms:

"Is not this Court competent to proceed with the trial of this suit in pursuance of the order of the District Court in C. M. A. No. 101 of 1923 preferred against the order of the Revenue Divisional Officer when this Court on its small cause side had already held that it had no jurisdiction to try this suit?"

The suit was brought in the District Munsif's Court on its small cause side by the trustees of Nagore Durga for rent. The defendant contended that the property in his possession formed part of an estate and that a civil Court had no jurisdiction to try the case. The District Munsif held that he had no jurisdiction to try the case and directed that the plaint be returned to the plaintiffs for presentation to the proper Court. The plaint was presented to the Revenue Divisional Officer and he held that the defendant was not a ryot under Act I of 1908 and directed the return of the plaint to the plaintiffs. Against this order of the Divisional Officer the plaintiffs appealed to the District Court of Negapatam and the District Judge held that the revenue Court had no jurisdiction and that the civil Court had jurisdiction to try the case. The plaint was again presented to the District Munsif. The District Munsif was confronted with his previous order that the civil Court had no jurisdiction and the order of the District Judge that the revenue Court had no jurisdiction and that the civil Court had jurisdiction to try the case. The order of the District Court on appeal from the Revenue Divisional Officer is not binding on the District Munsif. The District Munsif evidently was under the impression that he being subordinate to the District Judge was bound by his order. The District Munsif acting as a Small Cause Judge is subject to the administrative control of the District Court under S. 28 of the Provincial Small Cause Courts Act, but he is not bound by an order of the District Judge passed in his judicial capacity on an appeal from the revenue Court. As we are of opinion that the order of the District Judge in C. M. A. No. 101 of 1923 is not binding upon the District Munsif, he is at liberty to pass any order he likes. Either party will be entitled to move the High Court against the order of the District Munsif and the decision of the High Court in revision will bind the District Munsif as well as the District Court. It is not

necessary that the question referred to us should be answered at this stage.

The papers will be returned to the District Munsif.

Papers returned.

A. I. R. 1926 Madras 366

SPENCER, J.

K. Narayana Iyengar and *another*—Appellants.

v.

A. Trippayya—Respondent.

Second Appeal No. 1831 of 1922, Decided on 27th October 1925, from the decree of the Sub-J., Bellary, in A. S. No. 18 of 1922.

Civil P. C., Sch. 2, para. 15—Arbitrators going beyond scope of reference and giving award on a matter to which all parties agreed—Award on this part is enforceable by suit.

A reversioner sued for a declaration that the mortgage by a widow and a sale of a house were invalid beyond her lifetime and made the mortgagee-purchaser and the decree-holder parties. The matter was referred to arbitration by order of Court on consent of parties. The arbitrators went beyond the scope of reference and declared the reversioners to be entitled to obtain immediate possession of the house during the widow's lifetime upon payment of a certain sum.

Held: that this part of the award can be enforced in a separate suit as an award by arbitrators on an agreement by parties: 23 *All.* 394 (*P. C.*) and *A. I. R.* 1924 *Cal.* 567, *Dist.*

[P 366, C 1, 2]

C. V. Anantakrishna Iyer—for Appellants.

B Somayya—for Respondent.

Judgment.—In O. S. No. 208 of 1916 in the District Munsif's Court, Bellary, the plaintiff sued for a declaration that a mortgage by a widow named Subbalakshmamma and a sale of a house were invalid beyond her lifetime, he being the reversioner to the estate. The mortgagee-purchaser and the decree-holder in a money suit filed against the widow were made parties. The matter was referred to arbitration by order of Court on the consent of the parties. The arbitrators went beyond the scope of reference and declared the plaintiff to be entitled to obtain immediate possession of the house during the widow's lifetime on payment of Rs. 900, which was not a matter referred to their decision through Court. The Court that tried the suit, therefore, rightly refused to embody that part of the award in its decree. In the present suit the same plaintiff has sued for possession of the house alleging that he has tendered Rs. 900 within the period provided in the award which was one year from the date of the award. The suit was dismissed with costs, the District Munsif holding that there was no consent on the part of the defendant that the arbitrators should settle the question of immediate delivery of the house. Upon appeal the learned Subordinate Judge held that although the question of immediate possession was not a matter referred to the arbitrators through Court, yet the allegation in the plaint, that the arbitrators were privately asked to decide this question, and that the parties agreed to abide by their decision was true. He disagreed with the finding of the District Munsif, who believed the evidence given by the defendant, and he found as a fact that the defendant accepted the terms of the entire award not only in respect of the matters referred through Court but also in respect of the matters which the parties themselves invited the arbitrators to decide. This is a finding of fact by the appellate Court which had jurisdiction to decide it and I must accept the finding.

The learned Subordinate Judge on the question of law held that this part of the award could be enforced as an agreement between the parties. I think he was right. The decision in *Muhammad Mumtaz Ali Khan* v. *Farhat Ali Khan* (1) dealt only with an ultra vires award upon a matter which was not referred to arbitrators either through Court or otherwise, and *Rampratap Chamria* v. *Durgaprasad Chamria* (2) may be distinguished on the same ground. These cases do not decide that if there is a private agreement to refer to arbitration and the arbitrators pronounce an award, that award cannot be enforced in a subsequent suit.

The only other point is whether the plaintiff made a tender of Rs. 900 within one year of the date fixed in the award. It was found that he gave a notice through his vakil offering the money unconditionally before the due date and he applied for a challan for remitting Rs. 900 to the treasury on the 10th April 1918 which was the last day for the tender. The Subordinate Judge was, therefore, right in holding that the plaintiff had

(1) [1901] 23 All. 394=28 I. A. 190=5 C. W. N. 881=8 Sar. 85 (P. C.).

(2) A. I. R. 1924 Cal. 567.

complied with the condition under which it was agreed in adjustment of the parties' disputes that the plaintiff should pay Rs. 900 and get possession of the property. The second appeal fails and is dismissed with costs. The amount deposited in Court may be paid to the respondent's vakil in adjustment of the respondent's costs.

Appeal dismissed.

A. I. R. 1926 Madras 367

PHILLIPS, J.

Pazhaniandy Tarakan—Plaintiff—Appellant.

v.

Murukappa Tarakan and *others*—Defendants—Respondents.

Second Appeal No. 1635 of 1922, Decided on 24th August 1925, against the decree of the Dist.-J., South Malabar, in A. S. No. 652 of 1921.

Trusts Act, S. 88—Trustee cannot maintain a suit in derogation of trust, but if in possession, can recoup himself what is spent on trust.

Under S. 88 a trustee is bound to hold the property on behalf of the trust and cannot therefore bring a suit in his personal capacity in derogation of the trust, but if he is in possession of the trust property he can out of it recoup himself what he has spent for the benefit of the trust. [P. 367, C. 1,2]

P. S. Narayanasami Aiyar—for Appellant.

K. Bashyam Aiyangar and *C. S. Swaminadhan*—for Respondents.

Judgment.—In this case the plaintiff and his family obtained a Saswatam lease of certain property which was dedicated in trust. The plaintiff was appointed the managing trustee and in pursuance of that appointment he gave notice to the person in possession of the property to deliver it up. The title of plaintiff's transferrer was disputed and subsequently plaintiff purchased the Saswatam right from the rival jenmi in his own name. He now sues for damages for trespass and an injunction. The lower appellate Court dismissed his suit on the ground that under S. 88 of the Trusts Act, plaintiff was bound to hold the property on behalf of the trust and could not, therefore, bring a suit in his personal capacity in derogation of the trust.

The first argument put forward in appeal is that in asmuch as the plaintiff did not obtain actual physical possession of the property, S. 88, does not apply. In S. 88, there is no recital as to the possession of the property and in the cases relied on by the appellant *Munisami* v. *Maruthammal* (1) and *Srinivasa Moorthy* v. *Venkata Varada Aiyangar* (2), there is really nothing to support this contention. In fact in *Munisami* v. *Maruthammal* (1) it was held that:

"If an executor accepts the office and acts as executor with full knowledge of all the circumstances bearing on his right . . . . . he is estopped from subsequently repudiating the Will."

Here the plaintiff accepted the trust and acted upon it and consequently he is now estopped from disputing the trust.

The next point put forward is that the plaintiff is entitled to be reimbursed out of the trust the money which he paid out of his own pocket and that, therefore, until that is done the property is his own. This is no doubt true and would be applicable in a case where the beneficiaries sought to take the possession out of the plaintiff's hands, but in the present case this is not even a suit against the beneficiaries, but a suit against a co-trustee, and when S. 88 lays down that the plaintiff must hold this property for the benefit of the trust I do not think that any Court would allow him to sue in his own capacity as being solely entitled to the property. If he does sue in such capacity he is, in effect, committing a breach of trust. Plaintiff is admittedly in possession of the trust property and can, out of it, recoup himself what he has spent for the benefit of the trust. Consequently, I think that the lower appellate Court is quite right in dismissing his suit. The second appeal is dismissed with costs.

Appeal dismissed.

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(1) [1910] 34 Mad. 211=20 M. L. J. 687=8 M. L. T. 124=(1910) M. W. N. 233.

(2) [1911] 34 Mad. 257=21 M. L. J. 669=14 C. L. J. 64=10 M. L. T. 263=(1911) 2 M. W. N. 375=13 Bom. L. R. 520=8 A. L. J. 774=15 C. W. N. 741 (P. C.).

* A. I. R. 1926 Madras 368

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

Commissioner of Income-tax, Madras—Referring Officer.

v.

King and *Partridge*—Respondents.

Ref. Case No. 3 of 1925, Decided on 29th October 1925.

* *Income-tax Act* (1922), *S.* 11—*Deduction cannot be allowed in respect of amount paid as profession tax under Madras City Municipal Act* (4 *of* 1919), *S.* 111.

Profession tax paid under S. 111 of the Madras City Municipal Act cannot be allowed as proper deduction from the taxable income as an expenditure incurred solely for the purposes of the profession of the assessees within the meaning of S. 11 of the Income-tax Act.

The profession tax is a payment made out of the income of the tax-payer and is quite different from license fee though the payment is to be made in the manner of a license fee. The question, however, depends upon the nature of the profession tax levied. [P. 368, C. 1, 2; P. 369, C. 1.]

Patanjali Sastri—for Referring Officer.

R. N. Aingar and *T. D. Narasiah*—for Respondents.

Order.—This is a reference under S. 66 (2) of the Indian Income-tax Act (XI of 1922) and the question submitted for our opinion is whether profession tax paid under S. 111 of the Madras City Municipal Act should be allowed as a proper deduction from the taxable income "as an expenditure incurred solely for the purposes of the profession" of the assessees within the meaning of S. 11 of the Income-tax Act.

The assessees are a firm of attorneys practising in Madras and they claim that they are entitled to the deduction above mentioned. The Commissioner of Income-tax was of opinion that the deduction claimed was not an allowable item.

The answer to the question put to us depends in our opinion upon the nature of the profession tax levied by the Municipality. If the profession tax is a contribution from the income of the assessee to the Municipality it will stand on the same footing as income-tax itself which is such a payment to the Government. It is clear, in assessing the income of a person the income-tax he pays could not be deducted, for what is paid is a part of the income itself and not an expenditure for earning that income or profit. It was so ruled in *Ashton Gas Co.* v. *Attorney-General* (1) and the proposition is conceded before us. What then is the profession tax? Is it a payment made out of the income of the tax-payer or is it an expenditure which he has to incur to enable him to earn his income? We are of opinion that it is the former and not the latter.

Under the City Municipal Act (IV of 1919), S. 111, every person not liable for the Companies tax who, within the City and for a period of 60 days in the half-year, exercises "a profession, art, trade or calling or holds any appointment, public or private, bringing him within the taxation rules of Sch. IV," is liable to pay the profession tax. Now Sch. IV makes it clear that the amount of tax payable is dependent on the income of the person taxed, the minimum being an income of Rs. 100 a month, except in the case of hotel-keepers, etc., dealt with under Class IX. Professional men are taxed not because they carry on their profession but because they do so and earn income. The amount of tax varies with the income and if a person is overtaxed he has a right of appeal.

Now the nature of the tax cannot vary with the individual taxed. In the case of persons holding appointments under the Government it seems to us impossible to predicate that they pay profession tax to enable them to earn their salary. S. 111, Explanation 2, makes even pensioners liable for profession tax as if they were holders of appointments carrying a salary equal to the pension. In their cases it is still more difficult to treat the profession tax as a payment by them to earn their income. It is clear in these cases the Municipality is claiming a part of their income as a tax. A different rule, it seems to us, cannot be applied in the case of men who make their income by professional services. It is argued that because S. 111 uses the words "by way of license fee" we must hold that the payment of the profession tax is for the purpose of obtaining a license to carry on one's profession in the City. We are unable to accept this argument. The Act deals with several matters in which the obtaining of a license is a prerequisite to the carrying on of a business

(1) [1906] A. C. 10=75 L. J. Ch. 1=22 T. L. R. 82=18 Manson 35=70 J. P. 49=93 L. T. 676.

or profession within the Municipal limits. We find examples of it in Chap. XII of the Act. There is no provision in the Act which makes the carrying on of one's profession without paying the profession tax illegal; and no formal license is issued on payment. The tax, if unpaid, can no doubt be collected by coercive processes of distraint, etc., but the carrying on of the profession is not interfered with. It is clear, therefore, that the Act does not treat the profession tax as a payment for a license. The words "by way of a license fee" seem to us to show that the payment is to be made in the manner of a license fee, but do not imply that in itself the tax is a license fee. It is true that under Part II, Sch. IV, R. 9, the tax is estimated on general considerations and not on the exact amount of ascertained income of the person taxed. This merely provides a method of estimating one's income to avoid the trouble of having accounts produced and examined in every case. The fact that when an over-estimate is made liberty is given to the person taxed to produce his accounts and prove his income and get his tax reduced indicates that the proper basis of the tax is the income earned. In this view the payment of the profession tax cannot be held to be "an expenditure for the purpose of such profession" though it is incurred in connexion with it. The words "for the purpose of" were construed by Lord Davey in the case of *Strong and Co., Ltd.* v. *Woodifield* (2), where the expression was "for purposes of the trade." His Lordship observed: "These words appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits." Following that view we consider that the payment of profession tax does not fall within S. 11.

The cases of *Smith* v. *Lion Brewery Co., Ltd.* (3) and of *Usher's Wiltshire Brewery, Ltd.* v. *Bruce* (4) were cited by the learned counsel for the assessees. But, instead of helping him, they show what may properly be treated as money spent for purposes of trade. The expenses referred to in those cases were directly incurred for the purpose of increasing the income of the trade and were therefore allowed to be deducted. These cases do not apply here in the view we take of the nature of the profession tax. Along with these cases should be considered the case of money spent for an anti-prohibition campaign by a brewer which was disallowed as a deduction as it was held that it was not money directly spent for increasing the brewer's income though it may have indirectly that effect: *Ward and Co.* v. *Commissioner of Taxes* (5).

The case of *Commissioner of Income-tax* v. *Nedungadi Bank* (6) referred to the Companies tax and not to the profession tax. The observation in it regarding profession tax that it stands on the same footing as income-tax, supports the contention of the Government, but we do not look upon it as any authority on the point before us as the observation is only an obiter dictum. The case is not otherwise applicable.

Etherington'e case (7) referred to excess profits duty which stands on a different footing altogether; as pointed out by the learned Judge there it was declared by statute to be an admissible deduction. Furthermore, the case was one of net profits of the Company on which dividend was payable to the manager and not an income-tax case.

For the above-mentioned reasons we have come to the conclusion that the amount of profession tax paid is not a proper deduction for assessment of income-tax and we answer the question submitted in the negative. The assessees will pay the Commissioner's costs and vakil's fee, Rs. 250.

Reference answered in the negative.

(2) [1906] A. C. 448=75 L. J. K. B. 864=22 T. L. R. 754=5 Tax Cas. 215=95 L. T. 241.

(3) [1911] A. C. 150=80 L. J. K. B. 566=5 Tax Cas. 568=27 T. L. R. 261=55 S. J. 269=75 J. P. 273=104 L. T. 321.

(4) [1915] A. C. 433=84 L. J. K. B. 417=31 T. L. R. 104=59 S. J. 144=6 Tax Cas. 399=112 L. T. 651.

(5) [1923] A. C. 145.

(6) A. I. R. 1924 Mad. 693 (S. B.).

(7) [1919] 2 Ch. 254.

A. I. R. 1926 Madras 370

DEVADOSS AND WALLER, JJ.

(*Vollayan*) *Ambalam* and *others*,—In re.

Criminal Appeal No. 154 of 1925, Decided on 19th August 1925, against the judgment of the S. J., Ramnad, in Case No. 50 of 1924.

(*a*) *Criminal P. C., S. 297—Misdirection.*

Where a charge is, as a whole, distinctly favourable to the defence, it is a matter of great difficulty to say that there is any misdirection which has misled the jury into giving the verdict. It is not enough to say that the Judge might have laid much more stress than he has laid on the defects in the prosecution case in order to establish misdirection. [P. 370 C. 2]

(*b*) *Criminal P. C., S. 423 (2)—Defence case not adequately explained to jury—Evidence improperly admitted—Verdict of guilty must be set aside.*

Where the defence case was not adequately put before the jury and evidence was admitted which should have been excluded, the verdict of guilty must be set aside. [P. 370, C. 2]

V. L. Ethiraj and *K. P. Ramakrishna Iyer*—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—Appellants have been convicted of dacoity by a jury. The charge against them briefly is that they accused P. W. No. 1 of having stolen some timber and extorted from him and his two sons one of whom, strangely enough, is a minor, a promissory-note for Rs. 200. The Sessions Judge summed, upon the whole case in favour of the defence laying though, as it turned out, insufficient emphasis, on the defects in the prosecution case which were both numerous and striking. The jury, however, elected, while acquitting the 4th accused, to convict the five appellants. The acquittal of the 4th accused is perhaps the most inexplicable feature of a highly unsatisfactory case. The evidence against him was precisely as strong or as weak as that against the appellants. If he was innocent, so obviously were they. The Judge having agreed with the Jury that he was innocent and doubting, as he evidently did, the truth of the prosecution case, should certainly have referred the rest of the verdict as flagrantly perverse.

As a result, appellants are now driven to allege misdirection in the charge and irregularity in the selection of the jury. We may say at once that the alleged irregularity has not been made out. No doubt, some sort of objection was taken to one of the jurors and it is said that that objection was not waived; but the affidavit filed by the Counsel who appeared at the trial is studiously silent on the point. Where a charge is, as a whole distinctly favourable to the defence, it is a matter of great difficulty to say that there is any misdirection which has misled the jury. It is not, we think, enough to say that the Judge might have laid much more stress than he has laid on the defects in the prosecution case. There are, however, two respects in which the Judges' charge is extremely defective. The defence really was that P. Ws. Nos. 1 and 2 had executed a promissory note in favour of the 4th appellant, 40 days before the occurrence, and that the prosecution had been launched in order to avoid this note. The note in question was produced in Court and P. W. No. 1 denied having signed it. He had, of course, to deny, because it bears a date earlier than that of the alleged extortion is signed by himself and only one son and is differently attested from the extorted note. It is, however, very probable as Mr. Adam conceded that there really was one note and that Ex. V is the note that is alleged to have been extorted. However, Ex V was an important feature of the case and the Judge, in our opinion, did not sufficiently impress the Jury with its importance. He should have asked the Jury to consider whether a note really had passed 40 days before the alleged extortion and whether the prosecution was not merely a device to defeat that note. The other matter is this. The evidence given by P. W. Nos. 4, 5 and 6 as to the statements alleged to have been made to them by P. W. No. 1 was relevant only if those statements were made at or about the time of the occurrence. The Judge should, we think, have told the Jury that the statements in question were not made under circumstances which justified proof of them being admitted in evidence.

We consider that the defence case was not adequately put before the jury and that evidence was admitted which should have been excluded. The verdict must, therefore, be set aside. We see no reason to order a re-trial. The appellants are acquitted and discharged.

Accused acquitted.

*** * A. I. R. 1926 Madras 371**

VENKATASUBBA RAO AND REILLY, JJ.

Alagirisami Pillai—Appellant.

v.

Lakshmanan Chetti and another — Decree-holder and Judgment-debtor — Respondents.

Appeal No. 108 of 1923, Decided on 30th July 1925, from the decree of the Sub-J, Dindigul, in A. S. No. 53 of 1922.

* * (a) *Civil P.C., O. 21, Rr. 16 and 53 and O.38, R. 10—Attached debt ripening into a decree—Attaching creditor can execute that decree and realise the amount of the debt attached.*

A attached before judgment a debt due from C to B and got a decree against B. Then B sued C and obtained a decree under which C paid up the amount to B;

Held: that A's right to recover the debt was not destroyed and he could recover it by executing the decree passed in B's favour,

Venkatasubba Rao, J.—The attachment before judgment attached to B's decree and A could execute it as assignee.

The attachment placed on the debt fastens itself on the decree without any further act on the part of the attaching creditor: 44 *Mad.* 919 (*F. B.*), *Rel. on*; 17 *All.* 198 (*P. C.*); *A. I. R.* 1924 *Cal.* 661 and *A. I. R.* 1922 *All.* 98, *Dist.* [P.372, C.1]

Reilly, J.—A must attach B's decree before executing it.

Attachments in execution or before judgment are in their nature merely means of getting the property concerned into the control of the Court and of restraining the party against whom they are directed from transferring, delivering or destroying the property. By special provisions in R. 53 of O. 21 an attachment in execution of any of certain special classes of decrees—not all decrees—carries with it a special privilege, namely, the right to execute the decree attached. This is a peculiar privilege, in itself quite foreign to the idea of attachment and given only by special provisions. Unless those special provisions are complied with, that special privilege cannot be acquired. [P.376, C.1]

* (b) *Civil P. C., O. 21, R. 16—Rule is not restrictive.*

Venkatasubba Rao, J.—There is nothing in O. 21, R. 16, prohibiting persons other than those mentioned in it from being treated as transferee decree-holders. [P.372, C.2]

(c) *Civil P. C., S. 60 (m)—Present gift with payment postponed creates vested interest.*

If a gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. If there is a present gift with a postponed payment, a vested interest is created. A stipulation that interest shall be given in the meantime shows that a present gift was intended. [P.373, C.2]

B. Sitarama Rao and *L. V. Krishnaswami Aiyar*—for Appellant.

K. Rajah Aiyar—for Respondents.

Venkatasubba Rao, J.—Before dealing with the questions of law raised, I shall briefly set forth the facts.

Lakshmanan Chetty entered into a partition with his coparceners under the deed of division, dated 9th February 1918. A sum of money fell to his share and this sum was retained under the terms of that deed with his brother Ramalinga Chetty. The appellant filed a suit for money (O. S. No. 495 of 1919) against Lakshmanan and attached before judgment the debt due to him under the partition deed. The appellant, on 3rd July 1919, obtained a decree in his suit. Lakshmanan, some time after this, filed a suit against Ramalinga (O. S. No. 772 of 1920) for recovery of the money due to him under the partition deed and obtained a decree. Lakshmanan and Ramalinga, within a month of this decree, entered into a settlement and Lakshmanan reported satisfaction which was recorded,

The decree was obtained by Lakshmanan in O. S. No. 772 of 1920 on the 2nd February 1921, satisfaction was entered on 2nd March 1921, and the appellant on 27th July 1921 applied to execute the decree in O. S. No. 772 of 1920.

The first question that has to be determined is: Can the appellant who has attached the debt, but who has failed to attach this decree, execute it as if he has attached the decree also?

The attachment of a debt is effected under O. 21, R. 46, Civil Procedure Code. It is made by a written order prohibiting the creditor from recovering the debt and the debtor from paying it. It is conceded that the attachment was in force on the date Ramalinga alleges he satisfied the decree by payment to Lakshmanan. Ramalinga, in making the payment, acted in contravention of the prohibitory order and Lakshmanan in receiving the debt was equally guilty of disobedience of that order.

Under S. 64, Civil Procedure Code, any payment to the judgment-debtor, contrary to the attachment, is void as against all claims enforceable under the attachment. For the appellant, Mr. B. Sitarama Rao, his learned vakil, contends that if it was incumbent upon him to follow up the attachment of the debt by attaching the decree, Ramalinga could successfully plead that his payment was not void against the attachment of the decree. In other

words, if the appellant could trace his rights to the attachment of the debt, the payment relied on by Ramalinga subsequent to that attachment would be void against it; but if the source of the appellant's title should be held to be attachment of the decree, Ramalinga could successfully rely upon the payment made prior to that attachment. To bring out the point of Mr. Sitarama Rao's contention I shall take an illustration. A attaches a debt due from C to B. Then B sues C and obtains a decree. On the same day as judgment is obtained C pays up the amount to B. If the right rule is that the decree must be attached A may be easily defeated; for even more than ordinary diligence on his part will not prevent B from receiving and C from paying the sum decreed.

The Civil Procedure Code does not contain a provision to the effect that the payment shall be void not only as against the later attachment of the decree, but also as against the prior attachment of the debt. To this extent there is a lacuna in the Code. But by a distinct provision the creditor is prohibited from paying the debt attached. In the circumstances, what is the reasonable view to take? I am prepared to hold that the attachment placed on the debt fastens itself on the decree without any further act on the part of the attaching creditor. The debt matures into and merges in the decree, and the attachment gets naturally transferred from the debt to the decree. Consistent with the policy and the provisions of the Code this, in my opinion, is the only reasonable view to take. It has been held by the Judicial Committee in *Beti Maharani* v. *Collector of Etawah* (1) that when a debt is attached a suit for its recovery is not stayed. The order of attachment is infringed only if the restrained debtor pays the debt to the restrained creditor, and it is pointed out that very often it may be desirable to institute a suit. Can the attaching creditor's rights be then defeated by the debtor converting the simple debt into a decree debt and receiving payment? The commonsense of the thing demands that this cannot be countenanced.

The appellant's learned vakil relies upon S. 146, Civil Procedure Code, which runs thus:

"Save as otherwise provided by this Code, or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him."

Lakshmana could apply to execute the decree. The appellant, as one claiming under him, could likewise execute it. This contention seems to me to be perfectly sound. The respondents' learned vakil urges that O. 21, R. 16 governs the case of a transferred decree-holder; that that provision is complete and self-contained and S. 146 cannot be invoked. I cannot accept this argument. Is there anything in O. 21, R. 16 prohibiting persons other than those mentioned in it from being treated as transferee decree-holders? It is only in that case that S. 146 will not apply by reason of the words "save as otherwise provided by this Code." To place a narrow construction on S. 146 will be to defeat the very object of that section. In the very nature of things, it is impossible to provide by express provision for every conceivable set of facts that may arise. It is just to meet this contingency that Ss. 146 and 151 have been enacted. I am against whittling down the scope of S. 146 by placing a too limited and narrow construction upon it. It must receive its full effect and I think the appellant can invoke it in the present instance.

The view I have taken receives strong support from *Muthia Chetty* v. *Govindoss Krishnadoss* (2). The point that had to be decided was: Could a transferee of a part of the decree execute it? It was contended that he could not, and for that position reliance was placed on O. 21, Rr. 15 and 16. The contention advanced may be put thus: R. 15 refers to a case of a decree passed jointly in favour of two or more persons. In that case, application for execution of the whole decree may be made by one or more of the joint decree-holders. Next. R. 16 provides for the transfer: (1) of an entire decree; and (2) of the interest of a decree-holder in a decree passed jointly in favour of two or more persons. It was argued that the transfer by a decree-holder of a part of a decree does not fall either under R. 15 or R. 16, and the transferee in that case could not

(1) [1895] 17 All. 198=22 I. A. 31=6 Sar. 551 (P. C.)

(2) [1921] 44 Mad. 919=(1921) M. W. N. 649=41 M. L. J. 316=14 L. W. 287 (F. B.).

therefore execute the decree. It need hardly be observed that this was a most unjust contention; the Full Bench holding that S. 146 was applicable rejected the argument. Wallis, C. J., observes that the section should receive a beneficial interpretation, and as execution by a transferee of a part of a decree is not prohibited by O. 21, R. 16, there is nothing to prevent S. 146 from receiving its full effect. With the observation of Kumaraswami Sastri, J., that the Courts ought not to refuse relief on the ground that the Legislature has not made provision for a particular case, I entirely agree.

I do not think it necessary to refer in detail to the cases cited for the respondent where the scope of S. 146 was restricted. *Mathurapore Zemindari Co.* v. *Bhasaram Mondal* (3) may be taken as representing a class of cases. But this may be easily distinguished as what was assigned was property in the suit previous to the decree. In *Shib Charan* v. *Ram Chandar* (4), which may also serve as a type, there was a transfer of the property subsequent to the decree and it was held that the transferee could not invoke S. 146. This case also is distinguished from the present. But I must dissent very respectfully from the observations made in it in regard to the effect to be given to S. 146. It will be moreover apparent that in the various cases relied on by the respondent (of which these two are typical) the transferee could have safeguarded his position by taking appropriate proceedings under the provisions of the Code. But in the present instance, this element is wanting, and in my opinion this makes a very great difference.

I, therefore, hold that the appellant can rely upon S. 146. Two minor contentions I may now dispose of. First, it is argued that as Lakshmana who certified that the decree was satisfied could not execute it, the appellant could have no higher rights under S. 146. This argument is based upon a misapprehension. The appellant claims under Laksnmana in the sense that he acquired Lakshmanan's rights on the date of the decree. As I have remarked, the simple debt became merged in the decree debt, and the moment the decree was passed the attachment of the debt became automatically converted into attachment of the decree, and any dealing by Lakshmanan will not in consequence be of any avail.

The other contention has reference to certain facts which I have not so far mentioned. Lakshmanan, previous to filing the suit (No. 772 of 1920) against Ramalinga for the recovery of the corpus, had instituted against him a suit for the interest on the debt. This suit was O. S. No. 231 of 1919 and was decreed on 16th December 1919. The appellant attached this decree and realized on 27th July 1920 about a tenth of the amount due to him. It is urged that the rights under the original attachment of the debt became thus exhausted and the appellant rendered himself incapable to pursue further remedies. This argument is untenable as what was attached was the entire debt and the recovery of a portion cannot bar the recovery of the balance.

Then remains one of the main contentions raised, namely, that the attachment is void as Lakshmanan had only a contingent interest in the sum attached and S. 60, sub-Cl. (*m*), Civil Procedure Code, declares such an interest not liable to attachment. Whether Lakshmanan took a vested or a contingent interest is a question of intention, and on a construction of the partition deed I find no difficulty in holding that his interest was vested. It recites that the sum fell to Lakshmanan's share, but is to be retained by Ramalinga who is bound to pay it over to the former at his marriage. Ramalinga cannot in the meantime alienate his property and is enjoined to pay Lakshmanan interest at a rate fixed.

It is a well-known rule of construction that if the gift and direction as to payment are distinct, the direction as to the time of payment does not postpone the vesting. The question is: Are there words constituting a gift independent of the direction to pay? If there are, the interest is a vested interest. In the deed in question, there is a present gift with a postponed payment and a vested interest is thus created: Bartholomew's Trusts (1 Mac & C 354 Re Hart's Trusts 3 De G & J 195 at 202; Hawkins' Wills, 2nd Edn., 1912, p. 270 at 272). A stipulation that interest shall be given in the meantime shows that a present gift was intended. A bequest to A, to be paid on his marriage with a clause that interest shall be paid till then, is vested:

(3) A. I. R. 1924 Cal. 661.
(4) A. I. R. 1922 All. 98.

Vize v. *Stoney* (5). The result is that the last contention also fails.

My learned brother thinks that the attachment of the debt cannot become automatically transferred into an attachment of the decree. Although we take different views on this point our conclusions do not materially differ. According to my view, attachment of the decree in the circumstances is not essential; according to my learned brother's view, this attachment cannot be dispensed with; but neither the alleged payment by Ramalinga nor the order of the Court recording satisfaction is an obstacle in the way of the appellant executing the decree. On the point, namely, whether the appellant, if he relies as a source of his title upon the attachment of the decree, can ignore a payment made prior to that attachment, I would prefer to express no opinion at present. Although we give different reasons for our conclusions, we are agreed that the appellant has not lost his remedy and that he is not bound by the alleged payment or the recording of satisfaction. I have, therefore, no objection to the appellant being directed to amend his execution petition by asking for attachment of the decree, and I accordingly agree to the order being in the terms suggested in my learned brother's judgment.

Reilley, J.—I agree that Lakshmanan Chetti's interest in the Rs. 1,233, to which he was entitled under the partition-deed, Ex. III, was a vested interest and not a contingent interest, and it was attachable under S. 60, Civil Procedure Code, and R. 6 of O. 38, Civil Procedure Code, on 17th June 1919, as a debt due to him, though on that date he could not enforce payment of it. But with great respect I find myself unable to agree that the appellant was entitled on the strength of his attachment before judgment to execute the decree for that amount which Lakshmanan Chetti afterwards obtained in O. S. No. 772 of 1920 on the District Munsif's file without attaching that decree.

My view of the position in this case is as follows: The appellant instituted O. S. No. 495 of 1919 on the District Munsif's file, a suit for money, against Lakshmanan Chetti (Respondent 1) and on 17th June 1919, obtained in that suit an attachment before judgment of the debt due to Lakshmanan Chetti from his brother, Ramalinga Chetti (Respondent 2), under Ex. III. The attachment order is not before us; but it is admitted that it was in the usual form, prohibiting Lakshmanan Chetti from recovering the Rs. 1,233 or the interest on it and Ramalinga Chetti from paying that amount or the interest on it until the further order of the Court. On 3rd January 1920, the appellant obtained a decree in his suit against Lakshmanan Chetti for Rs. 624. It is not disputed that the attachment order prohibiting Lakshmanan Chetti and Ramalinga Chetti from recovering and paying the debt respectively was not affected by that decree but remained in full force after the making of that decree. Meanwhile Lakshmanan Chetti, who had filed O. S. No. 231 of 1919 against Ramalinga Chetti for the whole debt due to him under Ex. III, had, on 16th December 1919, obtained decree in that suit only for the interest on the principal amount, his claim for the principal amount being dismissed as premature on the ground that he had not then been married and, therefore, had not fulfilled the condition on which the principal was to become payable. The appellant's attachment before judgment did not prevent Lakshmanan Chetti from prosecuting that suit to a decree; but it did prohibit him from recovering any amount under his decree. The appellant then attached in execution of his own decree the decree for interest which Lakshmanan Chetti had obtained in O S. No. 231 of 1919, executed the latter decree under R. 53 of O. 21, Civil Procedure Code, and realized the amount due under it, Rs. 68-4-0, from Ramalinga Chetti. It has been suggested before us for Ramalinga Chetti that the execution of this decree of Lakshmanan Chetti against him for the interest, so far due on the Rs. 1,233 somehow extinguished the appellant's attachment before judgment of the whole debt. I agree that that could not be so and that the order prohibiting Lakshmanan Chetti from recovering and Ramalinga Chetti from paying the debt persisted after the execution by the appellant of Lakshmanan Chetti's decree in O. S. No. 231 of 1919. Later on Lakshmanan Chetti fulfilled the condition of marriage and instituted another suit, O. S. No. 772 of 1920, on the District Munsif's file, against Ramalinga Chetti for the principal amount of Rs. 1,233 and

(5) 1 Dr. and War. 337.

the interest on it not so far recovered. That he was entitled to do in spite of the appellant's attachment before judgment; and he obtained a decree for the whole amount claimed and costs on 2nd February 1921. That decree the appellant could have attached and executed under R. 53 of O. 21, as he had already attached and executed the decree in Lakshmanan Chetti's previous suit, O. S. No. 231 of 1919. But before he bestirred himself to do so, Lakshmanan Chetti, on 22nd February 1921, took out an arrest warrant against Ramalinga Chetti, who appears to have been arrested under it. On 2nd March 1921, Lakshmanan Chetti reported to the Court that Ramalinga Chetti had paid the full amount of the decree to him, and the District Munsif recorded full satisfaction. On 27th July 1921, the appellant applied for permission to execute under R. 16 of O. 21, Civil Procedure Code, Lakshmanan Chetti's decree against Ramalinga Chetti in O. S. No. 772 of 1920. That is the petition against the dismissal of which, after confirmation of the dismissal by the Subordinate Judge, the present appeal is preferred.

The appellant claimed to execute the decree under R. 16 of O. 21. He did not attach Lakshmanan Chetti's decree under R. 53 of O. 21, and in explanation of his failure to do so it is suggested that he could not do so because the recording of satisfaction on 2nd March 1921, stood in his way. I may remark that, if the recording of satisfaction stood in the way of his attaching the decree in July 1921, it equally stood in the way of the appellant executing the decree as a transferee under R. 16 of O. 21. But I cannot see that the recording of satisfaction was a bar to execution of the decree by the appellant. There is nothing sacrosanct about the recording of satisfaction. As between Lakshmanan Chetti and Ramalinga Chetti the admission of Lakshmanan Cheti that he has received the full amount of the decree may be conclusive. So far as the purposes of the Court are concerned, the recording of satisfaction is a mere matter of office business, a note that those proceedings are closed. In my opinion it cannot be supposed for a moment that by settling the decree between themselves, and getting the Court to record satisfaction as between them, Lakshmanan Chetti and Ramalinga Chetti were able to defeat the rights of third parties, still less that they were able by so doing to evade the prohibitory order against them, which was still in force. To allow them so to defeat the order obtained by the appellant would be to allow a clear abuse of the process of the Court and a clear fraud upon the Court. It is not disputed that the District Munsif recorded satisfaction in ignorance of the appellant's attachment before judgment, which was not brought to his notice. Even between the parties to a decree an order recording satisfaction which has been obtained by fraud may be vacated: [see *Paranjpe* v. *Kanade* (6) and *Vilakathala Raman* v. *Vayalil Pachu* (7)]. As stated in *Syed Tuffuzzool Husain Khan* v. *Raghunath Pershad* (8), which was quoted before us for another purpose, "to proceed so far as the practice of his Court will allow him to recall and cancel an invalid order is not simply permitted to, but is the duty of a Judge who should always be vigilant not to allow the act of the Court itself to do wrong to the suitor." That principle is now clearly recognized in S. 151, Civil Procedure Code. In my opinion, had the appellant in July 1921, applied for the attachment of Lakshmanan Chetti's decree in O S. No. 772 of 1920, and had Ramalinga Chetti then objected that he had already satisfied the decree by payment to Lakshmanan Chetti, the answer would have been that that payment made in defiance of the prohibitory order obtained by the appellant and still in force, could affect the appellant in no way; and, if it had been further objected that the formal order of the District Munsif made on 2nd March 1921, recording satisfaction of the decree stood in the appellant's way—an objection of which personally I see of very little force—it would obviously have been within the District Munsif's power under S. 151, Civil Procedure Code, to cancel that order. In my view the proper course for the appellant in July 1921, was to attach the decree in O. S. No. 772 of 1920 under R. 53 of O. 21 and proceed to execute it against Ramalinga Chetti, who could have raised no effective bar to his doing so. Section 64, Civil Procedure Code, would not perhaps have been applicable, as the appellant would not have been enforcing his decree

(6) [1882] 6 Bom. 148.
(7) [1914] 27 M. L. J. 172.
(8) [1871] 14 M. I. A. 40=7 B. L. R. 186=2 Suther. 434=2 Sar. 656 (P. C.).

under his original attachment before judgment, but under his attachment of the decree itself. But, as the satisfaction of the decree by Ramalinga Chetti could not have been pleaded successfully against the appellant, the road to the execution of the decree by the ordinary procedure of attaching it would have been open to him.

It has been contended before us that it was unnecessary for the appellant to attach Lakshmanan Chetti's decree on the debt in O. S. No. 772 of 1920 because on the making of that decree the appellant's original attachment of the debt in some way developed into an attachment of the decree. With respect I am unable to accept the contention. Attachments in execution or before judgment are in their nature merely means of getting the property concerned into the control of the Court and of restraining the party against whom they are directed from transferring, delivering, changing or destroying the property. By special provisions in R. 53 of O. 21 an attachment in execution of any of certain special classes of decrees—not all decrees—carries with it a special privilege, namely, the right to execute the decree attached. This is a peculiar privilege, in itself quite foreign to the idea of attachment and given only by special provisions. Unless those special provisions are complied with, I do not understand how that special privilege can be acquired. In the present case what the appellant got when the debt was attached at his instance was an order prohibiting Lakshmanan Chetti from recovering it and Ramalinga Chetti from paying it. He acquired by that order no right to sue on the debt or to collect it or to give a valid discharge of it. How can the prohibitory order which he obtained grow or ripen into or be converted into something quite different, namely, the right to execute a decree obtained on the debt? It appears to me that that is impossible without some provision of law to that effect. The special privilege of executing Lakshmanan Chetti's decree—it is something quite different in nature and effect from the prohibitory order—was, in my view open to the appellant only if he took, as he could have taken, the special step necessary for obtaining that privilege, namely, the attachment of the decree. Incidentally I may point out as a minor difficulty in the theory that the attachment of the debt automatically develops into the attachment of any decree in that debt that the decree in most cases includes an amount for costs to which the attachment of the debt itselt cannot apply. In the present case the costs awarded to Lakshmanan Chetti by the decree in O. S. No. 772 of 1920 were considerable.

I do not think it necessary to consider in this case the question whether the appellant should be regarded as "claiming under" Lakshmanan Chetti in any sense within the meaning of S. 146, Civil Procedure Code. As the case appears to me, the appellant might have proceeded under the definite provisions of R. 53 of O. 21, and it therefore is unnecessary—and indeed impossible—for him to call in aid for his present purpose the provisions of S. 146. Similarly the appellant is, in my view, mistaken in attempting to represent that he is in any sense a transferee of Lakshmanan Chetti's decree under R. 16 of O. 21 instead of claiming his right to attach that decree and then execute it. If I may say so the appellant, in attempting to make use of S. 146 and R. 16 of O. 21, in this case appears to be taking a very circuitous route to get round an obstacle which does not really lie in his path or which at the worst would crumble at a touch, namely the District Munsif's order recording satisfaction.

I do not think that the appellant's petition under appeal should have been dismissed. The proper course would have been to allow him to amend it by adding a prayer for the attachment of the decree in O. S. No. 772 of 1920. I agree that the present appeal should be allowed with costs, that the dismissal of the appellant's execution petition should be set aside and that the petition should be remanded to the District Munsif for fresh disposal; but I would add a direction that the District Munsif should allow the appellant to add a prayer for the attachment of Lakshmanan Chetti's decree in O. S. No 772 of 1920.

Appeal allowed.

* A. I. R. 1926 Madras 377

VISVANATHA SASTRI, J.

(Vaddadi) Butchiraju and *others*—Appellants.

v.

Doddi Seetharamayya and *others*—Respondents.

Second Appeal No. 327 of 1923, Decided on 5th October 1925, from the decree of the Addl. Sub-J., Vizagapatam, in A. S. Nos. 196 and 198 of 1922.

(a) *Inam—Mortgage—Land unenfranchised—Mortgagee remaining in possession over 12 years becomes usufructuary and as such can be redeemed—Original character is not changed by subsequent assertion of absolute purchase which is invalid.*

Where unenfranchised land is mortgaged and the mortgagee remains in possession for over 12 years, he acquires by prescription the right of a usufructuary mortgagee and is liable to be redeemed as such ; and the taking of a sale in discharge of the mortgage does not alter the nature of the possession of the mortgagee when the alleged purchase is not valid : 44 *Mad.* 946 ; 14 *Bom.* 279 and 14 *Mad.* 38, *Rel. on.*

[P. 377, C. 2]

* (b) *Right of suit—Right maturing during suit—Relief should be granted.*

Where a suit is premature on the day it is filed but it matures subsequently before final disposal, grant of relief should not be refused : 7 *L. W.* 403 ; 40 *Mad.* 308 (*F. B.*) ; 34 *M. L. J.* 258, *Appl.*

[P. 377, C. 2]

Y. Suryanarayana—for Appellants.

B. Satyanarayana—for Respondents.

Judgment.—The suit was for the recovery of lands which originally formed karnam service inam, and which has first been mortgaged and subsequently sold by the karnam to Defendants 1 and 2. The 3rd plaintiff is the karnam and Plaintiffs 1 and 2 are his sons. The mortgage (usufructuary) was under Exhibit II on 3—7—1907 ; and the sale was under Exhibit I on 5—4—1910. The inam was enfranchised in April 1911. The District Munsiff held that the alienations having been made before enfranchisement were invalid, that the defendants had, on the date of the suit (3—7—1920) prescribed for a mortgagee's interest ; and that plaintiffs were entitled to possession on payment of Rs. 700, Rs. 800 and Rs. 1,000 or Rs. 1,600. Both sides appealed, the appeal by plaintiffs relating to their liability to pay Rs. 1,600 before getting possession. The learned Subordinate Judge held that defendants had prescribed only for a mortgagee's interest ; and that plaintiffs were entitled only to redem as per the terms of Exhibit II. And for the reason that Exhibit II allowed 15 years for payment, he held that the suit filed on 3—6—1920 was premature, and, allowing the appeal, dismissed the suit.

It was contended before me that the sale was in discharge of the mortgage ; that on the date of the sale the mortgage had become extinguished ; that consequently defendants could have prescribed only for vendees' interest ; and that as the suit was filed within 12 years from the date of the sale, it was not premature.

It was held in *Sontyana Gopala Dasu* v. *Inapatalupula Rami* (1) that where unenfranchised land is mortgaged and the mortgagee remains in possession for over 12 years, he acquires by prescription the right of a usufructuary mortgagee and is liable to be redeemed as such. The question is whether the taking of a sale in discharge of the mortgage alters the nature of the possession of the mortgagee. I am of opinion that the original character of the possession as mortgagee is not changed by an assertion of an absolute purchase of the property when the alleged purchase is not valid : see *Bhagwant Govind* v. *Kondi* (2) ; *Byari* v. *Puttanna* (3).

The rights of the parties have therefore to be considered on the basis of Ex. II. Under it the sum secured was payable in 15 years from its date, and so the right to redeem accrued only on 3—7—1922. It was urged before me that the Court could take into consideration the circumstances prevailing on the date of the decree and decide accordingly. In support of this contention reliance was placed on *Raghavachariar* v. *Srinivasa Raghavachariar* (4) and *Duraiswamy Pillai* v. *Chinniah Goundan* (5). These and other cases have been referred to by the learned Subordinate Judge and there can be no doubt, as observed by him, that although a sum of money has not become payable on the date of the suit, but became payable since, the Court can pass a decree for its recovery : see

(1) [1921] 44 Mad. 946=41 M. L. J. 194=(1921) M. W. N. 385.
(2) [1890] 14 Bom. 279.
(3) [1891] 14 Mad. 38.
(4) [1916] 40 Mad. 308=31 M. L. J. 575=20 M. L. T. 407=(1916) 2 M.W.N. 363 (F. B.).
(5) [1918] 34 M. L. J. 258=7 L. W. 335=(1918) M. W. N. 89=22 M. L. T. 538.

Subbraya Chetty v. *Nachiar Ammal* (6). But the learned Subordinate Judge has refused to apply this principle on the ground that by the time the claim for redemption matured, i. e., on 3—7—1922, the defendants had prescribed for a vendees' title on foot of their sale-deed, Ex. 1, of the date 5—4—1910. I am unable to accede to this view. The sale being void, and possession having commenced under the mortgage deed, defendants prescribed only for a mortgagee's right even after the sale-deed came into existence. It has never been held that they could prescribe for mortgagee's right under Ex. II and for a vendee's right under Ex. I. Such being the case there can be no question of their having fully prescribed for a vendee's right on 3—7—1922.

I, therefore, allow the appeal and setting aside the decree of the lower appellate Court, restore the decree of the District Munsiff with costs both here and in the lower appellate Court.

Appeal allowed.

(6) [1918] 7 L. W. 403=(1918) M. W. N. 199.

A. I. R. 1926 Madras 378

PHILLIPS, J.

Sinnanna Kone and *others*—Defendants 3, 6 to 12—Appellants.

v.

Muthupalani Chetti and *another*—Plaintiff & Defendant 1—Respondents.

Second Appeal No. 1413 of 1922, Decided on 17th April 1925, against a decree of the 2nd Addl. Sub-J., Madura, in A. S. No. 93 of 1921.

Civil P. C., S. 11—Decrees in connected suits—One decree appealed against—Decree not appealed from is not res judicata.

Where in two connected suits tried and decided together an appeal is filed against one decree but not against the other, the decree not appealed against is not res judicata and so does not affect the hearing of the appeal against the other decree: 29 *Mad.* 333, *Foll.*; *A. I. R.* 1923 *P. C.* 167, *Dist.* [P 378 C 2]

T. L. Venkatarama Iyer—for Appellants.

K. V. Sesha Iyengar—for Respondents.

Judgment.—The appellants set up a peculiar custom in their community that widows and daughters were excluded by the reversioners of the last male member of a family and this custom has been found by the lower appellate Court not to have been proved.

The finding is objected to on the ground that it is bad in law, but I have not been referred to any statement in the judgment in which the law has been wrongly propounded and the arguments here have mainly been directed to showing that adequate weight has not been attached by the learned Subordinate Judge to certain portions of the evidence. It is also contended that two important statements made by the plaintiff's witnesses have not been considered at all. The evidence of these witnesses has been dealt with by the Subordinate Judge and there is nothing so vital in these so-called admissions as to make it obligatory on the Subordinate Judge to deal with them in greater detail. The whole of the evidence is oral although the custom is said to be one which is in accordance with the law which prevailed before the present system of Hindu Law came into being and consequently must have been in existence for an incredibly long period. The Judge, therefore, rightly relies on the argument that notwithstanding this fact, there is no documentary evidence to support the custom. Certain documents are alleged to be in existence which have not been produced and the appellants rely entirely on oral evidence. The Subordinate Judge has found that to be totally inadequate and I see no reason to differ from his conclusion. An attempt is made to support the custom by a statement in the District Gazetteer where similar custom in this community is referred to, but the custom there set out is not in accordance with the custom pleaded in this case and therefore, does not at all corroborate the existence of the custom pleaded. I see no reason for not accepting this finding of the Subordinate Judge and, therefore, confirm it.

A further point is argued namely, that the question at issue in this appeal was res judicata because in a connected suit tried with this one and decided at the same time no appeal was preferred. This question has been expressly decided by a Full Bench of this Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (1) and I am bound by that decision. It is argued that that decision has been overruled by the Privy Council decision in *Bommade-*

(1) [1906] 29 Mad. 333=16 M. L. J. 63.

vara Naganna Naidu Bahadur v. *Ravi Venkatrppayya* (2). I have already considered this point in a previous case, Second Appeal No. 1623 of 1922, where I came to the conclusion that *Panchanada Velan* v. *Vaithinatha Sastrial* (1) was not expressly overruled and I am still of the same opinion. Applying *Panchanada Velan* v. *Vaithinatha Sastrial* (1) the Subordinate Judge is right in hearing this appeal and deciding it on the merits.

The second appeal is, therefore, dismissed with costs.

Appeal dismissed.

(2) A. I. R. 1923 P. C. 167.

A. I. R. 1926 Madras 379

KRISHNAN, J.

Marappa Goundan—Defendant No. 3—Petitioner.

v.

V. Subramania Iyer and *others*—Plaintiffs and Defendant No. 2—Opposite Party.

Civil Revision Petition No. 929 of 1924, Decided on 27th April 1925, from an order of the Dist. Munsif. Gobichettipalyam, in I. A. No. 486 of 1924.

Civil P. C., O. 22. R. 4—Abatement of suit as a whole or in part depends upon the necessity of the deceased party's presence or absence.

Where one of the defendants dies during the pendency of a suit, the decision on the question whether whole suit abates, or it abates only as to that defendant, would depend upon the question whether the deceased person was such a necessary party that his absence from the record should lead to the dismissal of the suit itself: *A. I. R.* 1924 *Cal.* 399, *Dist.* [P 380 C 1]

T. M. Krishnaswami Iyer—for Petitioner.

S. S. Ramachandra Iyer—for Opposite Party.

Judgment.—This is an application to revise an order passed by the District Munsif of Gobichettipalayam in O. S. No. 1162 of 1922. The suit was brought by the plaintiffs for the recovery of a half share of the suit property on payment of Rs. 30, their share of the mortgage amount, with mesne profits, from the defendants. There were originally three defendants. The property had been sold by the 1st defendant to Defendants Nos. 2 and 3 long prior to suit. The 1st and 2nd defendants remained ex parte and the 3rd defendant appeared and pleaded that the 1st defendant was entitled to sell and that the plaintiffs had no share and that the suit ought to be dismissed At the trial the Munsif held that the plaintiff's claim for a half share in the property was well-founded and gave a decree against all the defendants for partition of the property into two equal shares, and for plaintiffs being put into possession of one of such shares on their paying Rs. 30. It was also decreed that defendants do pay plaintiffs pas mesne profits and future mesne profits for a period of three years. Against this decree, the 3rd defendant put in an appeal to the District Judge. But, som time after the decree was passed, plaintiffs discovered that the 1st defendant had died five days prior to the date of the decree. Apprehending, therefore, that some difficulty might arise, so far as the claim against the 1st defendant was concerned in the case, they put in an application to have the legal representative brought on record and the case re-opened by the Munsif. The District Munsif accepting the plaintiff's explanation for not being aware of the death of the 1st defendant, allowed their petition and set aside the whole decree and re-opened the case not only as against 1st defendant's legal representatives but also against Defendants Nos. 2 and 3. The 1st and 2nd defendants were originally ex parte in the case. The 3rd defendant was alone contesting the case, and it is he who has come up here in revision and objects to the case being re-opened as against him for the purposes to get what relief he can by his appeal to the District Judge. If the order as to re-opening the case against all the defendants were to stand, he will have to wait till after the case is disposed of again and file a fresh appeal. It seems to me that the Munsif's order setting aside the decree against all the defendants cannot be supported. The property had passed to Defendants Nos. 2 and 3 by the sale by 1st defendant. That being so, the 1st defendant was not interested at all in the suit, so far as the claim for possession of the half share in the property is concerned. The only claim in which he might have been interested is the claim for mesne profits; for the Munsif has passed a decree against all the defendants jointly for mesne

profits. That is a matter in which it cannot be said that the defendants are so jointly interested that the absolving of one of them from liability to pay mesne profits would necessarily absolve the other defendants also. There is no connexion between the case of the 2nd and 3rd defendants and that of the 1st defendant. I am of opinion that the order of the Munsif setting aside the decree originally passed against Defendants Nos. 2 and 3, as well as against 1st defendant, cannot stand; that he ought not to have set aside the decree against Defendants Nos. 2 and 3 at all and that he ought to have done so only against 1st defendant. There is no fear of any conflicting decision in this case. There are circumstances where such conflicts cannot be avoided. But those circumstances do not justify the re-opening of a case against all the defendants. Some cases have been cited before me from the Indian Cases, namely, *Balaram Pal* v. *Kanysha Majhi* (1), *Kali Dayal* v. *Nagendra Nath* (2) and *Sheikh Dendoo* v. *Sheikh Sachoo* (3). The decision in *Kali Dayal* v. *Nagendra Nath* (2), I think, puts the matter correctly and I am prepared to adopt the view taken there. I am not prepared to agree with the ruling in *Sheikh Dendoo* v. *Sheikh Sachoo* (3), which seems to imply that in every appeal, if a respondent dies and no legal representative is brought on record, the appeal abates. I think the abatement of the whole appeal would depend upon the question whether the deceased person was such a necessary party that his absence from the record should lead to the dismissal of the appeal itself. In these circumstances, I must set aside the order of the District Munsif, so far as he allows the case to be re-opened against Defendants No. 2 and 3, and direct him to proceed with a fresh trial only as regards the legal representative of the 1st defendant.

The petitioner will have his costs in the High Court against the plaintiffs, but I do not interfere with the order passed in the lower Court as to costs.

Order partly set aside.

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(1) [1919] 53 I. C. 548.
(2) [1920] 24 C. W. N. 44=30 C. L. J. 217.
(3) A. I. R. 1924 Cal. 399.

A. I. R. 1926 Madras 380

JACKSON, J.

M. R. M. Ramasawmy Chetty—Petitioner.

v.

V. S. Chengalroya Pillai— Opposite Party.

Criminal Revision No. 18 of 1925, Decided on 9th September 1925, from the judgment of the 2nd Presidency Mag., George Town, Madras, in C. C. No. 20052 of 1924.

Companies Act (7 *of* 1913), *S.* 104 (*b*)—*Ratification by Board of Directors is not a contract within S.* 104 (*b*).

Ratification of previous contract with vendors of business by the Board of Directors cannot be described as a contract in writing constituting the title of the allottee within the meaning of S. 104 (b). [P. 380, C. 2]

V. L. Ethiraj—for Petitioner.

V. Rajagopalachari—for the Crown.

Order.—Petition to revise the judgment and sentence of the 2nd Presidency Magistrate in C. C. 20052 of 1924.

The petitioner sold his business to certain persons under a contract dated 1st October 1922. On 7th October 1922 these persons registered themselves as a company. The company furnished a return of allotment of shares under S. 104, Act 7 of 1913. The Registrar acting under S. 104 (B) called for the contract in writing entitling the vendor of the business to certain shares allotted otherwise than in cash. The petitioner thought that the contract entered into before the company was registered would be sufficient; but the Registrar demanded a contract entered into by the company, and since such a contract was not in writing he called for prescribed particulars under S. 104 (2). Instead of furnishing these duly stamped the petitioner produced the previous contract ratified at a meeting of the directors. The Registrar held that this was not a compliance with his demand, and prosecuted the petitioner under S. 104 (3). He has been fined Rs. 100. Hence the petition. I do not think that this ratification by the Board of Directors can be described as a contract in writing constituting the title of the allottee and in the absence of any such contract in writing the petitioner was bound to furnish the prescribed particulars duly stamped. There is therefore no ground for revision. The petition is dismissed.

Petition dismissed.

A. I. R. 1926 Madras 381

PHILLIPS, J.

P. S. Kesavalu Naicker—Defendant—Appellant.

v.

Corporation of Madras — Plaintiff — Respondent.

City Civil Court Appeal No. 22 of 1924, Decided on 9th October 1925, from the decree of the City Civil Court, Madras, in Original Suit No. 68 of 1923.

(a) *Madras City Municipal Act* (4 *of* 1919), *S.* 226—*Section does not apply to licenses for keeping ice depot.*

S. 226 deals with temporary obstructions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licenses for keeping an ice depot.

[P. 382, C. 1]

(b) *Madras City Tenants Protection Act* (3 *of* 1922), *S.* 2 (4)—*Tenant is a tenant though he accepts license from Corporation in absence of evidence that he agreed to be licensee.*

In the absence of evidence that a tenant who held the land as tenant for many years agreed to be a mere licensee, the mere issue of licenses under the Municipal Act would not be sufficient material to raise a presumption of a change in the nature of his possession. [P. 382, C. 2]

(c) *Madras City Tenants Protection Act* (3 *of* 1922), *S.* 2 (4)—*Person building pucca structure must be presumed to hope that he will not be evicted.*

When a man has spent a considerable sum of money in erecting a pucca masonry building on another's land, there is a legitimate inference to be drawn, that he did so in the hope that he would not be evicted, an inference, which may be rebutted by other circumstances, which show that he could not have had such a hope.

[P. 383, C. 1]

(d) *Interpretation of Statutes—Provisions must supersede intention of Legislature—Words should be given natural meaning.*

When the Legislature passes an enactment, its provisions must be looked to rather than the intention of the Legislature as revealed in the discussion which preceded the passing of the Act. It is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act.

[P. 382 C. 2 ; P. 383, C. 1]

K. Duraiswami Aiyangar—for Appellant.

S. Rangaswami Aiyangar—for Respondent.

Judgment.—In this case the facts are as follows: The defendant's uncle, Muthuswami Naicker, put up the building in suit 48 years ago, on the roadside land in the Pantheon Road, for the purpose of selling aerated waters and ice. The building is a pucca masonry one and the plaintiff, Corporation of Madras, now wishes to eject the defendant, to whom the property was given by his uncle about 1908. The defendant obtained lease deeds for this property in 1908, 1911 and 1914 for a period of 3 years each. At the end of the last lease, the Corporation proposed to sell the right to occupy the building and site at auction and notice was issued on 18th April 1917, (Ex. IV). The defendant protested against this by a lawyer's notice (Ex. II) and put in a petition (Ex. III) on 30th April, 1917. As a result of this, a fresh lease for one year was granted to the defendant and this was renewed for a second year in 1918 for the year 1918-1919. When the new Municipal Act was passed, the Corporation seem to have thought that it could not grant a lease of the suit property and they proposed to auction the property and grant a license. On 21st February 1919, the date of the auction, no bidders turned up. On 24th February 1919, the defendant went to the Revenue Officer and agreed to pay a rent of Rs. 3-8-0 per mensem in respect of the suit land, and on 14th July 1919, the Corporation granted him the lease Ex. E-1. On 17th March 1920, a notice was issued by the Corporation, that the right of putting up a bunk on the suit site would be sold by auction. But as a matter of fact no auction appears to have taken place, and on 9th October 1920, the Corporation issued Ex. F, which purports to be a permit under S. 226 (1), Act 4 of 1919. Under this the defendant was permitted to occupy the suit site for the purpose of keeping an ice depot for one year. A similar permit was issued on 4th August 1921, for the year ending 31st March 1922. On 2nd March 1922, the Corporation again proposed to auction the site and then finally on 11th November 1922, the Corporation gave a notice to the defendant to quit. The defendant replied stating that he had held the land for a very long period and that he was entitled to compensation under the City Tenants' Protection Act.

The main question for consideration here is, whether the defendant is a tenant within the meaning of the Madras City Tenants' Protection Act. The learned City Civil Judge has found that he was not a tenant but merely a licensee. We see that up to 31st March 1920, the defendant had been obtaining leases from the

Corporation for the use of the site and was undoubtedly up to that time a tenant. It is suggested that for the year 1920 the Corporation had no power to grant a lease of the suit land as it comes within the definition of public street contained in the Act. Such public streets are vested in the Corporation and although the Corporation has not the full ownership in them yet they have a certain proprietary right in the soil, and this has been recognized in *S. Sundaram Ayyar* v. *Municipal Council of Madura* (1) in which it was held that the Corporation had a certain proprietary right in the soil of public streets. Under the new Municipal Act, of 1919 the Corporation is authorized to lease any Corporation immovable property and if the Corporation has a proprietary right in public streets to the extent of that right it can grant a lease, and even, if it had no right to grant a lease, I do not think the Corporation can now contend that the lease actually granted by them in 1919 was void as being prohibited by law. Up till March 1920, therefore, the defendant was a tenant. But it is contended for the respondents that by the mere fact of his accepting Exs. F and G the permits under S. 226 (1), he became a mere licensee. When we turn to S. 226 (1) we find that it deals with persons making holes and causing obstruction in the street, and provides that persons are forbidden to make holes or cause any obstruction in any street unless the consent of the Commissioner is obtained. Clause 2 prescribes that when such permission is granted such persons shall cause such holes or obstruction to be sufficiently fenced and enclosed, and shall cause such hole or obstruction to be sufficiently lighted during the night. It is not suggested that the plaintiff's building was in any sense an obstruction to the street, and the idea of allowing him to occupy it for the purpose of keeping an ice depot from year to year has no connexion with the provisions of S. 226. S. 226, deals with the temporary obstructions, which would be an offence unless permission is granted for making them. It has nothing whatever to do with giving licenses for keeping an ice depot. The defendant never even expressed his consent to be a licensee. He and his predecessor had been tenants of the Corporation for over 40 years and the mere fact that these extraordinary permits were issued to him and were not refused, cannot convert that tenancy into a holding by mere license. In the absence of evidence that the defendant agreed to be a mere licensee, I think that the mere issue of licenses would not be sufficient material to raise a presumption of a change in the nature of his possession which had for many years been that of a tenant. The present case, where the license is obviously a license which the Corporation has no power to issue in such form and in the circumstances that existed, is much stronger and the defendant must be deemed to have been holding on as a tenant after expiry of his last lease. Even on 10th April 19.0, he was treated by the Tahsildar as a tenant of the Corporation. No attempt was made to disturb his possession and his possession has all along been of the same nature. Whenever any change was proposed to be made, the defendant has protested and no change has actually been made in the nature of his possession. The question then arises whether the defendant is a tenant within the meaning of S. 2, Cl. (iv), Act 3 of 1922. That clause reads as follows :

" Tenant " means tenant of land liable to pay rent on it, every other person deriving title from him and includes persons who continue in possession after the termination of the tenancy."

The defendant certainly would seem to come within the definition. It is, however, argued that in order to understand this definition, which is not in itself an ambiguous, one must refer to the preamble of the Act which says :

" Whereas it is necessary to give protection to tenants who have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent."

The rule of construction is that the preamble of the Act may be referred to in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport ; but it is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act. In any case, I do not think, that in the present instance it can be said that the Act does not refer to persons in the position of the defendant Nor am I

(1) [1902] 25 Mad. 635 = 12 M. L. J. 3[illegible].

satisfied that defendant's position is not that contemplated by the preamble. It is difficult now to adduce evidence that the person who constructed the suit building 48 years ago did so in the hope that he would not be evicted. The oral evidence of the actual builder to that effect would not be of much value when given for the purpose of such a suit as this; but I think that, when a man has spent a considerable sum of money in erecting a pucca masonry building on another's land there is a legitimate inference to be drawn, that he did so in the hope that he would not be evicted, an inference, which may be rebutted by other circumstances, which show that he could not have had such a hope. In the present case there is something rather more than a mere inference; for, as the learned Judge points out "the defendant's predecessor-in-title apparently ventured upon a brick-built structure in view of the favour that he then enjoyed from very high officials who got ice from him" If he enjoyed the favour of high officials (possibly officials in the employ of the plaintiff Corporation) it is difficult to suppose that he spent his money without hoping that he would be allowed to reap the benefit of the expenditure. In that view the defendant would come within the meaning of the Act. It is urged that if the provisions of the Act are applied literally, the scope of the Act would be very materially widened beyond that expressed in the preamble. This may be so; but when the Legislature passes an enactment, its provisions must be looked to rather than the intention of that Legislature as revealed in the discussion which preceded the passing of the Act. Construing the Act as it stands, I must hold that the defendant is a tenant within the meaning of the Act and consequently under S. 3 is entitled on ejectment to be paid compensation for his building. He did make an application under S. 9, but that is not pressed. This is intelligible when we remember that the plaintiff Corporation is not the absolute owner of the plaint site, and consequently what the defendant could purchase under S. 9 is only the limited interest of his landlord. The suit will have to be remitted to the lower Court for investigation as to the value of defendant's superstructure and when that has been determined the decree will have to be modified by awarding that amount to the defendant as compensation. A finding as to the amount of compensation payable to be submitted within 3 weeks. Objections, 7 days. The defendant will have his costs of this appeal and costs of the lower Court will be provided for in the revised decree.

In compliance of the above order the City Civil Judge, Madras, submitted the following finding:

Finding.—This suit has been remanded for an enquiry as to the amount of compensation payable to the defendant in respect of the superstructure on the plaint site. As this required local inspection and investigation, the taking of measurements and finding out of values, I remitted the question with the consent of parties to a commissioner who has a great deal of experience in such matters, being the person most often entrusted with ascertainment of values in dispute between parties. He has submitted a report with full particulars as to measurements and values He assesses the present value of the superstructure at Rs. 468-15-0.

Both parties have filed objections. The defendant's principal objection, or at any rate the point argued before me, was that the ground rent charged by the Municipality for the suit super structure is Rs. 3-8-0; that the building itself will fetch a rent at least of Rs 8 and that if the said sum is capitalized his client would be entitled at least to Rs. 900. This method of arriving at value has been found by experience to be extremely unsafe in a city like Madras. It is within my experience that a pace of land 8 feet by 3 feet, on which a bunk is put up at an expenditure of say Rs. 0, fetches a rent of Rs. 8 or Rs. 10 per mensem. If the said sum was capitalized in the manner suggested by the defendant, the valuation of the structure would run up to Rs. 700 or Rs. 800. The rent charged in respect of a site depends upon its eligibility as a trade site and its suitability for the particular trade sought to be carried on and has no reference in most cases to the actual value of either the land or the superstructure erected thereon. The method adopted by the commissioner of finding out the different kinds of materials employed in the building, and then assessing them at their

present value, seems to me to be the most fair one as between the parties.

The plaintiff's main objection was that the defendant's building is a very old one ; that it is not plumb or straight from top to bottom ; that it had numerous cracks which had been recently concealed by colour washing ; and that the commissioner has not made any allowance for these defects. He further says that the Municipal Engineer has valued the building only at Rs. 200. I am not able to pay any serious attention to the valuation of the Municipal Engineer, which is, moreover, not on record, as the said Engineer has not been submitted to cross-examination, and after all the valuation can only be regarded as one suggested by one of the parties to the suit. I find that the commissioner has not suggested rates for a new building, but expressly admitted that it is an old building recently furnished up and makes allowance for its age and wear and tear. I submit a report to the effect that the structure put up by the defendant on public Municipal land is worth Rs. 468-15-0 and that he is entitled to compensation at that rate before he is evicted by the plaintiff. I may also add that the defendant took some time in order to ascertain whether the Commissioner of the Corporation would allow him to continue as tenant on Municipal land on the same terms as those on which he has been a tenant till recently. Apparently there was an agreement as to the terms, but as plaintiff wanted the entire cost of the suit negotiations appear to have fallen through. I mention this as this incident is responsible for the delay in submitting this report.

[The appeal came on for final hearing after the return of the finding before Phillips, J.]

Judgment.

The petitioner is not entitled to rental value, but only to the value of the building. The finding that it is worth Rupees 468-15-0 is, therefore, accepted and plaintiff will have a decree for possession of the land and superstructure on payment of this amount less the annual rental due by defendant up to date of delivering possession. Each side will bear his own costs in the lower Court. The time for delivery is one month.

Appeal allowed.

✻ A. I. R. 1926 Madras 384

COUTTS-TROTTER, C. J., AND VISWANATHA SASTRI, J.

(*Kommineni*) *Appalaswamy* and *another*—Plaintiffs—Appellants.

v.

Kommineni Simhadri Appadu and *others*—Defendants—Respondents.

Appeal No. 349 of 1922, Decided on 27th August 1925, from the decree of the Sub-J., Vizagapatam, in O. S. No. 46 of 1918.

✻ *Practice—Witness—Statements of opposite party as a witness is evidence on the part of the party calling him.*

There is no objection whatever to an advocate seeking to prove his case out of the mouth of the opposite party; but if he puts the opposite party into the box he takes the risk of making statements made by that witness part of his own evidence. [P. 151, C. 1]

P. Somasundaram—for Appellants.

V. Govindarajachari—for Respondents.

Coutts-Trotter, C. J. — This is a hopeless appeal and I do not desire to waste my words on it except on one matter. The onus was rightly found by the learned Subordinate Judge to be on the defendants ; accordingly they opened the proceedings and called evidence first. The defendants adopted the objectionable practice of calling the 1st plaintiff as their witness, objectionable for this reason, that they were obviously bound to follow it up, and it appears clearly from the judgment that they did follow it up, by asking the Judge to disbelieve and set aside all the evidence given by the 1st plaintiff. This practice has frequently been unfavourably commented upon by this Court and indeed also by the Privy Council. There is no objection whatever to an advocate seeking to prove his case out of the mouth of the opposite party ; but if he puts the opposite party into the box he takes the risk of making statements made by that witness part of his own evidence. It is possible that in a proper case the Court would be satisfied from the witness' demeanour that he was hostile and might in such circumstances even allow the advocate to cross-examine him ; but that very rarely happens. This course was adopted in this case apparently because the vakil said that he wanted to elicit some facts from this witness before he heard any

other evidence in the suit. He was evidently suspicious that the witness might improve upon facts in the light of any other evidence that might be adduced if he was not examined first. There is no warrant for any such procedure whatever and I regret that the Subordinate Judge permitted it to be done. But, in my opinion, in this particular case it cannot be allowed to affect the result because the answers the witness did give were sufficient in the opinion of the learned Judge, and sufficient in my opinion, to show that the whole of this story about an undivided family property is a concoction from start to finish. That is all I desire to say about this appeal which will be dismissed with costs.

Viswanatha Sastri, J.—I agree.

Appeal dismissed.

A. I. R. 1926 Madras 385

DEVADOSS AND WALLER, JJ.

(*Sree Rajah Vadrevu*) *Viswasundara Rao Bahadur*—Appellant.

v.

Vannam Paidigadu and *others*—Respondents.

Appeals Nos. 55, 130 and 70 of 1923, Decided on 24th July 1925, from the appellate orders of the Sub-J., Cocanada, in Appeals Nos. 27, 26 and 28 of 1922.

(a) *Limitation Act, Art.* 180—*Art.* 180 *applies to application by purchaser for delivery of possession and not Art.* 181.

Art. 180 is applicable to an application by the purchaser of immovable property of a sale in execution of a decree for delivery of possession and not Art. 181. There is no warrant for extending the period of limitation by applying Art. 181 to a case where, owing to the auction-purchaser's default, delivery could not be effected. *Opinion of Oldfield, J.*, in (1918) *M.W.N.* 214, *Foll.* and that *of Abdul Rahim, J., Diss.* [P 385 C 1, P 386 C 2]

(b) *Civil P. C. O.* 21, *R.* 95—*Court's duty.*

The Court is not bound under R. 95 to see that delivery is actually effected. [P 385 C 2]

K. Kameswara Rao—for Appellant.

P. Somasundaram and *Y. Gangaraju*—for Respondents.

Judgment.—The only point involved in this appeal is whether Art. 180 is applicable to an application by the purchaser of immovable property at a sale in execution of a decree for delivery of possession, or Art. 181.

The appellant purchased property in execution of a decree and the sale was confirmed on 29th June 1918. The application out of which the present appeal arises was made on 30th July 1921. Both the District Munsif and the Subordinate Judge have held that the appellant's application is barred by limitation under Art. 180 of the Indian Limitation Act. It is contended by Mr. Kameswara Rao before us that an application for execution was made in June 1920, and the District Munsif ordered that the property sold should be delivered to the purchaser and that this order was not carried out by the Court and therefore should be considered to be in force. He urges that when a Court passes an order for delivery it is the duty of the Court to see that the delivery takes place, and he relies upon the wording of O. 21, R. 95, and contends that the words "the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser, or any person whom he may appoint to receive delivery on his behalf, in possession of the property" lay upon the Court the duty to see that delivery takes place. O. 21, R. 95 makes it obligatory on the Court to make an order for delivery on an application by the purchaser. The Court is not bound to see that delivery is actually effected; for delivery may not take place notwithstanding the order of the Court by reason of a third person being in possession or by some resistance offered by a person entitled to object to delivery, or the delivery cannot take place owing to misdescription or wrong description or owing to the absence of the purchaser or his man. In this case the application of June 1920, was dismissed as the warrant of delivery was returned unexecuted as there was no one to take delivery. The contention that the order for delivery is in force till actual delivery takes place is not supported by the wording of O. 21, R. 95, or by any decided case. The contention that when an order for delivery is made that order is to remain in force till actual delivery takes place is tantamount to saying that an order for delivery is a decree which can be kept alive by periodical applications. To uphold this contention would be to apply Art. 182 to orders passed for delivery. Art. 180 is clear in its terms. It gives three years' time for making an

application for delivery of possession from the date when the sale becomes absolute. When there is a specific provision applicable to the case, it is not proper to overlook that article and apply Art. 181 of the Limitation Act which is a residuary article applicable to cases not provided for elsewhere in the First Schedule to the Limitation Act or by S. 48 of the Code of Civil Procedure.

There is only one reported decision of this Court on this point: *Nandur Subbayya* v. *Sri Venkataramayya Apparao Bahadur* (1), and the learned Judges who decided that case took different views on the question. Abdur Rahim, J., held that in a case like this Art. 181 is the proper article to apply. His view is that when an application for delivery of possession is made and the Court passes an order for delivery that order should be considered to be in force till actual delivery is effected, and he holds that if the Court wanted to dismiss the application it should give notice to the applicant to show cause why the order for delivery of possession should not be dismissed, and that if no notice is given to the auction-purchaser to show cause why his application should not be dismissed, the dismissal should be considered as shelving the petition for statistical purposes. Where the Court is unable to give effect to its order by reason of the absence of the petitioner, who is bound to be present in order to take delivery, or owing to causes over which he has control, it is not the duty of the Court to give notice to show cause why the petition should not be dismissed. It would be different if the delivery was obstructed by the judgment-debtor; if owing to anything that the judgment-debtor does, or owing to causes which are beyond the control of the auction-purchaser, the delivery is not effected; it may be said that the order for delivery remains in force and a subsequent application to execute that order is a valid application even if that application may be more than three years after the date of the sale being made absolute. Oldfield, J., took the view that Art. 180 was the proper Article applicable to the case. He observes at page 218:

"It has been recognized in a long series of cases: *Thakur Prasad* v. *Abul Hasan* (2), already referred to, that a decree-holder's proceedings can only be held to be legally continued when the interruption to them was not occasioned by any fault of his own but either by successful objection of a judgment-debtor, or a third party, or by some obstacle interposed by the Court."

With very great respect we are unable to follow the reasoning of Abdur Rahim, J., and we respectfully adopt the reasoning of Oldfield, J. Oldfield, J., and Bakewell, J., held in a similar case that Art. 180 was the proper article applicable to the case in C. M. S. A. No. 75 of 1916. The decision in *Jit Mal* v. *Jwala Prasad* (3) has no application to the present case. In that case the arrest of the judgment-debtor could not be effected as he concealed himself. It was held that the application was pending as the arrest could not be effected owing to the conduct of the judgment-debtor. But where owing to the default or laches of the auction-purchaser delivery of possession could not be effected, the Court would be justified in dismissing the application for delivery of possession even though an order for delivery has been made. Art. 180 was enacted in the Act of 1908 and the article is clear in its terms. There is no warrant for extending the period of limitation by applying Article 181 to a case where owing to the auction-purchaser's default delivery could not be effected. We hold that Art. 180 of the Limitation Act has been properly applied to the facts of the case and we dismiss this appeal with costs.

The point involved in C. M. A. No. 130 of 1923 is the same and the judgment in this appeal governs that case also. C. M. A. No. 130 is dismissed with costs for the reasons given in our Judgment in C. M. A. No. 55 of 1923. C. M. A. No. 70 of 1923 is dismissed without costs.

Appeals dismissed.

(1) [1918] M. W. N. 214=7 L. W. 16.
(2) [1900] 23 All. 13.
(3) [1899] 21 All. 155=(1899) A. W. N. 6.

A. I. R. 1926 Madras 386

ODGERS AND MADHAVAN NAIR, JJ.

P. T. Ramalinga Mudaliar—Appellant.

v.

Arunachala Mudaly and *others*—Respondents.

Letters Patent Appeal No. 137 of 1924, Decided on 29th September 1925, against the judgment of Devadoss, J., in C. C. C. A. No. 33 of 1922, D/- 22nd July 1924.

(a) T. P. Act, S. 60—Mortgages between 1858 and 1882—Equity of redemption must be recognised.

As to mortgages executed between the years 1858 and coming into force of the Transfer of Property Act in 1882 the equity of redemption which had been originally imported from the English Courts and enunciated by the Sudder Court in Madras must be recognized: 1 *Mad.* 1, *Foll.* [P.387,C.2]

(b) T. P. Act, S. 58—Mortgage merging into sale—Mortgagor undertaking repayment within fixed period covenanting to convert the mortgage into sale if it is not repaid by the period fixed —Some other transaction must be proved dehors to relinquish equity of redemption.

Where a mortgagor undertook to repay the mortgaged amount within a certain period together with interest thereon and in default of such payment the mortgagee was to treat the mortgage as an absolute sale and enjoy together with rights to water, trees, minerals, etc., therein from generation to generation so long as the sun and moon exist and with power of alienation by way of gift, exchange or sale:

Held: that there must be some transaction proved *dehors* the document before the Court can be satisfied that the equity of redemption had been relinquished or disposed of by the mortgagor. [P.387,C.1,2]

S. Krishnamurthy Aiyar—for Appellant.

S. T. Srinivasagopalachari—for Respondents.

Judgment.—This is an appeal from the judgment of Mr. Justice Devadoss confirming the judgment of the Judge of the City Civil Court. On the 18th June 1862, one Mannappa Mudaliar mortgaged a cawnie of land situated in Perambur in this city to Velayuda Mudaliar for Rs. 50. By the document of mortgage, Ex. B, he undertook to repay this sum within the end of February 1870 together with interest thereon at Rs. 2 per cent. per mensem. "In default of such payment you are to treat this itself as an absolute sale and enjoy together with rights to water, trees, minerals, etc., therein from generation to generation so long as the sun and moon exist and with powers of alienation by way of gift, exchange or sale." At the end of 1920 the grandson of Mannappa Mudali, the present plaintiff brought a suit in the City Civil Court to redeem this property which had been unquestionably and admittedly in the possession of the mortgagee and his descendants since some time in 1870. The exact time may become important and it will be considered by and by. So that the plaintiff about 50 years after the execution of this mortgage is now coming to redeem a piece of land said in 1870 to be worth Rs. 50 or Rs. 60 and which may not unreasonably be supposed to have by this time enormously increased in value. The defendants alleged in their written statement the terms of the document which I have set out and said that, after the date fixed in the said deed, Mannappa Mudali finally relinquished his interest in the property and in 1874 Singara Mudaly obtained a Collector's certificate in his name after the publication of the usual notices etc. That document is Ex. I. The application for the certificate is Ex. II and is dated 15th January 1874, wherein the applicant sets out that the land was purchased by his father Velayutha Mudaliar from Mannappa Mudaliar on 15th June 1869. It has been long established since *Thambusami* v. *Hosain* (1), that as to mortgages executed between the years 1858 and the coming into force of the Transfer of Property Act in 1882 the equity of redemption which had been originally imported from the English Courts, and enunciated by the Sudder Court in Madras, must be recognized and it is admitted that if a right of redemption in the case still exists the plaintiff is entitled to succeed. It is also admitted by Mr. Srinivasa Gopalachariar for the respondents that there must be some transactions proved dehors the document Ex. B before the Court can be satisfied that the equity of redemption has been relinquished or disposed of by the mortgagor. Our attention was called to *Athan Kutti* v. *Subhadra* (2), which distinguished *Usman Khan* v. *Dasanna* (3). It is really of little use to refer further to the law in the matter as in my opinion the question resolves itself really into one of fact. We have to consider what was the character of this mortgage set out in Ex. B. The appellant contends that it is a usufructuary mortgage and that therefore possession was delivered to the mortgagee at the date of the mortgage. The argument on the other side is that there is no statement in the document that possession has been delivered. Further there is a personal

(1) [1877] 1 Mad. 1=2 I. A. 241=3 Suther. 198=3 Sar. 531 (P. C.).
(2) [1917] 32 M. L. J. 317=5 L. W. 461=(1917) M. W. N. 9.
(3) [1912] 37 Mad. 545=23 M. L. J. 360=12 M. L. T. 330=(1912) M. W. N. 295.

covenant to repay and a stipulation for a certain rate of interest both of which are indicia of what we now call simple mortgage or hypothecation. The learned City Civil Court Judge who dismissed the plaintiff's suit held that possession was not transferred to the mortgagee but that at the expiry of a year or thereabouts the mortgagee made no demand on the mortgagor for the interests due to him and as the latter was unable to pay either interest or principle relinquished the title in favour of the mortgagee and referring to the decision in 32 *M. L. J.* the learned Judge says "that decision could have no application to a case like the present where the defendants did not come into possession on the date of the mortgage but on a later date. The learned City Civil Court Judge comes to the conclusion that some time after the date of the mortgage there was an oral sale of the equity of redemption by the mortgagor to the mortgagee and that the mortgagee was then for the first time put in possession of the mortgaged property.

Appeal was taken to Mr. Justice Devadoss, who after examining the evidence as he was entitled to do, came to the conclusion agreeing with the learned trial Judge that the mortgage evidenced by Ex. B was a simple mortgage and that after the due date for repayment the mortgagee asked for his money and the mortgagor said the mortgagee might take the land as his own, whereupon possession was handed over to the mortgagee. The learned Judge further remarks "the conduct of the parties goes to show that the property was treated by both the parties as the property of the defendants." We have been taken through the evidence adduced in the case and have examined it with care. The evidence is to the effect that when the mortgagee demanded his money the mortgagor said: "I cannot pay, take the land." D. W. 3, who is the son of the mortgagor says that for one year the land was in their possession and because the father was unable to pay, the land was given up to the defendant's ancestors relinquishing for ever according to Ex. B. He also says: "There was no separate sale as the mortgage deed itself made it into a sale at the end of the year." That expression is strongly relied on by the learned vakil for the appellant as showing that there was no independent transaction and had that stood alone I think it would have deserved a good deal of consideration. To complete the evidence D. W. 4 says: "At the end of the year when the land was given up to Velayudha they started improving the land. When the mortgagor was asked for money he replied: "You better have the land, I have no money to pay." On this evidence I think one must come to the conclusion that possession was not given under Ex. B, but that the mortgagee was put into possession after the mortgagor had distinctly relinquished or sold or transferred to him the equity of redemption on being unable to pay the principal money and interest. There was, therefore, a separate transaction dehors the instrument such as was subsequently embodied in the requirements of S. 60 of the Transfer of Property Act. There is a concurrent finding on the points I have discussed by both the City Civil Court Judge and Mr. Justice Devadoss, and I can see no reason to come to a different conclusion. In my opinion the appeal must be dismissed with costs.

Madhavan Nair, J.—I entirely agree and have nothing to add.

Appeal dismissed.

A. I. R. 1926 Madras 388

MADHAVAN NAIR, J.

Challa Lakshmakka — Plaintiff — Appellant.

v.

Challa Bala Rangappa—Defendant—Respondent.

Second Appeal No. 445 of 1922, Decided on 26th January 1925, from a decree of the Sub-J., Anantapur, in Appeal Suit No. 36 of 1921.

Hindu Law—Partition—Recital in deed of mukhtiarnama by all members that they were already living separately evidences severance of status.

Where all coparceners of a joint family prior to final division executed a mukhtiarnama appointing certain persons as arbitrators for partition and recited in the document that they had already been living separately:

Held: that the document evidenced a severance of status between the parties. [P.390, C.1]

L. A. Govinda Raghava Iyer—for Appellant.

Rajagopalachariar—for Respondent.

Judgment.—The plaintiff (appellant) instituted this suit for the recovery of the suit properties on the ground that they belonged to her deceased husband who obtained them for his share in a partition between himself and his three brothers, one of whom was the father of the defendant. The defendant's case is that the defendant's father and the plaintiff's husband were given a joint share while the other two brothers took each a separated share and on account of the death of the plaintiff's husband the properties survived to him and that she has no right to them. The necessary issue for trial was first recorded by the District Munsif as follows: "Whether the plaintiff's husband was divided from defendant's father and whether defendant has, therefore, no right to resist plaintiff's suit?" Some time after, this issue was amended by the District Munsif in the following form: "Whether plaintiff's husband was not divided from other members of his family." As the amended issue stands, it is clear that the burden of proving that there was no division as alleged lay on the defendant. The District Munsif held that the defendant did not prove that the plaintiff's husband did not get divided from the other members of the family as set up in the written statement and that the evidence showed that the plaintiff's husband got divided from each of his other brothers. On this finding the plaintiff's suit was decreed. On appeal the learned Subordinate Judge held that the burden of proof as regards partition was wrongly thrown on the defendant and that it was the duty of the plaintiff to prove that her husband effected an out and out severance from the defendant's father and his other brothers and since she had not done so he reversed the decision of the District Munsif and dismissed the plaintiff's suit.

It is argued before me by Mr. Govindaraghava Aiyar that, in the circumstances of the case, the lower appellate Court's decision as regards the party on whom the burden of proof lay is wrong and that this fact vitiates the whole judgment. In order to understand this argument, it is necessary to mention that all the brothers prior to the actual division of the properties executed Ex. IV, which is called a mukhtiarnama, appointing some arbitrators to effect a final division of their properties. The material portion of this mukhtiarnama runs as follows: "Already, three years ago, not having been on good terms among ourselves, we were living separately and the lands and the debts due by us to outsiders were, however, held in common; but dispute having arisen among us thereby we have appointed you this day for the purpose of putting a stop to our dispute and for finishing the division of our assets and liabilities. Therefore, we shall abide only by the decision given by you. If we, however, do not act according to your advice but raise objection, the Court of Justice need not accept our statement. This mukhtiarnama has been executed with our consent." (Note.—In this translation of mukhtiarnama after the word "and" I have substituted "for finishing the division of our assets and liabilities" in the place of "for making a settlement of division in respect of our assets and liabilities" (as I am informed that that is the correct translation of the document.) It is clear that it is this Ex. IV to which reference has been made in para. 3 of the plaint and also in para. 2 of the written statement, though there may be a slight discrepancy with regard to the date of the transaction as given in those paragraphs of the pleadings. The argument that is now advanced is that this document effects a complete severance of interest between the various brothers on account of the unequivocal declaration contained therein by the four brothers of their intention to divide the properties; in short, that it amounts to a partition between the brothers to be followed up later on by actual division of the properties. If this construction of the document is accepted, it would then follow that the plaintiff has proved the separation of her husband from his other brothers by partition, and then it would be for the defendant to prove that no such out and out partition took place, what actually happened being that the defendant's father and the plaintiff's husband were given a joint share while the other brothers took each a separated share; in other words, the burden of proof will be on the defendant to show that the plaintiff's husband was not divided from the other members of his family as alleged in the plaint.

Numerous cases were cited to me by Mr. Govindaraghava Ayyar to show that this reference to arbitration really amounted to a severance of interest between the brothers. As we are concerned solely with the construction of the document, no useful purpose will be served by a discussion of those cases ; but I would refer to one case, namely, *Kasam* v. *Jorawar Singh* (1), in which their Lordships of the Privy Council had to construe an arbitration agreement which is very much like the present one. In that case the substance of the document is given as follows : "On December 4, 1905, all the members of the family signed a kararnama appointing one Ghasi Ram as arbitrator to partition the property and agreeing to accept whatever partition he might make." Later on it is stated in the judgment that "the arbitrator divided the property into two lists . . . The formal division was not at once carried out . . . but after his death the lists appear to have been acted upon by all the persons interested." Their Lordships held that this document effected a severance of the joint estate. In the same way it appears to me that a severance of interest has been created by Ex. IV, and the arbitrators were appointed simply to finish this severance already effected by the division of the assets and liabilities. It is argued by Mr. Rajagopalachariar for the respondent that no severance of interest can be said to have taken place in this case inasmuch as it appears from the arbitrator's evidence that when they divided the properties a joint share was given to the plaintiff's husband and the defendant's father. In my view, this difference does not affect the question whether under Ex. IV there was a severance of interest between the various brothers.

The severance of interest being thus proved by the plaintiff, it will be for the defendant to prove the special plea that he has set up. In my view, the issue was properly amended by the District Munsif, though this amendment was made very late. As I consider that the learned Subordinate Judge's judgment is vitiated on account of the burden of proof being wrongly placed on the plaintiff, I think the District Court of Anantapur should be called upon to reconsider the evidence on record in the light of the above remarks and submit a fresh finding on the amended issue. I order accordingly. No other point was argued before me in the second appeal. The finding should be submitted before the 1st of August. Time for objections : ten days.

[In compliance with this order the District Judge of Anantapur submitted the finding that there was a complete partition between all the four brothers in 1909.

After the return of the said finding the judgment of the High Court was follows]

Judgment.—It has been now found by the lower Court that there was a complete partition between all the brothers in 1909. It cannot be said that this finding has been arrived at without considering the defendant's case or his evidence ; for the learned District Judge says in para. 8 of his order that the defendant's evidence about the partial partition is either worthless or false. It may also be pointed out that no specific case of reunion was ever set up by the defendant,

Accepting the finding, the lower (appellate) Court's decree is set aside and the decree of the District Munsif is restored with costs here and in the Court below.

Order accordingly.

(1) A. I. R. 1922 P. C. 353.

A. I. R. 1926 Madras 390

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Koyyalamudi Subbanna and *another*—Defendants 2 and 3—Appellants.

v.

Koduri Subbarayudu and *another*—Plaintiffs—Respondents.

Letters Patent Appeals Nos. 64, 65 and 66 of 1924, Decided on 28th August 1925, from the judgment of Krishnan, J., D/-22nd February 1924, reported in *A.I.R.* 1925 *Mad.* 371.

(a) *Negotiable Instruments Act, S.* 28—*Scope.*

The principle in S. 28 applies to cases of guardian and ward. 46 *Cal.* 663 (*P.C.*).*Foll.* [P 392, C 2]

(b) *Negotiable Instruments Act. Ss.* 28 *and* 29—*Distinction.*

The language of S. 29 is widely different from that of S. 28. Under S. 28 it is sufficient to indicate that personal liability is excluded. Under S. 29 there must be express words limiting the liability, and under S. 28 the agent's liability may be altogether excluded. but under S. 29 the

executor's liability can only be limited to the extent of the assets. [P. 392, C. 2]

(c) *Negotiable Instruments Act, S. 29—Alleged executor need not be executor in fact.*

It is not necessary for the applicability of S. 29 that the alleged executor should be executor in fact. [P. 390, C. 1]

(d) *Negotiable Instruments Act, S. 29 —Legal representative.*

The term "legal representative" in S. 29 includes executors or administrators. [P. 394, C. 2]

A. Krishnaswami Aiyar, B. Satyanarayana and *K. N. Rajagopala Sastri*—for Appellants.

P. Somasundaram—for Respondents.

Venkatasubba Rao, J.—These three appeals have been filed against the judgment of Krishnan, J. Defendants 2 and 3 are the executants of the promissory notes in question. In some notes they described themselves as the guardians of the 1st defendant, in others as executors under his father's Will. The 1st defendant was and continues to be a minor. The 2nd and 3rd defendants are respectively the maternal uncle and the brother-in-law of the 1st defendant. The plaintiffs in these suits asked for a decree against the 1st defendant to the extent of the assets of his father's estate and against Defendants 2 and 3 personally. It is not necessary to say what the decision of the trial Court was, but the Subordinate Judge dismissed the suits against Defendants 2 and 3 and passed decrees against the 1st defendant to the extent of the assets of his father. The plaintiffs preferred second appeals to the High Court and Krishnan, J., in all the three suits passed decrees against Defendants 2 and 3. As the first defendant had not appealed to the High Court the decree against him was not disturbed. Defendants 2 and 3 have filed the present Letters Patent appeals. They contend that they are not liable on the promissory notes.

On a negotiable instrument only the executant is liable. This proposition admits of no doubt. The question that has in each case to be determined is, on a fair contruction, who is the executant of the document? As Chalmers says:

"It is often difficult to determine whether a given signature is the signature of the principal by the hand of an agent, or the signature of the agent naming a principal." See Law of Bills of Exchange, 8th Edn. p. 91.

The law relating to negotiable instruments differs from the ordinary law of contracts in several respects. The liability must be determined on the wording of the note and in each case the question is: Is the instrument so drawn in form as to make the executant liable or the principal liable? In other words, who is the real executant of the documents? Is the executant in truth the principal although the agent's signature appears on the bill, or is the executant the agent although the principal is named ?

So far as the Indian Law is concerned, S. 28 of the Negotiable Instruments Act enacts the rule of law applicable to agents. The material portion of the section runs thus:

"An agent who signs his name to a promissory note without indicating thereon that he signs as agent or that he does not intend thereby to incur personal liability is liable personally on the instrument."

Under the section an agent signing the note prima facie is liable but he may exclude his liability by indicating on the note that he signs as agent or that he does not intend to incur personal liability. In each case the question is: Are the words sufficiently unequivocal to indicate that the agent has not made himself personally liable ?

S. 28 of the Indian Act is in one respect strikingly different from S. 26 of the Bills of Exchange Act, 1882. The English Act requires that the words indicating that the personal liability is excluded must be added to the signature itself. The Indian Act is less rigorous and from the whole of the instrument the intention may be inferred.

The most useful case on the subject is *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1). Their Lordships of the Judicial Committee point out that as the document passes from hand to hand it is of the utmost importance that the responsibility is made plain and can be instantly recognized. The English theory of bills, as Chalmers observes in his introduction to the work already quoted, is the banking or currency theory and in England, bills have developed into a perfectly flexible paper currency. It follows, therefore, that as the note passes from hand to hand the real name of the person liable upon it must be disclosed.

(1) [1919] 46 Cal. 663=29 C. L. J. 340=17 A. L. J. 405=25 M. L. T. 258=36 M. L. J. 429=21 Bom. L. R. 605=(1919) M.W.N. 810=28 C. W. N. 937=10 L. W. 143 P.C.

In the light of this principle I shall first examine the promissory note in Letters Patent Appeal No. 66 of 1924. The note is signed by the two guardians. Their representative character is not disclosed in the signature. In regard to the body of the note, the following points are no doubt in favour of the appellants :—

(1) The debt is mentioned as having been originally due by the minor's father :

(2) It is stated that their ward is a minor and that they were appointed guardians.

But the language in the opening portion of the note is ambiguous. It is susceptible of two meanings : literally it means that the guardians are executing the note because their ward is a minor. What may be said to be the idiomatic meaning is, that the guardians are executing the note on behalf of the minor.

In the operative part of the note, they make themselves unconditionally liable. They say :—

"We shall pay, either of us, on demand."

Who are referred to by this word 'We'. The words in the preamble being doubtful and there being no ambiguity in regard to the signature, the proper view to take is, that anyone reading the note will reasonably connect the word 'We' with the names appearing at the bottom of the note.

It is true that the debt of the minor's father is mentioned in the body of the document. But, on this, does it necessarily follow that the executants are not personally liable? Supposing the guardians had been pressed for payment of the debt and they undertook to pay the amount personally themselves, can it be said that such a note as the present could not have been passed ? In my opinion, a mere allusion to the pre-existing debt does not clinch the question. On the whole I think that the wording does not clearly unequivocally exclude the personal liability of the executants and that Krishnan, J.'s decision in regard to this note must be upheld.

Before passing on to the next note, I desire to make one observation. Unlike S. 26 of the English Act, which deals generally with the liability of persons signing in any representative capacity, S. 28 of the Indian Act in terms applies only to single case of agents and principals. But it seems to me that there is no reason to make the scope of the section so narrow and indeed their Lordships of the Judicial Committee in the case already quoted [*Sadasuk Janki Das* v. *Sir Kishan Prasad* (1)], first state the principles as of general application and then proceed to say that the sections of the Negotiable Instruments Act contain nothing inconsistant with those general principles. In *Ramaswami Mudaliar* v. *Muthuswami Aiyar* (2) and the unreported Appeal No. 306 of 1922 on the file of the High Court, the principle of S. 28 is tacitly assumed to be applicable to cases of guardian and ward.

Now I pass on to the note in L. P. Appeal No. 65 of 1924. This bears a very close resemblance to the note which I have just dealt with. But there is a striking difference in one particular, that in the signature portion it is made to appear that the guardians are signing the note on behalf of the minor. The point is thus left no longer in doubt, and, on the construction of the note, I find that the guardians have clearly indicated that they did not intend to incur personal responsibility. In my opinion, therefore, Krishnan, J.'s decision in regard to this note is wrong, and cannot be supported.

I shall next deal with the promissory note in L. P. Appeal No. 64 of 1924. To my mind, these present no difficulty. The appellants do not describe themselves as guardians but as executors, and the section that applies is S. 29 of the Negotiable Instruments Act. The relevant portion of that section is as follows :

"A legal representative of a deceased person who signs his name to a promissory note is liable personally thereon unless he expressly limits his liability to the extent of the assets received by him as such."

The language of S. 29 is widely different from that of S. 28. In the first place, under S. 28 it is sufficient to indicate that personal liability is excluded. Under S. 29 there must be express words limiting the liability. Secondly, under S. 28 the agent's liability may be altogether excluded, but under S. 29 the executor's liability can only be limited to the extent of the assets.

These notes purport to have been executed by the appellants in their capacity as executors. When S. 29 specifically deals with the case, it is not permissible to invoke the principle of S. 28. The appellant's learned vakil

(2) [1915] 30 I. C. 481

has contended that his clients were not in fact executors because the minor's father could not have made a valid appointment of executors. Granting this to be so, it does not in my opinion make the slightest difference. We are concerned not with the fact whether they are executors, but only whether they have described themselves as executors. It is not to be expected that when the paper passes from hand to hand every successive holder is to satisfy himself as regards the truth of the statement in the note; and I am not prepared to accept the contention that the section has no application unless the executant happens to be in fact a legal representative. I am, therefore, of the opinion that Krishnan, J.'s judgment in regard to this note is right and must accordingly be confirmed.

I feel that it is necessary that I must add one word. The lower Court has passed a decree against the minor and he has not filed an appeal challenging its correctness. We are, therefore, not concerned with the propriety or otherwise of the decree against the minor. But nevertheless it seems to me that although the agent is personally liable on the note, there is nothing to prevent the Court from passing a decree against the minor himself provided that the plaint is framed in an alternative form suing the guardian on the note and the minor alternatively on the consideration: see *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1) and *Krishna Aiyar* v. *Krishnaswami Aiyar* (3). This question, however, does not here arise and need not be pursued further.

I may state in conclusion that Mr. Alladi Krishnaswami Aiyar, the learned vakil for the appellants, desired to raise a new point, one relating to the rule of election as laid down in *French* v. *Howie and Wife* (4) and *Moore* v. *Flanagan and Wife* (5), but that we did not permit him to raise this point as he did not raise it before Krishnan, J., and attempted to do so for the first time before us.

The result is that L. P. Appeals Nos. 64 and 66 of 1924 are dismissed with costs and L. P. Appeal No. 65 of 1924 is allowed and the suit dismissed with costs throughout against Defendants 2 and 3.

(3) [1900] 23 Mad. 597.
(4) [1906] 2 K. B. 674.
(5) [1920] 1 K. B. 919=89 L. J., K. B. 417=122 L. T. 739.

Madhavan Nair, J.—These Letters Patent Appeals are directed against the decision of Krishnan, J., in three second appeals which arose out of suits instituted by the plaintiff for the recovery of the money due to them on promissory notes executed by Defendants 2 and 3. The 1st defendant is the minor son of one Veeranna who died leaving debts. Though the property belonging to him is joint family property, Veeranna nevertheless executed a Will naming Defendants 2 and 3 as executors. Though the document is invalid, so far as it purported to deal with joint family property, Defendants 2 and 3 entered upon the management under the Will and executed the various suit promissory notes to Veeranna's creditors. The plaintiffs in these suits claimed decrees against Defendants 2 and 3 personally as the makers of the promissory notes and against the estate of the 1st defendant. The District Munsif gave a decree against Defendants 2 and 3 personally and dismissed the suits against the minor's estate. Both the plaintiffs and Defendants 2 and 3 preferred appeals to the Subordinate Judge who gave decrees against the estate of the minor dismissing the suits against Defendants 2 and 3. The minor, i. e., the 1st defendant, did not appeal to the High Court, but the plaintiffs preferred second appeals claiming personal decrees against Defendants 2 and 3. The learned Judge, Krishnan, J., set aside the decrees passed by the Subordinate Judge with the result that the plaintiffs in the High Court succeeded in obtaining the decrees against Defendants 2 and 3 personally.

The question for determination in all these Letters Patent appeals is the same, namely, whether Defendants 2 and 3 are personally liable under the suit promissory notes.

L. P. A. No. 64 *of* 1924.—As there is some difference in the language of the promissory notes in the various suits, and as the argument advanced by the learned vakils on both sides had reference to the language, it will be useful to refer to these promissory notes at the very commencement. Exs. A, B, E and F are the four promissory notes in this Letters Patent appeal against S. A. No. 998 of 1921. Ex. A states in its preamble that it is "executed by Subbanna and Satyanarayana (Defendants 2 and 3) jointly as executors appointed in accordance with the

registered Will of the late Chinna Veeranna, his son Viswanatham being a minor . . . . ." In its body it states: "On demand we promise to pay to you or to your order the sum of Rs. 113-2-0 only, the amount borrowed to serve our need, i. e., the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna . . . . . ." This promissory note is signed by the two defendants without the qualification as executors being added to their signatures. Ex. B is similar to Ex. A, except that in its body the statement "the amount we have agreed to pay on behalf of the aforesaid Chinna Veeranna" is absent. It simply says: "On demand we promise to pay to you or to your order the sum of Rs. 585-10-6 only, the amount borrowed to serve our need, i. e., the amount of principal and interest on the promissory note executed by the late Chinna Veeranna." The preambles of Exs. E and F are similar to those of Exs. A and B, with this difference, that in the preamble of Ex. F "his son Viswanatham being a minor" is absent. In the body of these two promissory notes, Exs. E and F, we find the expression: "We both individually promise to pay to you or to your order the sum of Rupees . . . . . ." which does not appear in Exs. A and B. These promissory notes run thus: "We both individually promise to pay to you or to your order the sum of Rupees . . . . . on the promissory note executed by the late Chinna Veeranna." In the signature portion of all these promissory notes the names of Defendants 2 and 3 appear without any qualification. Though these promissory notes thus present some special features they agree in this respect that each of them is stated in the preamble to have been executed by Defendants 2 and 3 "as executors" and signed by them without disclosing their representative capacity.

Mr. Krishnaswami Aiyar, the learned vakil for the appellants, argues that the language used in these promissory notes distinctly shows that the appellants have not undertaken any personal liability to pay the promissory note debts and that the learned Judge was wrong in applying S. 29 of the Negotiable Instruments Act in deciding this case, inasmuch as it is clear that Defendants 2 and 3 cannot in law be considered executors as the deceased Veeranna had no power to execute a Will, the property being joint family property. S. 29 being inapplicable, and the language of the documents showing that there was no personal liability, the learned vakil argues on the analogy of various decisions which he has brought to our notice that in this case the only decree that could be passed is one against the estate of the deceased Veeranna.

The important question for consideration is whether S. 29 of the Negotiable Instruments Act applies to this case. S. 29 runs as follows:

"A legal representative of a deceased person who signs his name to a promissory note, bill of exchange or cheque is liable personally thereon, unless he expressly limits his liability to the extent of the assets received by him as such."

The term "legal representative" includes executors or administrators. If this section is applicable, Defendants 2 and 3 are liable personally on these promissory notes, as they say in the preamble of the notes that they have executed them "jointly as executors appointed in accordance with the registered Will of the late Chinna Veeranna." The argument that Defendants 2 and 3 are not, strictly speaking, executors and therefore S. 29 is inapplicable cannot be accepted; for we are dealing with promissory notes and it is well known that those are intended to pass freely from hand to hand and a party who takes a negotiable instrument of the class we are dealing with is not expected to decide for himself whether the person who has executed the instrument in his capacity as an executor is really an executor in the eye of the law or not, before accepting the note. If this principle is not given effect to the very object of a negotiable instrument would be defeated. Defendants 2 and 3 having described themselves as executors, persons dealing with them on the promissory notes will naturally treat them as executors, and the promissory notes will be passed on from hand to hand distinctly on that understanding. It is necessary, therefore, that S. 29 should be applied in a case like the present one; and if so, Defendants 2 and 3 are clearly liable personally, unless they are able to show that they have expressly limited their liability to the extent of the assets

received by them as such. The language of the promissory notes that I have already referred to speaks with no uncertain voice. In none of them is the liability of the executants expressly limited in any way to the extent of the assets received by them as such, while in all of them there is a distinct promise to pay made by the executants. The cases cited by Mr. Krishnaswami Aiyar in this connexion need not be considered in detail, as most of them deal with the question how far can recourse be had to the estate on notes executed by an executor, or guardian of a minor or trustee of a property. The decisions in *Krishna Chettiar* v. *Nagamani Ammal* (6), *Ramajogaya* v. *Jagannadhan* (7) and *Ammalu Ammal* v. *Namagiri Ammal* (8) and the other cases cited by him do not deal with the question with which we are here concerned. As the executants of the promissory notes in question have not in any way expressly limited their liability to the extent of the assets received by them, I must hold that S. 29 of the Negotiable Instruments Act applies to this case and that the decision of the learned Judge is right. I dismiss this Letters Patent Appeal with costs.

L. P. A Nos. 65 *and* 66 *of* 1924.—The langugage of the promissory notes in these appeals is different from the language of the notes already examined. The preamble speaks of these notes as promissory notes executed "by guardians under the Will of the late Veeranna, as Viswanatham happens to be a minor."

L. P. A. No. 66 *of* 1924.—In L. P. A. No. 66 the body of the note amongst other things, contains the statement that: "On demand the amount of principal and interest accrued up to date.....will be paid by either of us." In this appeal the two executants signed the promissory note with their names without describing themselves as guardians. The language of the promissory note, Ex. A, which I have noticed above, distinctly shows that the executants intended to incur personal liability on this note. Though there are no specific provisions in the Negotiable Instruments Act regarding the liability of a guardian on a promissory note executed by him, it seems to me that the principle underlying S. 28 regarding the liability of an agent signing a promissory note may well be applied to such a case. S. 28 of the Act deals only with the case of agents and principals, in this respect differing from S. 26 of the English Act which deals generally with the liability of persons signing in a representative capacity. In two decisions of this Court the principle underlying S. 28 of the Negotiable Instruments Act has been applied in deciding on the liability of a guardian executing a promissory note on behalf of the minor: *Ramaswami Mudaliar* v. *Muthuswami Aiyar* (2). The 2nd defendant who was described in the body of the note as the guardian of the 1st defendant who was at its date a minor, and the necessity for borrowing was stated in it as arising from the 1st defendant's father's debt. The learned Judges state: "We are not, however, prepared to treat those facts alone as sufficient to indicate that 2nd defendant signed as 1st defendant's guardian or did not intend to incur personal liability." The 2nd defendant was therefore held liable on the promissory note. The extract from the judgment shows that the learned Judges in deciding the case have assumed that the principle of S. 28 of the Negotiable Instruments Act is applicable to the case of the guardian and ward: *See* also the unreported decision in Appeal No. 306 of 1922 on the file of the High Court. The decision in the Privy Council in *Sadasuk Janki Das* v. *Sir Kishan Prasad* (1) supports the view that a general application can be given of the principle underlying S. 28 of the Negotiable Instruments Act. Defendants 2 and 3 in this case have not indicated that they signed the promissory note as agents or that they did not intend to incur personal liability. On the other hand, the language of the promissory note, in my opinion, distinctly shows that they are personally liable. The decision of the learned Judge is, therefore, right and this Letters Patent Appeal No. 66 should be dismissed with costs.

L. P. A. No. 65 *of* 1924.—In this appeal the language used in the preamble and in the body of the promissory note indicating the liability of Defendants 2 and 3 is like the language in the promissory note in L. P. A. No. 66, but the executants in signing the promissory note described themselves in the signature

(6) [1916] 39 Mad. 915=18 M.L.T. 216.
(7) [1918] 42 Mad. 185=36 M.L.J. 29=25 M.L.T. 23=9 L.W. 229=(1919) M.W.N. 148 (F.B.).
(8) [1917] 33 M.L.J. 631=22 M.L.T. 391=6 L.W. 772=(1918) M.W.N. 110.

portion as "guardians of minor Viswanatham." This is a distinctive feature of this note and in this respect it differs from the promissory note, Ex. A, just noticed. When we read the promissory note bearing this feature in mind, the conclusion is irresistible that the executants have signed this note merely as guardians excluding thereby their personal liability. It therefore follows that, on the language of this note, Defendants 2 and 3 are not personally liable. As the construction that I am putting on the language of this promissory note is different from that given to it by the learned Judge, the decision in S. A. No. 999 of 1921 must be set aside. The plaintiff in this case will only be entitled to a decree against the minor's estate and not against the guardians personally. This Letters Patent Appeal is allowed with costs throughout.

As pointed out by my learned brother, we have not allowed the learned vakil for the appellants to argue a new point which he desired to raise in these appeals.

A. Nos. 64 *and* 66 *of* 1924 *dismissed.*

A. No. 65 *of* 1924 *allowed.*

A. I. R. 1926 Madras 396

RAMESAM, J.

D. A. Kandasami Chettiar—Petitioner.

v.

G. F. F. Foulkes—Respondent.

Civil Revision Petition No. 924 of 1924, Decided on 24th September 1925, from the order of the Dist. J., Salem, D/- 11th November 1924.

(*a*) *Madras Local Boards Act* (14 *of* 1920), *S.* 56 (4)—*Member restored by resolution need not take fresh oath—Taluk Board Member ceasing to be Dt. Board Member for non-attendance is not restored to Dt. Board membership on his being restored to Taluk Board.*

The effect of the restoration of a member, though it may not be retrospective, is certainly to restore him to the office of membership for the balance of the period for which he was originally elected or nominated, including the rest of the day on which he was restored. It is not that he becomes a new member getting a fresh full period of office from the date of the restoration, he is restored to his former membership, that is, the membership he previously had by election or by nomination completed by the oath of allegiance which he had previously taken: *A. I. R.* 1925 *Mad.* 1034, *Rel. on.*

Where a member of the Taluk Board, who had been elected to the District Board, lost his membership of the Taluk Board by absence for three consecutive months and thereby lost his membership of the District Board also, and he was then restored to the membership of the Taluk Board.

Held: that the resolution of the Taluk Board cannot have the effect of restoring him to the membership of the District Board which he lost; *A. I. R.* 1925 *Mad.* 1034, *Rel. on.* [P. 397, C. 1, 2]

(*b*) *Election—Court may allow amendment of objection petition.*

An application for an amendment of the petition filed after the expiry of the days allowed for an objection petition may, in the discretion of the Judge, be allowed. [P. 397, C. 2]

(*c*) *Madras Local Boards Act* (1920), *S.* 35—*Election.*

S. 35 does not apply to an election petition. [P. 398, C. 1]

T. M. Krishnaswami Iyer and *V. Ganpathi Iyer*—for Petitioner.

S. Varadachari—for Respondent.

Judgment.—This is a revision petition against the order of the District Judge of Salem refusing to set aside the election of the President of the District Board of Salem held on 29th July 1924. The first ground alleged in the petition and repeated before me here is that five of the voters, namely, Arunachalla Goundan; 2. Bommanna Chetty; 3. Rahu; 4. Chinappa Goundan; and 5. Vasudeva Reddi have ceased to hold their office as members of the District Board by reason of their non-attendance at the meetings of the District Board for three consecutive months. Four of these were elected and one was nominated. Though all the five were restored to their office by a resolution of the Board under S. 56 (4) of the Act, it it said (1) that they cannot exercise the functions of the members of a Board at the meeting at which they were restored; (2) that they ought to take a fresh oath of allegiance and until a fresh oath of allegiance was taken, they cannot exercise the functions of members of the District Board and in this case no such fresh oath or allegiance was taken.

The District Judge was of opinion that these members were not disqualified and their membership did not cease as they were not absent for three consecutive meetings. It appears that four of them were absent from one meeting and the fifth absent from two consecutive meetings, but in two of the three months preceding the meeting of the 29th July, the Board had not met at all, infringing

R. 1 of the rules regulating the proceedings of Local Board (Sch. II of the Act). It is unnecessary to consider this question as the members were all restored to the office and as I have come to the conclusion that the other objections against their membership cannot stand. If, at the meeting of the 29th July, they were first restored to membership and afterwards the Board proceeded to the election of the President, I do not see any thing irregular or illegal in this precedure. Therefore, there is no substance in the first ground.

The second ground is that a fresh oath of allegiance must be taken. The effect of the restoration of a member, though it may not be retrospective as to make him a member of the Board during the preceding three months or so as to restore to him any privileges besides the mere membership such as presidentship or vice-presidentship which he lost along with the membership, as was held by me n *Devasigamoney* v. *Sethuratna Iyer* (1), is certainly to restore him to the office of membership for the balance of the period for which he was originally elected or nominated. It is not that he becomes a new member getting a fresh full period of office from the date of the restoration. Whenever there is a fresh election or fresh nomination no doubt a fresh oath of allegiance ought to be taken. But in the case of a restored member he is restored to his former membership, that is, the membership he previously had by election or by nomination completed by the oath of allegiance which he had previously taken. If it be said that he does not get the benefit of the prior election or nomination and the oath which he had taken, it would be creating a fourth class of members not contemplated by the Act. The Act contemplated only ex officio members, elected members and nominated members. It is clear, therefore, that the restoration makes him the elected or nominated member he previously was. If so, he gets also the benefit of the previous oath of allegiance. I do not think, therefore, there is any substance even in the second ground. The result is, that, so far as these five voters are concerned, the petition fails.

The next ground taken is that one Mekha Pillai a member of the Taluk Board Salem who had been elected to the District Board lost his membership of the Taluk Board by absence for three consecutive months and thereby lost his membership of the District Board also. He was then restored to the membership of the Taluk Board, by a resolution of the Taluk Board dated the 29th of March 1924. The contention is that the resolution of the Taluk Board cannot have the effect of restoring him to the membership of the District Board which he lost. On this matter I do not agree with the view taken by the District Judge that the restoration of Mekha Pillai to the membership of the Taluk Board also restores him into the membership of the District Board. I adhere to the view I have taken on this matter in my judgment in *Devasigamoney* v. *Sethuratana Iyer* (1). But this does not help the petitioner for the respondent got 22 votes, and the petitioner got 19. In the first place, it is not clear that Mekha Pillai voted for the respondent : vide the judgment of the District Judge in para. 8. But assuming that he voted for the respondent and that his vote is invalid the respondent has still got a majority.

The next objection taken is that there are two cases like the case of Mekha Pillai and others who were elected to the District Board and who have lost their membership of the District Board by non-attendance at the Taluk Board and losing the membership of the Taluk Board and whose restoration to the membership of the Taluk Board does not, according to my view, restore them to the membership of the District Board. This objection was not taken in the original petition. It was sought to be introduced into the case by an application for amendment dated the 1st November, that is during the hearing of the petition. Though I do not hold that an application for an amendment of the petition filed after the expiry of the days allowed for an objection petition is never maintainable and I think that such an amendment petition may, in the discretion of the Judge, be allowed, even after the expiry of that period, I cannot say that the discretion has been improperly exercised by the District Judge in this case. If the petition cannot now be allowed to be amended, it is obvious that the petition must fail.

(1) A. I. R. 925 Mad. 1034.

It has been contended by Mr. Varadachari who appeared for the respondent that S. 35 of the Act cures all the above defects in the election alleged by the petitioner. I adhere to the view I expressed in *Devasigamoney* v. *Sethuratna Iyer* (1). Mr. Varadachari has called my attention to S. 57 (3) and to the fact that the English Act, on which the decision in *Nell* v. *Longbottom* (2) was passed, there is a section (S. 84) which shows that an election petition did not come under the scope of S. 42 of the English Act similar to S. 35 of the Indian Act, and that in the Indian Act there is no section similar to S. 84. He also urged that it is inconvenient to hold that the acts of a Board the members of which consist of persons like Mekha Pillai in this case are invalid. I agree with this view in all acts of the Board other than election, S. 35 cures such a defect. But I do not think that S. 35 applies to an election petition. I think the rules regarding election petition allowing the improper receipt or refusal of a vote to be questioned correspond to S. 84 of the English Act. Were it not so, the election petition becomes a farce. I do not think that S. 57 (3) can help us in this matter. It relates to the case of a dispute being raised as to the membership of a member himself and provides that he should be deemed a member pending such decision.

But, as I have already held, the petition must fail and is, therefore, dismissed with costs.

Order will follow.

Petition dismissed.

(2) [1894] 1 Q. B. 767=63 L. J. Q. B. 490=70 L. T. 499=10 R. 193.

A. I. R. 1926 Madras 398

PHILLIPS AND RAMESAM, JJ.

R. Rama Vadhyar—Plaintiff—Appellant.

v.

T. Krishnan Nair and *others*—Defendants—Respondents.

Appeal No. 21 of 1924, Decided on 14th October 1925, from the decree of the Sub-J., South Malabar, at Palghat, in O. S. No. 20 of 1921.

(a) *Contract Act, S. 64—Malabar tarwad—Money borrowed for tarwad but not so spent—Tarwad property is not liable.*

Where there is no evidence to show either that the money borrowed was spent on tavazhi purposes or that there was such a lack of tavazhi money that it was necessary to borrow, the mere fact that it was borrowed by karnavan for expenses of tavazhi, does not render the tarwad property liable: 22 *Mad.* 289 and 35 *M. L. J.* 96, *Dist.* [P. 400, C. 1]

(b) *Malabar Law—Debts by karnavan in excess of his powers under family karar does not bind Tarwad.*

A loan borrowed in excess of the powers of the karnavan as determined by a family karar cannot be a charge on the Tarwad property: 35 *Travancore L. R.* 110, *Appr.*; 22 *Mad.* 289, *Dist.* [P. 400, C. 2]

T. R. Ramchandra Aiyar and *S. Srinivasa Aiyar*—for Appellant.

C. V. Anantakrishna Aiyar—for Respondents.

Judgment.—The appellant, plaintiff brought this suit to recover money lent under a usufructuary-mortgage deed, Ex. A, and a subsequent mortgage deed, Ex. C. He also sought to include in the mortgage money, the rent due under a lease Ex. B. His claim was made not only against the karnavan of the tavazhi of Defendants 1 to 16, but also against the properties of the tavazhi. The members of the defendant's tavazhi and the other members of the tarwad entered into a karar in 1914 under which certain debts were allotted to the several tavazhis and power was given to charge the tavazhi properties with the repayment of those debts, but it was expressly forbidden to charge the tavazhi properties with any further debt. Rs. 3,000 was thus allotted to the tavazhi of Defendants 1 to 16 and they were authorised to borrow money to pay off the debt, but it was expressly provided that they should not borrow for the interest thereon, which interest had to be paid out of the current income. If it became necessary to borrow, all the adult members were to join in borrowing and if they did not do so, the debt would not be binding on the tavazhi properties. When the plaintiff entered into the plaint transactions, he was fully aware of the terms of the karar and knew, therefore, that unless all the adult members of the tavazhi joined in borrowing, the loan would not be binding on the tavazhi properties except in respect of the Rs. 3,000 mentioned in the karar. At that time there were 6 adult members of the tavazhi, i. e., Defendants 1 to 6,

first defendant being the karnavan. Accordingly Ex. A. was executed by Defendants 1 and 4 on 30-4-1914 for a sum of Rs. 3,000 and in order that interest should not accrue on this sum, 29 out of 46 items of property mortgaged were put into the possession of the plaintiff mortgagee so that out of the proceeds he could repay himself the interest due. On the same date as Ex. A, the plaintiff re-transferred the 29 properties to the mortgagors stipulating for payment of a rent of Rs. 225 the equivalent of the interest on the Rs. 3,000 borrowed under Ex. A. This lease, Ex. B. was for one year only and it provides that the rent due under it should be a charge on the tarwad property. These two documents Exs. A and B were executed by Defendants 1 and 4, the karnavan of the tavazhi and the eldest female member. They were also attested by two other male members.

So far as Ex. A is concerned it cannot be disputed that it is binding on the tavazhi property, for it is executed for tavazhi necessity by the karnavan and it is within the karnavan's powers under the family karar. The charge for rent accrued under Ex. B cannot, however, be binding upon the tavazhi properties. In the first place the only rent which has been charged on the property is one year's rent from Kumbam 1090, and it is admitted that that year's rent has been paid.

It is now argued for the appellants that inasmuch as Defendants 1 and 4 continued to hold over as tenants the rent for the subsequent years is also a charge on the property. This point was specifically dealt with in *Kutti Umma* v. *Mahadeva Menon* (1), where it was held in almost indentical circumstances that such rent could not be a charge and that the lessor's only remedy was to recover three years, arrears of rent from the lessees. *Kutti Umma* v. *Mahadeva Menon* (1), was followed in *Mamambath Pettiyeth* v. *Cheria Uthalamma* (2), and in accordance with these decisions we must hold that the plaintiff has no charge on the properties for arrears of rent. The claim for 3 years' arrears cannot be enforced against Defendants 5 and 6 and is not a charge on the tavazhi properties. Further Ex. B is in excess of the karnavan's powers under the karar, which expressly stipulated that the interest on the Rs. 3,000 was to be paid out of the current income ; admittedly there was no necessity for execution of Ex. B which, therefore, cannot be binding on the tarwad in any event. So far as the claim under Ex. B is concerned the plaintiff's appeal must fail. The subsequent mortgage deed Ex. C was executed by Defendants 1 to 4 alone and the debt has been found by the Subordinate Judge to have been borrowed for the purpose of the tavazhi. It appears that it was borrowed for the expenses of litigation between the first defendant and Defendants 5 and 6 who were claiming separate maintenance. The borrowing, however, is in excess of the powers of the karnavan under the karar and would, therefore, not be binding upon Defendants 5 and 6 and the tavazhi property unless all the adult members joined. The suggestion that Defendants 5 and 6 impliedly joined in the borrowing cannot be held proved on the mere assertion of plaintiff that they told him he could borrow from first defendant if he liked. It is, however, contended that inasmuch as the money was borrowed for tavazhi purposes the tavazhi properties are liable. Mr. Ramchandra Aiyar relies for this proposition on *Puzhakkal Edom* v. *Mahadeva Pattar* (3) : in that case an injunction had been granted against a karnavan restraining him apparently from borrowing money. Notwithstanding this injunction, he borrowed money and it was held that because the loan was contracted for tarward purposes it was binding on the tarward properties. The reason for that decision is that the effect of the injunction was merely what is laid down in the Civil P. C. and that, therefore, it could not be held that when money was borrowed and utilised for the benefit of the tarwad, the tarwad would not be liable. Reliance is also placed on *Sinaya Pillai* v. *Munisami Ayyan* (4), where an alienation made by a guardian appointed by Court, without the sanction of the Court, was held to be valid and binding on the minor in accordance with the principle laid down in S. 64 of the Indian Contract Act. Other cases cited in support of the proposition are cases in which suits brought against receivers are held to be maintainable although the leave of the Court had not previously been obtained, such as *Ammukutty* v. *Mana-*

(1) [1901] 11 M. L. J. 181.
(2) [1919] 16 I. C. 560.
(3) [1918] 35 M. L. J. 96.
(4) [1899] 22 Mad. 289=9 M L. J. 64.

vikraman (5). The latter class of cases is hardly analogous to the present one. The first case *Puzhakkal Edom* v. *Mahadeva Pattar* (3), related to injunction and may be distinguished on the ground that the disability imposed on the karnavan was a question between the Court itself and the borrower, the Court having full power to deal with disobedience of its order and, therefore, could not be allowed to affect the undoubted rights of a third party. The case of the guardian in *Sinaya Pillai* v. *Munisami Ayyan* (4), is dependent on S. 64 of the Indian Contract Act and we were asked here to apply that section to the present case. That section is in terms applicable to parties to contract and on equitable principle is extended to others who are not parties, but the principle underlying that section is that the person made liable to refund must have received a benefit under the contract. In the case in *Sinaya Pillai* v. *Munisami Ayyan* (4), the minor had undoubtedly received such benefit, but it cannot be said that in this case Defendants 5 and 6 have received benefit. The contention is, that inasmuch as the tavazhi as a whole has received benefit the Defendants 5 and 6 must be deemed to have received the same. The words in the section are "shall restore any benefit received." What is the benefit received by Defendants 5 and 6 that can be restored or even what benefit has been received by the tavazhi as such which can be restored? The money which apparently is all the benefit received has not been received by anyone except the four members of the tavazhi who executed Ex. C. It, no doubt, was borrowed for expenses of the tavazhi, but there is no evidence to show either that it was spent on tavazhi purposes or that there was such a lack of tavazhi money that it was necessary to borrow. In these circumstances we think it must be held that S. 64 is inapplicable. If it were to be applied, it would render the family karar entirely nugatory, for, it would empower the karnavan to spend the current income of the tavazhi, and then to borrow for tarwad purposes without obtaining the consent of the other adult members. A similar case has been decided in Travancore, *Sekharin* v. *Painkathi* (6), in which it was held that a loan borrowed in excess of the powers of the karnavan could not be a charge on the tarwad property. In that case the powers of the karnavan had been restricted by a family karar, as in the present case, and we entirely agree with that decision and must hold that the money borrowed under Ex. C cannot be made a charge on the tavazhi properties. This decision is also in accordance with Second Appeal No. 615 of 1882 (unreported) where the same conclusion was arrived at.

The result is, that so far as the tavazhi properties are concerned the Subordinate Judge's decree is right. But it is contended for the respondents that the tavazhi properties have been made liable not only for the Rs. 3,000 due under Ex. A but also for the interest thereon. This is clearly wrong, for, the interest was provided for by the document Ex. B which is certainly not binding on the tavazhi. The plaintiff appears to have been out of possession of these properties and will probably lose a great portion of his interest, thereby suffering some hardship but this loss is entirely due to his own negligence in taking such a document in contravention of the terms of the karar of which he was fully cognizant.

The lower Court's decree must, therefore, be modified by substituting for the figure Rs. 4,105-13-0 the words Rs. 3,000 with interestat 7 and 1/2 per cent.from the date of the decree to 3 months from this day to which date the time for the payment of the money is extended and proportionate costs on Rs. 3,000.

The appeal is dismissed with costs of respondents 5, 7 to 9, 11 and 12 and the Memorandum of Objections is allowed with costs.

Decree modified.

(5) [1920] 43 Mad. 793=12 L. W. 331.
(6) 35 Travancore L. R. 110.

A. I. R. 1926 Madras 401

PHILLIPS, J.

Arulanandam Pillai—Plaintiff—Appellant.

v.

Malaya Pillai Nadan and *others*—Defendants—Respondents.

Second Appeal No. 1621 of 1922, Decided on 28th April 1925, against a decree of the Addl. Sub-J., Madura, in A. S. No. 59 of 1921.

(a) *Madras Estates Land Act* (1 *of* 1908), *S.* 125 —*Mortgage.*

Where the mortgage is not effected with the permission of the landlord under S. 125 it is not binding on a purchaser in a revenue sale.

[P 401 C 1]

(b) *Madras Estates Land Act* (1 *of* 1908), *S.* 125 —*Principle requiring the landlord taking advantage of special procedure, to prove that requirements of the Act are complied with does not apply where a purchaser in revenue sale and not the landlord, seeks the relief.*

Where the landlord, does not seek to avail himself of the special procedure by way of distress or sale provided for by the Act but it is the purchaser in a revenue sale whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly conducted, the principle that it is for the landlord who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with, does not apply : 27 *Mad.* 94, *Dist.*

[P 401 C 2, P 402 C 1]

T. Arumarthatha Pillai and *K. V. Srinivasa Iyer*—for Appellant.

C. V. Anantakrishna Iyer and *K. V. Venkata Subrahmanya Iyer*—for the Respondents.

Judgment.—In this suit the plaintiff-appellant seeks to enforce a mortgage on the plaint land which originally was in occupation of the first defendant and which was afterwards sold in a rent sale to the third defendant and by him transferred to the second defendant. The fourth defendant is the landlord.

The mortgage was not effected with the permission of the landlord and consequently under S. 125 of the Estates Land Act it is not binding on a purchaser in a revenue sale. The second defendant is, therefore, in no way bound by the mortgage unless it is established that the revenue sale was invalid. The plaintiff made certain allegations in his plaint to the effect that the sale was invalid because it was conducted collusively and fraudulently, that there was no proper notice by beat of tom-tom and that his mortgage right was not announced at the time of the sale or in the sale proclamation.

When the issues were framed, Issue No. 2 was framed on this allegation as follows :

" Whether the rent sale, under which the second defendant claims, is invalid for all or any of the reasons alleged in the plaint."

Although the issue was framed in this way, the District Munsif appears to have allowed the plaintiff to adduce evidence as to the alleged irregularities in the conduct of the sale, such as, that the time and place of sale were not in accordance with the sale proclamation, and the District Munsif held that the sale was not invalid, and dismissed the suit.

In appeal it was contended that the plaintiff had proved these irregularities and that was argued before the lower appellate Court, and the lower appellate Court held that the plaintiff had not proved these additional irregularities and decided that there was no evidence as to the exact time when the sale commenced, or as to the exact distance from the notified place of sale to the place where the sale was held.

It is now contended here that the burden is upon the fourth defendant, the landlord, to prove every condition necessary for the validity of the sale and reliance is placed on *Dorasamy Pillai* v. *Muthusamy Moopan* (1). It was no doubt held in that case that it is for the landlord, who seeks to avail himself of the special procedure by way of distress provided for by the Act, to show that the requirements of the Act have been complied with. I do not think that there is any need to question this proposition of law, but, even if it is applicable to the facts of this case, of which I am very doubtful, I do not think that, in the circumstances, the plea can be taken now.

An issue was framed as to certain allegations and no others, and consequently the defendant had no opportunity of adducing evidence to prove that the sale was conducted properly with reference to the time and place mentioned in the sale proclamation. The plea that second defendant failed to prove all the facts necessary to prove a valid sale has never been raised until this second appeal, and, therefore, if relief were to be given

(1) [1904] 27 Mad. 94=13 M. L. J. 479.

to the plaintiff, it would be necessary to re-try the case from the beginning. As a matter of fact the evidence in the case is not before me, but evidently the positive evidence for the plaintiff was insufficient to prove any irregularity in the sale as held by the lower appellate Court. I see no reason now for re-trying the case de novo. As a matter of fact, it appears to me that in this case the fourth defendant, who is the landlord, does not seek to avail himself of the special procedure by way of distress or sale provided for by the Act. It is the purchaser whose rights are sought to be limited by imposing on him a mortgage to which he would not be liable if the sale had been properly conducted. The landlord has but a very small interest in the matter; for it merely means that he has one tenant instead of another and there is nothing to show that that would benefit him in any way. The second defendant, under S. 125, is entitled to the whole property free of this mortgage which the plaintiff deliberately took without getting the sanction of the first defendant's landlord, although he ought to have known that such a mortgage would not be an encumbrance binding on the property. In this view I do not think that *Dorasamy Pillai* v. *Muthusamy Moopan* (1), is applicable. In either event, I think that the lower appellate Court's decree must be upheld.

The second appeal is dismissed with costs of the second respondent.

Appeal dismissed.

A. I. R. 1926 Madras 402

KUMARASWAMY SASTRI AND VENKATASUBBA RAO, JJ.

Ramu Chetty and *others*—Plaintiffs-Appellants.

v.

Panchammal and *another* — Defendants—Respondents.

Appeal No. 189 of 1923, Decided on 3rd November 1925, from the decree of the Sub-J., Vellore, in Original Suit No. 88 of 1921.

(a) *Evidence Act S. 92—Division of status may be proved by means of unregistered partition deed.*

Division of status can be proved even though there is an unregistered partition deed in evidence which may be used to determine the nature of the possession held by a party: *A. I. R.* 1922 *P. C.* 266, *Appl.* [P. 402, C. 2, P. 403, C. 1]

(b) *Evidence Act, S.* 91—*Section does not apply if a party does not attempt to prove the terms of the document* (*per Venkatasubba Rao, J.*).

S. 91 does not apply if a party has not attempted to give evidence in proof of the terms of the document.

T. M. Krishnaswamy Aiyar—for Appellants.

K. Ramanadha Shenai and *K. Sanjivi Kamath*—for Respondents.

Kumaraswamy Sastri, J. — The plaintiff is the appellant. His case is that the 1st defendant and some others were members of a joint Hindu family; that on the death of the 1st defendant's husband he became solely entitled to the property; that the 1st defendant is in wrongful possession of the items mentioned in the plaint. His claim is for a declaration of the plaintiff's right to the items mentioned in Schedules A, B and C of the plaint, for delivery of possession for injunction and other reliefs.

The case of the defendant is that her husband was not a member of the joint family with the plaintiff on the date of his death, but that he was a divided member of the family and he was enjoying certain properties in his own right, and on his death he is in possession of and them in her right.

The Subordinate Judge has found on the evidence adduced that the defendant's husband was divided in status and that she was in enjoyment of the property and dismissed the suit.

The appellant's vakil frankly admits that he cannot dispute the correctness of the finding, but his contention is, having regard to S. 92 of the Evidence Act, the finding is not admissible because there was an unregistered partition deed between the members of the family in 1914. And there being an unregistered deed all the evidence of the conduct of the parties and the rights of the various members is inadmissible. I am unable to agree with him in his contention. So far as the division of status is concerned a recent decision of the Privy Council in Rajam Iyer's case *Rajangam Aiyyar* v. *Rajangam Iyer* (1) is clear to the effect that a division of status can be proved even though the document has not been registered. It has also been held by their Lordships of the Privy Council that an unregistered document may be used to

(1) A. I. R. 1922 P. C. 266.

determine the nature of the possession held by a party. The Subordinate Judge has not relied upon any unregistered partition deed. For the purpose of coming to the conclusion he has arrived at, he takes the conduct of the parties into consideration, and comes to the conclusion that not only has the division of status been proved, but all the properties claimed have been enjoyed by the defendant's husband in his own right. I do not see why the evidence as regards the conduct of the parties in their dealings with each other and with regard to specific items of property should not, coupled with the finding of a division of status, be used and relied upon to show that certain properties which the plaintiff claims are not in wrongful possession of the defendant but belonged to the defendant's husband. I do not think that, on the facts of this case, S. 92 of the Evidence Act is necessary to be invoked by any of the parties. The plaintiff comes into Court and says that he is the absolute owner of the property, because he is a member of an undivided family. The defendant says that her husband is not a member of an undivided family, that he was divided in status, and that he enjoyed certain properties separately, as a divided member of the family. This is not a case when a claim is made by the defendant to any property on the allegation that it came to her by virtue of a deed of partition which is unregistered and so inoperative. The plaintiff's claim as a member of the joint family could not be sustained. I think the decision of the Subordinate Judge on the facts of the case is correct and would dismiss the appeal with costs.

Venkatasubba Rao, J.—I agree. According to the plaintiff he and the defendant's husband were undivided. On that footing he claimed possession. The defendant pleaded that there was a division. The lower Court has dismissed the plaintiff's suit. In the course of the trial it appeared that there was a writing evidencing the partition, but it was not registered, and no attempt was made to file it. The learned Judge has found that there was a partition relying mainly upon circumstances. He has inferred partition from circumstances such as these. The defendant's husband lent moneys and realized them in his own name. H dealt with the property as if he was the absolute owner of it. He carried on a separate business and was assessed to income-tax individually. From these and similar circumstances the Judge has inferred a partition. It is now contended for the appellants that under S. 92 of the Evidence Act evidence of partition ought not to have been received. S. 92 has clearly no application. The appellant's learned vakil probably intends to rely upon S. 91. As the terms of the partition have been reduced to the form of a document, no evidence can be given under that section to prove the terms of that partition except the document itself. This section does not equally apply as the defendant has not attempted to give evidence in proof of the terms of the document. The evidence was directed to prove that the parties lived as members of a divided family. From their conduct the Judge, as I have said, inferred a partition. It was not necessary to decide what the terms were on which the partition was made, nor does the Judge purport to decide those terms. He merely finds that the parties became divided and I do not think that there is anything in the Evidence Act to prevent him from doing it. He, in effect, says: "The plaintiff says the family was undivided. I find they were divided in interest." The Judge says nothing more. The plaintiff having come to Court with the case that the family was undivided and his case having been found to be false, his suit was liable to be dismissed. The plaintiff does not ask in his plaint that if there was a division in status, the Court should determine what the properties are to which he is entitled. On the finding that in law the parties became divided the plaintiff's case was untrue and it was open to the Judge to dismiss the suit. S. 91 is not in the defendants' way and the decision of the Judge is perfectly correct. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 404

SPENCER, J.

Meer Mohammad Noorulla Sahib—Appellant.

v.

Mari Nanjappa Nainivaru—Respondent.

Second Appeal No. 1583 of 1923, Decided on 27th October 1925, from the decree of the Dist. J., Salem, in Appeal Suit No. 81 of 1921.

Madras Estates Land Act (1 *of* 1908), *S.* 56—*Lands granted for services—Services discontinued—Lands become ryoti land.*

Lands orginally granted by a landlord of an estate for enjoyment upon service tenure, automatically become ryoti lands when services are discontinued by holders of such land, and no question of limitation arises in a suit by the landlord to enforce acceptance of a patta. 1 *Bom.* 586 and 28 *Bom.* 305, *Dist.*; 41 *Mad.* 554, *Ref.* [P 404, C 2]

S. Vaidyanadha Iyer—for Appellant.

K. Kuttikrishna Menon—for Respondent.

Judgment.—This suit was brought under S. 56 of the Madras Estates Land Act by a landholder to enforce the acceptance of a patta by the defendant, who is according to him, a ryot in one of the villages comprised in his estate. The period of limitation for such a suit is three months, after the expiration of one month from the defendant's failure to accept a patta. No question of limitation was raised in the Courts below, and as the District Judge says, no question can possibly arise in the circumstances. As this is not a suit for declaring the plaintiff's right to resume or assess rent-free land, it is unnecessary to apply Art. 130 of the Limitation Act, nor has that article been suggested in the grounds of appeal or in the arguments. The defendant is admittedly in possession of cultivable lands other than private lands in the plaintiff's estate. He alleged at the trial that they had been granted to his grandfather by the plaintiff's predecessor, free of rent, 100 years ago. The Court of Wards, who are in charge of this estate, directed the resumption of the inam under Exhibit A on the 24th January 1920. The defendant, having raised the defence that the land had been granted to his ancestor to be enjoyed free of service and free of any assessment for ever, failed to prove it. It was found by both the lower Courts that the land was granted originally to one Karim Shah as Masjid or Fakir inam, and the Ajmash account and Exhibit III support this conclusion. From these both the Courts drew the conclusion that the grant was one of a service inam and it is not suggested that any service is now being rendered.

Under S. 3, Cl. 16 of the Estates Land Act "Ryoti land does not include lands granted on service tenures either free of rent or on favourable rates of rent if granted before the passing of this Act. But when services are discontinued the lands become ryoti lands. In *Raja Venkata Ramayya* v. *Veeraswamy* (1) we held that no particular formality or procedure was required in case services are discontinued for putting an end to service tenures in order to make the lands ryoti lands in cases where lands which were once ryoti lands have been given to the occupancy ryot on a favourable rent in consideration of services to be rendered.

The burden lay on the defendant in this case to prove that the lands held by him were exempted from the class of ryoti lands and that he was entitled to hold them free of rent. For this purpose he relied upon Exhibits 1 to III, the effect of which, if genuine is to show that in 1808, 1815 and 1829 orders were issued that the Karim Shah inam was to be continued to Ghulam Ali who is said to be the defendant's grandfather and confirmed (jari) in his name. But there is nothing in these documents to imply that the grant was exempt from future services or that it was to be held permanently exempt from payment of rent. Assuming that Exhibit I is admissible being unsigned, the District Judge has found for reasons stated that there is no counexion shown between the document and the suit land. The defendant also relies on his long enjoyment for about 100 years, during which time he says he has paid no rent. There is no evidence as to the date when the services ceased to be rendered.

Keval Kuber v. *The Talukdari Settlement Officer* (2) and *Lakhamgavda* v. *Keshav Annaji* (3) are cases in which

(1) [1918] 41 Mad. 554=34 M. L. J. 309=23 M. L. T. 251=7 L. W. 508=(1918) M. W. N. 327.
(2) [1877] 1 Bom. 586.
(3) [1604] 28 Bom. 305=6 Bom. L. R. 364.

the grantees of an inam succeeded on the strength of their long enjoyment in resisting the claims of the landholder to impose rent. In 1 *Bom.* 586 (2) nothing was known as to the nature of the grant and the terms being unknown the Judges were unable to accept the argument that the grantor or his representative were entitled to take back the lands or dispense with the performance of the services.

In 28 *Bom.* 305 (3) the landholder in a similar case claimed to dispense with the defendant's services of his own free will, whether the defendant was willing to continue to render them or not and those learned Judges held that he was not entitled to do so, as the landlord had not proved his right to resume and as the defendants had proved long and undisturbed possession for a number of years and they were unwilling to discontinue the service.

The present case is quite different. Here all the evidence that we have points to the grant having been one for a service inam and admittedly the service is not being rendered and has not been rendered for a long time. The defendant, having failed to prove that he was entitled to enjoy the land rent free, the lower Courts were justified in directing him to accept a patta at the rate fixed in the accounts.

The second appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 405

PHILLIPS, J.

Vasteva Holla and *another*—Defendants—Appellants.

v.

P. Mahabala Rao—Plaintiff—Respondent.

Second Appeal No. 711 of 1924, Decided on 11th August 1925, against a decree of the Sub-J., South Kanara, in A. S. No. 89 of 1923.

(a) *T. P. Act, S. 76—Mortgagee is bound to pay enhanced assessment even apart from the provisions of the Act.*

Even if the T. P. Act does not apply, a mortgagee is bound to pay enhanced assessment in the absence of a provision to the contrary in the deed on the ground that it is his duty to manage the property with ordinary prudence. *A. I. R.* 1924 *P. C.* 102, *Foll.* [P 406. C 1]

(b) *Civil P.C., O.* 34, *R.* 10—*Costs of mortgagee in redemption suit are discretionary where he raises questions denying mortgagor's right to redeem.*

Ordinarily a mortgagee would be entitled to his costs in a redemption suit, but it is subject to the discretion of the Court where he raises questions which involve a denial of the mortgagor's right to redeem. [P 406, C 1]

K. Y. Adiga—for Appellants.

B. Sitarama Rao—for Respondent.

Judgment.—In this appeal against a redemption decree, the defendants, mortgagees, raise three points for consideration. The first point urged is that the mortgagees are entitled to set-off the enhanced assessment which has been paid by them and add it to the mortgage amount. Under the Transfer of Property Act, the mortgagee is bound to pay enhanced assessment unless there is a contract to the contrary, and if this principle is to be applied, altbough this particular mortgage was executed before the Transfer of Property Act was passed, I think that the mortgagees would be bound to pay the enhanced assessment themselves, because I can read no contract to the contrary in the document. There is a provision that the mortgagees shall pay assessment and that they should get the revenue registry in their own names, in virtue of which they would themselves be called upon to pay the assessment leviable at any particular time. Two cases were relied on by the appellants *Subbarow* v. *Venkata Narasimhan* (1) and *Panigatan Kanaran* v. *Raman Nair* (2). In the first of these cases no facts are given in the report and it is very difficult to say what in that particular case was the contract to the contrary ; for we do not know what the contract contained. In the second case, the amount of rent which was receivable by the mortgagee was directed to pay the assessment fixed at a certain definite amount to the mortgagor and enjoy the balance as interest. These terms do not appear in the suit contract. In fact, so far from the suit contract containing a contract to the contrary within the meaning of S. 76, it seems to me that it almost amounts to a specific contract to pay the assessment, whatever it was ; at any rate, I am not prepared to say that the lower Courts are wrong in finding that there was no contract to the contrary. Even if the Trans-

(1) [1904] 27 Mad. 368=14 M. L. J. 218
(2) [1907] 17 M. L. J. 517.

fer of Property Act does not apply, it has been held in a recent case decided by the Privy Council in *Abid Husain Khan* v. *Kaniz Fatima* (3) that a mortgagee is bound to pay enhanced assessment in the absence of a provision to the contrary in the deed, on the ground that it is his duty to manage the property with ordinary prudence. On this ground also, the decree must be confirmed in this respect.

The second point relates to improvements on kumaki land which have been disallowed by the lower Courts. The kumaki land is not included in the property mortgaged, but is land over which the adjacent wargdar has certain rights in the way of taking leaves, etc. Improvement to this kumaki land is, therefore, not necessarily improvement to the mortgaged property ; for it is quite possible that the mortgagor will never get possession of the kumaki land and its improvements. It has not been suggested that the improvements made on the kumaki have themselves enhanced the value of the mortgaged property, and, therefore, that question need not be considered. It is next argued that the commissioner in determining the amount of compensation payable for improvements has adopted the rate of wages applicable at the date the improvements were made, and reliance is placed on one sentence in his report. Whether this is so or not is not quite clear, but the deduction made by him from the present day rates may be due to the fact that the improvements have deteriorated since they were made. The point was not raised in either of the lower Courts and there is no material here for its determination. The objection must be disallowed.

The last objection relates to the costs in the trial Court. Ordinarily a mortgagee would be entitled to his costs but this is subject to the discretion of the Court where he raises questions which involve a denial of the mortgagor's right to redeem. Here there was a denial that a portion of the property was mortgaged ; there was also an excessive claim for improvements and also a claim for enhanced revenue. In these circumstances I cannot say that the lower Court has wrongly exercised its discretion.

In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

(3) A. I. R. 1924 P. C. 102.

A. I. R. 1926 Madras 406

DEVADOSS AND WALLER, JJ.

(*Mulugu*) *Chengayya*—Plaintiff—Appellant.

v.

Aruvela Devasanamba Garu and *others*—Defendants—Respondents.

Letters Patent Appeal No. 90 of 1924, Decided on 9th October 1925, from the judgment of Krishnan, J., D/- 12th March 1924, in Second Appeal No. 895 of 1921.

Hindu Law—Alienation by de facto manager—Question as to whether whole interest passed or any coparcener's share was reserved not cleared—Interest of whole family passes.

Where a vendee purchases property from a de facto manager of the joint Hindu family and there is nothing in the document to show that the manager conveys only his share or that he reserves the share of anybody from being conveyed, both the parties to the conveyance should be presumed to have intended that the whole interest of the family should be conveyed by it, although the vendor does not describe himself as the managing member of the family : 34 *All.* 296 (*P. C.*), *Dist.* [P 407 C 1]

B. Somayya—for Appellant.

N. Chandrasekhara Aiyar and *S. Kumaraswamiah*—for Respondents.

Judgment.—The question in this appeal is whether the plaintiff's share was sold by the 6th defendant to the 1st defendant under sale deeds, Exs. VII and III. The contention of Mr. Somayya for the appellant is that the 6th defendant sold the property as his and that he did not sell the property as the manager of the joint Hindu family and therefore he could not have validly conveyed the share of the plaintiff. He places great reliance upon the evidence of P. W. 3, the son of the 1st defendant. In his evidence he stated that it was believed at the time of the sale that the plaintiff had been adopted into another family. From this the appellant wants us to infer that the 6th defendant sold only his share of the family property. The circumstances are these : The plaintiff and the 6th defendant are brothers. The property of the family was sold for paying off the debts of their father and in the documents there is no mention that the right of the 6th defendant alone was sold. No doubt there is no mention in it that the 6th defendant conveyed the properties under Exs. VII and III as managing member of the joint Hindu family. But the question is where the de facto manager of a joint Hindu family conveys the property with-

out any reservation and without restricting the right conveyed to his own share, whether the Court should presume that the vendee contracts to buy and the vendor contracted to sell the interest of the whole family in the property. The proper presumption in such a case would be that where a vendee purchases property from a de facto manager of the joint Hindu family and there is nothing in the document to show that the manager conveys only his share or that he reserves the share of anybody from being conveyed both the parties to the conveyance intended that the whole interest of the family should be conveyed by it. Here in this case there is an additional circumstance that the debt for which the sales were effected was a debt binding both upon the plaintiff and upon the 6th defendant. The purpose being one which could bind both the plaintiff and the 6th defendant, the mere fact that the vendor did not describe himself as the managing member of the joint Hindu family is not a circumstance which should be taken as militating against the presumption that what the bona fide purchaser bought was the whole interest of the joint family in the property conveyed to him.

Mr. Somayya places great reliance upon *Balwant Singh* v. *R. Clancy* (1). The facts of that case are different from those of the present. In that case the vendor claimed the property as impartible property belonging to himself alone. It was held that he could not have intended to convey the interest of the younger brother whose right he denied in the document itself. Their Lordships of the Privy Council found that the brother was a minor at the time and therefore his consent to the sale was of no avail to the vendee. They also found that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh. Here when the 6th defendant conveyed the property, he did not deny the right of the plaintiff, nor did he hold out that he was the only person interested in the property. The case in *Ammani Ammal* v. *Ramaswami Naidu* (2) does not help the appellant. It is unnecessary to consider the cases quoted by Mr. Chandrasekhara Aiyar such as *Maharaj Singh* v. *Balwant Singh* (3), *Surapa Raju* v. *Venkayya* (4) and *Audimula Mudali* v. *Alamelu Ammal* (5) in the view we have taken of the case. We consider the judgment of the learned Judge to be correct and dismiss the Letters Patent Appeal with costs, two sets, one to the 1st defendant and the other to the 5th defendant's legal representatives.

Appeal dismissed.

(1) [1912] 34 All. 296=39 I. A. 109=(1912) M. W. N. 462=11 M. L. T. 344=9 A. L. J. 509=15 C. L. J. 475=16 C. W. N. 577=23 M. L. J. 18=14 Bom. L. R. 422 (P. C.).
(2) [1919] 10 L. W. 75=37 M. L. J. 113=(1919) M. W. N. 866.
(3) [1906] 28 All. 508=3 A. L. J. 274=(1906) A. W. N. 117.
(4) [1915] M. W. N. 908.
(5) [1916] 4 L. W. 126=(1916) 2 M. W. N. 115.

A. I. R. 1926 Madras 407

RAMESAM, J.

Kuchu Iyer—Appellant.

v.

Vengu Ammal and *another*—Respondents.

Second Appeal No. 617 of 1923, Decided on 2nd December 1925, from the decree of the Addl. Sub-J., Tinnevelly, in Appeal Suit No. 83 of 1922.

Succession Certificate Act (7 *of* 1889). *S.* 16—*Payment by debtor to person really entitled before grant of certificate is complete defence to a suit by certificate-holder.*

Where the debtor has paid the debt before the grant of the certificate to the person really entitled to the debt (other than the holder of the certificate), it affords a complete defence to the suit by the certificate-holder. The only effect of S. 16 is if the debt remained unpaid up to the grant of the certificate, the certificate is conclusive and compels the debtor to pay it to the certificate holder: 35 *Mad.* 162, *Foll.*; 8 *Bom. H. C. R.* 152 (*F. B.*), *Appr.*; 7 *Bom. H. C. R.* 31; 7 *L. W.* 330 and 26 *Mad.* 224, *Dist.* [P 408 C 1]

C. V. Ananthakrishna Iyer and *K. Venkateswara Iyer*—for Appellant.

K. Rajah Iyer and *P. V. Krishnaswamy Iyer*—for Respondents.

Judgment.—The respondents now agrees to the second appeal being allowed and they admit that the succession certificate has been rushed but plead that they are not liable for costs as the decrees in the Court below were obtained on the footing of the succession certificate which was then subsisting.

Mr. Ananthakrishna Iyer argues that, even on the footing of the succession certificate, he could plead and prove payment before the grant of the

certificate to the person lawfully entitled and the decision of the Courts below is wrong. I agree with him. The decisions relied on by the Courts below do not support the view taken by them. In *Damodhar Bapuji* v. *Zinga* (1) the plea was not that the payment was made to a person (other than the holder of the certificate but) really entitled to collect the debt.

Whether it is correctly decided or not, it did not deal with the question arising in this case. In *Muthiah Chettiar* v. *Ramanathan Chettiar*, (2) there was no plea of payment to another and the sentence relied on is a mere casual observation and was not meant to decide any point arising in the case. In *Meenakshi Achi* v. *Ananthanarayana Ayyar* (3) no payment to another was pleaded. The only question was who should continue the suit of the creditor who died during its pendency. The widow produced a succession certificate and claimed to proceed with it. The defendant said that the undivided brother of the deceased was the proper party but he disclaimed any such right. The point arising now did not arise there. On the other hand the case in *Purshotam Mansukh* v. *Ranched Purshotam* (4) (a decision of Westropp C. J., Melvill, Gibbs and West, JJ.) decides that the debtor can show that he paid to the person really entitled to receive though not to the holder of the certificate, before grant of the certificate. In my opinion this case lays down the correct principle and I agree with it, and hold that where the debtor has paid the debt before the grant of the certificate to the person really entitled to the debt (other than the holder of the certificate), it affords a complete defence to the suit by the certificate-holder. The only effect of S. 16 of the Act, is, if the debt remained unpaid up to the grant of the certificate, the certificate is conclusive and compels the debtor to pay it to the certificate holder. [See *Oriental Government Security Life Assurance Co. Ltd.* v. *Vantedu Ammiraju* (5).]

The District Munsiff ought to have made the defendant's wife a party and framed an issue as to the genuineness of the Will and then tried the case and the suit together. Instead of this he made a suggestion which if not actually absurd verges on it. The defendant's petition to make his wife a party was dismissed erroneously.

Apart from all this, there are no bona fides in the plaintiff's claim. Her main object was to attack the Will which has now been found genuine. Her attack against the Will was frivolous having regard to the history of the family and of the circumstances under which the Will was executed.

The second appeal is allowed and the plaintiff must pay the costs of the appellant in all the three Courts.

Appeal allowed.

(1) 7 B. H. C. A. C. 31.
(2) [1918] 7 L. W. 330=(1918) M. W. N. 242.
(3) [1903] 26 Mad. 224=12 M. L. J. 380.
(4) 8 B. H. C. A. C. 152 (F.B.).
(5) [1911] 35 Mad. 162=9 M. L. T. 451=(1911) 1 M. W. N. 276.

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* A. I. R. 1926 Madras 408

RAMESAM, J.

M. Venkatakrishnier — Plaintiff—Appellant.

v.

Secretary of State and *another*—Defendants—Respondents.

Second Appeal No. 309 of 1924, Decided on 15th July 1925, against a decree of the Dist. J., Ramnad, at Madura, in A. S. No. 199 of 1922.

* *Civil P. C., S. 80—Object of section is to inform defendant of the ground of complaint—Notice must not be construed too strictly and it may not set out all facts — Informing general nature of suit is sufficient.*

The object of S. 80 is merely to inform the defendant substantially of the ground of complaint and it must not be too strictly or too narrowly construed and must not be construed as if it is pleading. It need not set out all the details and facts of the case which the plaintiff intends to prove and the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed: *Jones* v. *Bird*, 24 *R. R.* 579; 24 *Mad.* 279 and 27 *Bom.* 189, *Foll.* [P 409, C 2]

Watrap Subrahmanya Iyer—for Appellant.

Govt. Pleader—for Respondents.

Judgment.—This second appeal arises out of a suit brought by the plaintiff against the Secretary of State for India in Council and the President. District Board, Ramnad, for certain declarations and for recovering damages. The plaintiff is the hakdar of the Mangammal Chatram and of certain inam lands

at tachec to it. Through the said lands passes a District Board Road No. 11, namely, the road from Thenkasi to Madura. The dispute between the parties relates to the eastern avenue of trees on the side of the said road. The dispute between the parties relates to the ownership of the ground of the avenue and of the trees. On a perusal of the pleadings in the case it is clear that the plaintiff says that he is the owner of the ground and avenue and as the result of it also of the trees growing on it. He also as a corollary claims the right to plant fresh trees at any place he likes on the avenue either in substitution of fallen trees or at other places. The defendants claim that the avenue is part of the road and as such the surface is vested in the District Board. But the first defendant claims the right to the sub-soil. It is obvious that the root of the difference between the parties is one relating to ownership. The right to cut the trees is merely an auxiliary of the title subject to one small exception which will be mentioned later on. The District Munsif has dismissed the suit on the ground that the notice issued by the plaintiff prior to the suit was not sufficient. On appeal the District Judge held that the only relief to which the first defendant's attention was directed was the declaration of the plaintiff's title to plant new trees on the roadside within the limits of the plaintiff's inam lands and to enjoy their usufruct. He held that the suit ought not to have been dismissed so far as this declaration is concerned and, as for the rest, as the other reliefs were not mentioned in the notice he held the suit was rightly dismissed. In the result he partially remanded the suit for trial. Plaintiff files this second appeal.

As I already pointed out the right to cut the trees is alleged only as the result of the right to the land itself. The notice, Ex. 1, certainly alleges that the inam lands and the avenue trees standing on the side of the road belonged to the petitioner ; see para 2. Paragraph 9 says that the public road does not include the roads passing through the inam village. Paragraph 10 says that the road is subject to rights of individuals. Paragraph 11 says that it is unjust to prohibit him from planting trees in his own inam. It is true that para. 13 mentions that he wants a declaration as to the right to plant new trees. But for this fact that he mentioned only one declaration in para. 13, there would have been no trouble. However, the question now is whether this is a proper notice according to law. In *Jones* v. *Bird* (1), it was said with reference to a similar section that the object of such a section is merely to inform the defendant substantially of the ground of complaint. This was referred to with approval in *Secretary of State* v. *Perumal Pillai* (2) ; in *Jehangir* v. *Secretary of State* (3) ; it was said " these notices must not be too strictly or too narrowly construed. They must not be construed as if they were pleadings and that they need not set out all the details and facts of the case which the plaintiff intends to prove, and that the notice must be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. " The cases in *Jones* v. *Bird* (1) and *Secretary of State* v. *Perumal Pillai* (2) were followed. In *Eales* v. *Municipal Commissioners of Madras* (4), Collins, C. J., and Shephard, J., observed, adopting the language of Pollock, that " we must import a little commonsense into notices of this kind, " though in that case the question was regarding the address of the plaintiff. I, therefore, think that the notice is substantially sufficient in so far as the prayers resting upon the plaintiff's ownership of the land are concerned. The cause of action is stated to be the order of Government of 10th August 1916 and the attitude which the defendants have now taken up was taken up in that order. Therefore there is no surprise to the defendants.

There are only two matters which require to be specifically dealt with. One is prayer (c) which relates to lopping off the branches where they cause the damage creating shade. In so far as this prayer rests on plaintiff's ownership of the land and the trees there can be no objection. But the Government Pleader apprehends, and rightly, that the plaintiff may probably claim a right to cut off the branches even if his ownership is not established on the ground that the

(1) [1822] 5 B. and Ald. 837=1 D. and R. 497=24 R. R. 579.
(2) [1901] 24 Mad. 279=11 M. L. J. 117.
(3) [1902] 27 Bom. 189=5 Bom. L. R. 80
(4) [1891] 14 Mad. 386.

defendant is not entitled to cause damage to his crops by over-shadowing trees. I agree with the learned Government Pleader in thinking that this cutting should not be regarded as alleged in the notice and there is no reason why the notice should be so construed as to cover a claim of this kind. Therefore prayer (c) of the plaint if it is urged in respect of trees found to belong to the defendant would certainly be disallowed.

The only other point which requires to be specifically dealt with is the claim for damages in prayer (f). It is now conceded that it is not intended to be urged against the Government, the first defendant. It is enough to record this admission. So far as the District Board is concerned, the notice given to them, Ex. 2, does not mention this as one of the reliefs, but in para 3 of Ex. 2 plaintiff mentioned that some wind-fallen trees were sold by the Local Fund authorities and the sale-proceeds were appropriated by them under orders of the Collector. I think this allegation of the appropriation of the proceeds relating to the ownership of the plaintiff is enough to constitute a notice to District Board. It is unnecessary to discuss the question whether the act of the second defendant in appropriating the proceeds falls within the language of S. 156 of Act V of 1884 and requires notice: vide *Syed Ameer Sahib* v. *Venkatarama* (5).

With these remarks the whole suit will be remanded to the District Munsif's Court for trial and disposal according to law. The plaintiff will be entitled to refund of Court-fees both in this Court and in the lower appellate Court. Costs will abide the result.

The memorandum of objections of the first defendant will be dismissed with costs of plaintiff.

Case remanded.

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(5) [1893] 16 Mad. 296.

✻ A. I. R. 1926 Madras 410

COUTTS-TROTTER, C. J., AND REILLY, J.

Manepalli Satyanarayanamurthi—Defendant—Appellant.

v.

Thommandra Erikalappa—Plaintiff—Respondent.

Appeals Nos. 141 and 195 of 1923, Decided on 23rd September 1925, from the decree of the Sub-J., Kistna, at Ellore, in O. S. No. 145 of 1921.

(a) *Contract Act, S. 73—Buyer repudiating cannot charge seller that the latter was unable to perform his part of the contract.*

A seller is not to be defeated merely by its being shown that after repudiation by the buyer he had not the goods to implement the contract actually in his physical possession. He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation. *British and Beningtons Ltd.* v. *N. W. Cachar Tea Co., Ltd.*, 1923 *A. C.* 48, *Rel on.* [P, 410, C. 2]

✻ (b) *Contract Act, S. 74—Deposit cannot be forfeited irrespective of damage.*

It is never the practice in mercantile contracts to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit. [P. 411, C. 1]

S. Varadachari and *V. S. Narasimhachari*—for Appellant.

Patanjali Sastri and *B. Somayya*—for Respondents.

Coutts-Trotter, C. J.—This case is really governed by the decision of the House of Lords in *British and Beningtons Ltd.* v. *N. W. Cachar Tea Co., Ltd.* (1). As I understand that case, it lays down that a seller is not to be defeated merely by its being shown that after repudiation by the buyer he had not the goods to implement the contract actually in his physical possession. He can show that he could supply the goods contracted for either from the open market or from any other source and he would be entitled to maintain a suit for damages for wrongful repudiation.

In this case the contract was that the buyer should take the goods between the 20th and 30th of April, 1919. He did not do so and he set up a false defence that he sent two men to take delivery within the contract period. Those two men were called and gave evidence and the learned Judges refused to believe them. No Judge sitting as a jury would have believed them because the seller wrote on

(1) [1923] A. C. 48.

28th April 1919, reminding the buyer that the date of effluxion of the contract was drawing near and the buyer (plaintiff) did not answer that until as late as 6th May 1919, when he set up this lying story about the two men having gone for the rice and being sent away empty. Now a point has been taken in this Court by Mr. Patanjali Sastri which is certainly ingenious, and it is this, that on the evidence before the Court which we have in the form of depositions it was never proved by the seller that the goods he had were goods which corresponded to the description of the goods to be sold, it being common knowledge of course that there are different brands and different qualities of rice, and indeed different qualities were mentioned at the trial. Two witnesses were asked whether they knew what sort of rice it was that the defendant proved to the learned Judge that he had at Ellore, and they spoke of some rice in somebody's godown and of some more that he could have got delivery of against cash from the Bank Of course the people who were asked those questions replied—there is no doubt that the vakil knew that they would reply—that they did not know. But unfortunately there is not a trace of that suggestion as to the quality not being right having been put to the defendant himself, the seller, who knew all about it. We are not to forget that the buyer's case at the trial was that he was entitled to have damages because he had asked for delivery and had not got it. In my opinion it would be quite wrong to act on a suggestion of this kind when it is clear that the defendant was never given a fair chance of explaining it at the trial.

The buyer's appeal (A. S. No. 195 of 1923) will, therefore, be dismissed with costs.

With regard to the seller's appeal (A. S. No. 141 of 1923) he says that, having got a deposit and there having been failure by the buyer to take delivery, he ought to keep the deposit. His own original suggestion was that he should return the deposit less whatever he is entitled to by way of damages. I can content myself with saying that it is never the practice in mercantile contracts, to hold that whatever be the damage suffered or not suffered the seller is to be entitled to keep the deposit. He is only entitled to such damages as the learned Judge sitting as a jury has suggested, namely, 12 annas a bag, and I do not think we ought to interfere in a matter which is eminently one for the trial Judge.

With regard to interest, it sounds plausible to say, as Mr. Varadachari has argued, that a person who is in default cannot possibly be heard to say that he is entitled to claim interest from the other side. The answer to it is the one that the learned Judge has given, namely, that the seller should have made calculation of the damages he has actually suffered and tendered the return of the balance to the buyer. No doubt it puts a man in a difficulty and if he goes ultimately into a Court of law he might have to justify his fixing the figure as best he could. But I take it that almost any tribunal would have an indulgent eye on the arithemetic of a man who adopted that straightforward course. In the result the seller had the buyer's money in his hands for a good many years to the amount of the excess between what the Judge has allowed by way of damages and the amount of the deposit which was Rs. 4,001. I think here too the judgment of the learned Judge must be upheld, and this appeal also will be dismissed with costs.

Reilly, J.—I agree.

Appeals dismissed.

A. I. R. 1926 Madras 411

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Muthuveeraswami Nayudu and *others*—Appellants.

v.

V. T. A. L. Annamalai Chettiar and *others*—Respondents.

Appeal No. 380 of 1923, and Civil Rev. Petition No. 403 of 1924, Decided on 25th August 1925, from a decree of the Sub.-J., Madura, D/- 8th August 1923.

Civil P. C., S. 47—Duty of Court—Question as to who are legal representatives and as to the bar of limitation must be decided by Court which passed the decree.

The questions as to who are the legal representatives and whether the decree was barred by limitation or not, must be determined by the Court which passed the decree before it transfers the decree for execution to another Court: 28 *Mad.* 466 (*F. B.*) and *A. I. R.* 1924 *Mad.* 673, *Rel. on.*

[P.412, C.1]

B. Sitarama Rao and *S. R. Muthuswamy Iyer*—for Appellants.

M. Subbaraya Iyer—for Respondents.

Judgment.—The lower Court, without dealing with the objections raised has made an order directing the decree, to be transferred to another Court. The application was to bring on record the legal representatives of certain deceased parties and to transmit the decree to another Court for execution. Notice was not served on all the persons on whom it should have been served. Defendants Nos. 4 to 6 raised the objection that they were not the legal representatives of Defendants Nos. 1 and 7. The learned Judge observed: "In the natural course they will be the legal representatives of Defendants Nos. 1 and 7." In this he is not correct. If the first defendant had left a widow for instance, Defendants Nos. 3 to 6 would not be his legal representatives in respect of his personal property. The learned Judge apparently did not bring to bear his mind upon the question, as he left it to be decided by the Court to which he directed it to be transferred.

Another plea put forward raised a question of limitation. Even this the Judge did not deal with.

In our opinion the objections must have been considered by the Judge. The question as to who are the legal representatives must be decided by the Court which passed the decree. See *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1). Whether the decree was barred by limitation or not is also a question to be determined by the Court which passed the decree. See *Rajilagiripathy* v. *Bhawanisankaran* (2).

The order is set aside and the lower Court is directed to deal with the application according to law.

No order is necessary in the civil revision petition.

We make no order as to costs in either case.

Order set aside.

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(1) [1905] 28 Mad. 466=15 M. L. J. 116 (F. B.).
(2) A. I. R. 1924 Mad. 673.

✻ A. I. R. 1926 Madras 412

DEVADOSS AND WALLER, JJ.

Kaliakkal—Petitioner.

v.

Palani Koundan and *another*—Respondents.

Civil Revision Petition No. 679 of 1923, Decided on 15th October 1925, against an order of the Dist. Munsif of Namakkal, D/- 30th November 1922 in R. E. A. Nos. 943 and 902 of 1922.

✻ (a) *Civil P. C., O. 9—Applicability.*

Order 9 does not apply to execution proceedings. 17 *All.* 106 (*P.C.*); 41 *Cal.* 1; 1919 *P. H. C. C.* 75 (*F. B.*), *Foll*; *A.I.R.* 1923 *Pat.* 239, *Not foll.* [P. 415, C. 1]

✻ (b) *Civil P. C., O. 21, Rr. 97 to 101—Proceedings under are in execution.*

Proceedings under Rr. 97, 98, 99, 100 and 101 are execution proceedings and not original proceedings. 19 *C. W. N.* 758 and 20 *C. W. N.* 1203, *Diss.* [P. 415, C. 1]

C. S. Venkatachari—for Petitioner.

L. S. Veeraraghava Aiyar—for Respondents.

Devadoss, J.—The only question in this revision petition is whether O. 9, R. 13 applies to execution proceedings. The District Munsif of Namakkal passed an ex-parte order on 26th October 1922, directing delivery of property free from obstruction. Defendants 5 and 6 applied on 5th November 1922, to set aside the ex parte order. The District Munsif has set aside the exparte order and passed a fresh order. The auction purchaser who is also a decree-holder has preferred this Civil Revision Petition. The question for decision is: Was the order of the District Munsif setting aside his previous exparte order passed without jurisdiction?

The answer to the question depends upon the wider question whether O. 9 applies to execution proceedings. There are several cases on the point which are not all reconcileable. In *Tirthasami* v. *Annappaya* (1), Muthusami Aiyar, J., held that Chaps. 7 and 13 of the old Code did not apply to execution proceedings. He rested his conclusion upon explanation to S. 647 of the Code of 1882. By S. 4, Act 6 of 1882 an explanation was added to S. 647. This explanation was enacted on account of the view held by the High Courts of Allahabad and Bombay that S. 647 corresponding to S. 141 of the

(1) [1895] 18 Mad. 131.

present Code applied to execution proceedings. The explantion is in these terms :

"This section does not apply to applications for the execution of decrees which are proceedings in suits."

The Privy Council held in *Thakur Prasad* v. *Fakirullah* (2), that independently of the explanation, S. 647 did not apply to applications for execution but only to original matters in the nature of suits, such as proceedings in probates, guardianships, and so forth. Muthusami Aiyar, J., held in *Tirthasami* v. *Annappaya* (1), that the dismissal of an execution petition did not bar a fresh application for execution. In *Balasubramania Chetti* v. *Swarnammal* (3), Benson and Sundara Aiyar, JJ., held that O. 2, R. 2 did not apply to execution proceedings. They observe at p. 201 :

"It could not have been the intention of the Legislature to apply to execution proceedings provisions laid down with regard to suits only. The procedure to be followed in appeal and execution application is specifically laid down in the Civil Procedure Code. S. 141 is intended to apply to other proceedings in civil Courts, such as probate etc."

Ayling and Seshagiri Aiyar, JJ,, followed this decision in *Somasundaram* v. *Chokkalingam* (4). In *Kajuluri Sami* v. *Sooryanarayana Raju* (5) Jackson, J., held that O. 9, R. 9 did not apply to orders passed in execution proceedings.

There are several cases which support the contention that O. 9 is applicable to execution proceedings. In *Subbiah Naicker* v. *Ramanathan Chettiar* (6). Ayling and Sadasiva Aiyar, JJ., were of opinion that O. 9, R. 13 applied to execution proceedings. The point did not directly arise in that case, but the learned Judges held : "Orders in execution which came under S. 47, Civil Procedure Code, are decrees as defined in S. 2 of the Code and hence ex parte orders passed in exetion are ex parte decrees and O. 9, R. 13 provides generally for the setting aside of ex parte decrees and not only for the setting aside of those classes of ex-parte decrees which are not also orders passed under S. 47 in execution proceedings. In *Chidambaram Chetti* v. *Thevanai Ammal* (7) the point was not decided, though Oldfield, J., in his referring order refers to the conflicting authorities on the point. The learned Chief Justice observed at p. 780 :

"I desire to say that our decision in this case must be taken to be confined to the particular facts of this case, that is to say, that where you have nothing more than the non-attendance at the hearing of an application to settle the terms of a sale proclamation, the respondent cannot be taken to be estopped by reason of that non-attendance on the principle of res judicata from thereafter denying the liability of the property to execution."

The decision in *Kali Shettithi* v. *Shama Rau* (8) relied upon by Mr. Veeraraghavier does not help him. For in the former, the point was not decided and in the latter Oldfield and Sadasiva Aiyar, JJ., held O. 9 of the Civil Procedure Code did not apply to execution proceedings.

There is a conflict of opinion in the other High Courts also. In *Hari Charan Ghose* v. *Manmatha Nath Sen* (9) Jenkins, C.J., and Ray, J., held that O. 9, R. 13, Civil Procedure Code was not applicable to a proceeding under Rr. 100 and 101 of O. 21. The learned Chief Justice after going into the history of S. 647 and the reason for enacting S. 4 of Act VI of 1882, observes :

"But after this alteration in the law, the Privy Council by a case *Thakur Prasad* v. *Fakirullah* (2) decided on S. 647 as it stood before the explanation was added, that the section did not apply to execution proceedings. The purpose of the Legislature in omitting that explanation was to do away with that which was shown to be unnecessary by the Privy Council decision and to rely upon the terms of the section as interpreted by the Privy Council."

This decision is a direct authority for the contention of Mr. Varadachariar for the petitioner that R. 13 does not apply to execution proceedings. A Full Bench of the Patna High Court in *Bhubaneswar*

(2) [1895] 17 All. 106=22 I.A. 44=5 M.L.J. 3 =6 Sar. 526 (P. C.).
(3) [1915] 38 Mad. 199=(1913) M.W.N. 685= 14 M.L.T. 196=25 M.L.J. 367.
(4) [1917] 40 Mad. 780=5 L.W. 267.
(5) A.I.R. 1925 Mad. 126.
(6) [1914] 37 Mad. 462=1 L.W. 251=26 M.L. J. 189=(1914) M.W.N. 205.

(7) 46 Mad. 768 A.I.R.=1924 Mad. 1 (F.B.).
(8) [1917] 5 M.L.W. 124=21 M.L.T. 297.
(9) [1914] 41 Cal. 1=18 C.W.N. 343.

Prasad Singh v. *Tilakdhari Lal* (10) held that O. 9, R. 9 did not apply to an order dismissing for default an application to set aside, under O. 21, R. 90, a sale held in execution of a decree. In that case, all the cases bearing on the question whether O. 9 applies to execution proceedings are collected. Though the learned judges do not discuss in detail all the cases, they give sufficient reasons for their conclusion that O. 9 has no application to execution proceedings. In *Sheonandan Chowdhury* v. *Debi Lal Chowdhury* (11) it was held that O. 9, R. 4 of the Civil Procedure Code applied to an application under O. 21, R. 100 which had been dismissed for default. With great respect, I am unable to follow the reasoning of the learned Judges. They observe at p. 378 :

" An application under O. 21, R. 100 is not an application in execution proceedings, but is an original matter in the nature of a suit, and in my opinion, the decision of the Judicial Committee in the case cited is an authority for the proposition that O. 9, R. 4, would apply by force of S. 141 to original matters in the nature of suits."

All matters in execution are governed by O. 21. O. 21 is headed " Execution of decrees and orders, " and applications under Rr. 97, 99, 100 and 101 are applications to the executing Court in the course of execution. It is difficult to understand why they cease to be proceedings in execution by the mere fact that the applications are made not by the decree-holder, but by other persons. It is the Court which executes the decree following the procedure laid down in O. 21, that entertains applications under Rr. 97, 100 and 101. The view that after sale, proceedings in execution are not strictly execution proceedings is held by some of the learned Judges of the Calcutta High Court. In *Diljan Mitha Bibee* v. *Hemanta Kumar Ray* (12) it was held :

" An application for setting aside an execution sale is not an application for execution but in the nature of original proceedings which is not excluded from the purview of S. 141 of the Civil Procedure Code. Such application, if dismissed for default, can be restored under O. 9, R. 9 of the Civil Procedure Code."

In *Bhuben Behari Nag* v. *Dhirendra Nath* (13) the same view was held. In *Ramappa Chettiar* v. *Ekambara Padayachi* (14), Venkatasubba Rao, J, held,

" A petition to restore a claim petition dismissed for default of appearance of the petitioner, is maintainable and not barred by O. 21, R. 63, Civil Procedure Code."

When a decree-holder or an auction-purchaser is resisted in obtaining possession of immovable property by a person in possession he may make an application to the Court complaining of such resistance or obstruction under R. 97. If the executing Court is satisfied that the obstruction was caused by the judgment-debtor, or by some other person at his instigation, it shall direct that the applicant be put into possession of the property, and if there is still further resistance, it may make the necessary order to enforce delivery of the property. If the Court is satisfied that the resistance or obstruction was occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or, on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application. (R. 99.) Where any person other than the judgment-debtor is dispossessed of immovable property by the holder of a decree for possession or by the auction-purchaser he may make an application to the Court complaining of such dispossession. If the Court is satisfied that the applicant was in possession of the property on his own account or on account of some person other than the judgment-debter, it shall direct that the applicant be put in possession of the property. R. 103 gives the right to the person against whom order is made under Rr. 98, 99, or 101 to institute a suit to establish the right which he claims to the present possession of the property, but subject to ths result of such suit, if any, the order shall be conclusive. In considering the question whether the provisions of the Code apply to execution proceedings, we must not overlook the fact that a right of suit is given under R. 103 to persons against whom an order is passed. In the case of parties to the

(10) [1919] 4 P.L.J. 135=(1919) P. H. C. C. 75 (F.B.).
(11) 2 Pat. 372=A.I.R. 1923 Patna 239.
(12) [1915] 19 C. W. N. 758.
(13) [1916] 20 C. W. N. 1203.
(14) A. I. R. 1924 Mad. 715.

decree, an appeal is provided under S. 47 of the Civil Procedure Code, and in the case of persons who are not parties to the decree, against whom an order is passed in execution, and in the case of the decree-holder or auction-purchaser against whom an order is passed in favour of persons not parties to the decree, a suit is provided. In the face of the clear wording of R. 103, it is difficult to understand why any proceedings after the property is brought to sale should be considered as something different from execution proceedings under O. 21. On a careful consideration of all the cases, I have no hesitation in holding that proceedings under Rr. 97, 98, 99, 100 and 101 are execution proceedings and, therefore, O. 9 does not apply to them. The order of the District Munsif setting aside an ex parte order was passed without jurisdiction, The Civil Revision Petition is allowed and the order dated 30th November, 1922, is set aside and that dated 26th October 1922, is restored with costs throughout,

Waller, J.—I agree and have nothing to add.

Petition allowed.

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* A. I. R. 1926 Madras 415

DEVADOSS AND WALLER, JJ.

Bulkee Bee and *others*—Appellants.

v.

Kaka Hajee Muhammad Ummar Sahib and *others*—Respondents.

Appeal No. 255 of 1924, Decided on 23rd September 1925, against the order of the Dist. J., North Arcot, at Vellore, D/- 20th December 1923.

* (a) *Civil P. C., O. 34, R. 6—Personal remedy is not open till a decree under R. 6 is passed.*

Under the present Code in the case of a mortgage, preliminary decree is passed under R. 4 of O. 34. If the mortgagor-defendant does not pay into Court the amount mentioned in the preliminary decree within the time fixed in the decree a final decree for sale has to be passed under R. 5 and if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount, a personal decree for the balance has to be passed under R. 6. It is the decree that is passed under R. 6 that is executable against the mortgagors personally. In the absence of a decree under R. 6 the mortgagee is not entitled to proceed against the property of the mortgagors other than those covered by the mortgage: *A. I. R. 1922 All. 388*, Dist.

[P. 415, C 2, P. 416, C 1]

(b *Civil P. C., O. 34, R. 4—Preliminary decree is not capable of execution.*

A preliminary decree is not capable of execution. It is only a decree absolute under R. 5 of O. 34 that can be executed; *33 All. 264 (P. C.)*, *Rel. on.* [P. 416, C 2]

A. Viswanatha Aiyar—for Appellants.

K. S. Krishnaswawi Aiyangar—fo Respondents.

Devadoss, J.—Respondents 1 and 2 herein are the transferee decree-holders of the mortgage decree in O. S. No. 40 of 1912 passed on the 5th March 1914. The mortgaged properties were sold but the sale proceeds were not sufficient to cover the decree amount. They applied to the lower Court for execution against the property of the mortgagors not covered by the mortgage. The mortgagors objected to the execution on the ground that there was no personal decree against them and that the application was barred by limitation. The learned District Judge overruled the objection and allowed execution to proceed against the property of the judgment-debtors not covered by the mortgage. The judgment-debtors have preferred this appeal.

It is contended by Mr. Viswanatha Aiyar for the appellants that no decree was passed under O. 34, R. 6, and, therefore, there is no personal decree against the mortgagors and the order of the District Judge is wrong. The decree passed on 5th March 1914, was only a preliminary decree and the final decree was passed on the 27th August 1914. In the final decree no provision was made for proceeding against the properties other than those covered by the mortgage; and no personal decree was passed against the mortgagors under R. 6. The question is whether the decree as it is can be executed against the properties of the judgment-debtors other than those covered by the mortgage.

Under the present Code of Civil Procedure, in the case of a mortgage, preliminary decree is passed under R. 4 of O. 34. If the mortgagor-defendant does not pay into Court the amount mentioned in the preliminary decree within the time fixed in the decree, a final decree for sale has to be passed under R. 5, and if the proceeds of the sale of the mortgaged property are not sufficient to cover the decree amount, a personal decree for the balance has to be passed under R. 6. It is the decree that is passed under R. 6 that is executable against the mortgagors

personally. In the absence of a decree under R. 6 the mortgagee is not entitled to proceed against the properties of the mortgagors other than those covered by the mortgage.

It is contended by Mr. K. S. Krishnaswami Aiyangar that inasmuch as the final decree does not contain a provision for personal remedy against the mortgagors the direction in the preliminary decree for payment of the amount should be taken to give a personal remedy and that decree could be executed against them. The contention that a preliminary decree is capable of execution is on the face of it untenable: *Ram Brichh Rai* v. *Dcoo Tewari* (1) is relied on. In that case the Court passsed a simple money decree for a portion of the claim which was not borrowed for legal necessity and a mortgage decree for the rest. The decree in that case gave two different reliefs to the decree-holders, one against the property and the other a simple money decree. The simple money decree was not a portion of the mortgage decree nor was it in consequence of the sale proceeds of the mortgaged property not being sufficient to cover the amount of the decree. That case, therefore, has no application to the prssent case. *Cheru-calath Kumbanari Vala Kathala Erechain* v. *Thevyatath Karan* (2); *Periyasami Kone* v. *Muthia Chetty* (3) and *Rajah of Kalahasti* v. *Varadachariar* (4) do not help the respondents. In all these cases the decrees were passed under the old Code of Civil Procedure. Under that Code it was usual to pass one decree directing the sale of the mortgaged property and to provide that if the sale proceeds of the mortgaged property were not sufficient to cover the decree amount, the other properties of the mortgagors should be proceeded against. Under the present Code no such decree could be passed. The case of *Shiba Durga* v. *Gopi* (5), relied on by the respondents, is against their contention. The learned Judges observe at page 577:

"It may be more correct to say that it is the final decree which makes the preliminary decree operative and effectual and renders it enforceable in execution. In that view it is the final decree which is executed.....It is idle to say that the personal remedy which the decree-holder is seeking to enforce is to be found in the preliminary decree. The personal decree was not available till after the mortgaged properties had been sold under the decree absolute."

It has been decided by the Privy Council in *Ashfaq Husain* v. *Gauri Sahai* (6) that a preliminary decree is not capable of execution and that it is only a decree abslute under R. 5 of O. 34 that can be executed. This decision was followed by Miller and Sadasiva Aiyar, JJ. in C. M. S. A. No. 86 of 1910 and by Benson and Sundara Aiyar, JJ., in C. M. A. No. 269 of 1911.

Till the mortgaged properties are sold it is not possible to say whether the sale proceeds would be sufficient to pay off the decree amount. It is only when the sale proceeds are not sufficient to cover the whole of the decree amount that the personal liability to pay the balance arises, granting that the document sued on provides for personal remedy against the mortgagor, and a preliminary decree cannot therefore give a personal remedy against the mortgagor.

In C. M. P. No.111 of 1920 Respondents 1 and 2 applied to the District Court of North Arcot for a personal decree under R. 6 of O. 34. Mr. Hughes, who was then the District Judge dismissed the petition on the ground that there was already a personal decree. This order was not appealed against and is binding on the parties. Respondents 1 and 2 hereto cannot now ask for passing a final decree under R. 6 inasmuch as such relief was denied to them by the order in C. M. P. No. 111 of 1920.

In the view we have taken it is unnecessary to consider whether the application of Respondents 1 and 2 is barred by limitation.

In the result the appeal is allowed and the order of the District Judge is set aside with costs throughout.

Appeal allowed.

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(1) A. I. R. 1922 All. 388.
(2) [1914] M. W. N. 497.
(3) [1913] 38 Mad. 677=15 M. L. T 232.
(4) [1911] 21 M. L. J. 1036=10 M. L. T. 429=(1911) 2 M. W. N. 458.
(5) [1915] 23 C. L. J. 573.
(6) [1911] 33 All. 264=38 I. A. 37=15 C. W. N. 370=8 A. L. J. 332=13 C. L. J. 351=9 M. L. T. 380=13 Bom. L. R. 367=4 Bur. L. T. 121=21 M. L. J. 1140=(1911) 2 M. W. N. 177 (P. C.).

* A. I. R. 1926 Madras 417

DEVADOSS AND WALLER, JJ.

(Addepalli) Venkata Gurunadha Ramaseshiah—Plaintiff—Appellant.

v.

Akella Kesava Ramiah and *others*—Defendants—Respondents.

Appeals Nos. 256 and 269 of 1919, Decided on 1st September 1925, from the order of the Dist. J., Kistna, at Masulipatam, in A. S. No. 120 of 1918.

* *Transfer of Property Act, S. 6 (e)—Right to recover ascertained and definite debt is transferable.*

If a certain sum of money is due from any person, that sum is recoverable on assignment; and if it is to be ascertained only on taking accounts it might be that the right to take the account is not assignable; but where the allegation is that the defendant is in possession of funds belonging to a person or that the defendant is accountable for a definite sum of money to a person such a claim is transferable. In such a case the right to recover the money is not a mere right to sue and the transfer of such a right does not offend against S. 6 (e): *A. I. R.* 1924 *P. C.* 162 and 16 *All.* 286, *Foll.*: *A. I. R.* 1924 *Cal.* 1047 and 38 *Mad.* 138, *Dist.* [P 419 C 1]

T. Ramachandra Rao and *K. Krishnamachariar*—for Appellant.

A. Krishnaswami Aiyar—for Respondents.

Judgment.—The plaintiff, acting secretary of Sri Kannika Parameswari Visamsetty Venkataratnam Hindu High School Committee, sues for the recovery of Rs. 4,278-5-9 from the defendants who are the sons of one Venkayya Garu. The plaint allegation is that Venkayya managed the affairs of the High School and was in possession of considerable funds and that he rendered an account to the committee of the school, and that on going through the account it was found that the account rendered by him was incorrect and that a sum of Rs. 4,000 and odd was with him and that the defendants, who are his heirs, are bound to pay the amount to the plaintiff. The defendants raised various contentions and the Subordinate Judge of Bezwada dismissed the plaintiff's suit on the ground that the plaintiff had no cause of action against the defendants. On appeal the District Judge at Masulipatam reversed the decree of the Subordinate Judge and remanded the suit to the lower Court for taking accounts. Against the decree of the District Judge the defendants have preferred this appeal.

The point for determination in this appeal is whether the plaintiff has a cause of action against the defendants. The Hindu High School at Bezwada was managed by a Committee, called Sri Kannika Parameswari Hindu High School Committee, till November 1915. The committee was registered under the Societies Registration Act of 1860. Owing to lack of funds or other reasons the committee transferred the institution and its properties to Sri Kannika Parameswari Visamsetty Venkataratnam Hindu High School Committee which was also registered under the Societies Registration Act of 1860. This transfer is evidenced by Ex. F., dated 28th November 1915. The contention of the appellants is that when the first committee transferred all its rights to the second committee it did not transfer any outstanding belonging to the first committee and therefore the plaintiff, who is the secretary of the second committee, is not entitled to sue the defendants for any sum of money that might be found due to the first committee. From the terms of Ex. F it is clear that the first committee transferred all its assets and liabilities in connexion with the Hindu High School at Bezwada to the second committee. In paragraph 2 the recital is:

"Whereas the members of your Committee applied on 5th September 1915, praying that the management of Sri Kannika Parameswari Hindu High School at Bezwada and the entire properties thereof be transferred to your committee on condition of your committee discharging the debts due by the said High School Committee and in pursuance of the terms of the memorandum hereto attached, we have agreed thereto and the members of our general committee have passed a resolution, No. 8, on 19th September 1915, to the effect that our general committee should be dissolved, that the management of the school as well as the properties should be transferred to your committee subject to the terms of the said memorandum, etc."

and in the operative portion of the deed there is this clause:

"Therefore in accordance with the said resolution we have hereby transferred to you the management of the school and delivered possession to you of the immovable and moveable properties belonging to the said school worth about Rupees 30,000 and specified in the schedules of moveable and immovable properties."

The appellant wants to rely upon the fact that in the schedule of assets this debt due from Venkayya is not mentioned; but from the tenor of the document and from the recitals therein it is quite clear that the entire properties of the school

were transferred to the second committee. As the learned Judge remarks though there is no list of debts in the schedule to Ex. F the debts of the old committee incurred in connexion with the school were discharged by the second committee. One of the recitals is :

"With this sum and with the sums which might be received hereafter the debts of the school should be discharged."

The second committee did undertake to discharge the debts of the first committee, and, though no list of debts was attached to Ex. F. the second committee was bound to pay all the debts of the first committee. It is not necessary that when one committee transfers all its assets to another committee there should be a list in order to pass the title of the first committee to the second committee with regard to the outstandings. In this case the second committee took over all that the first committee possessed on behalf of the Hindu High School at Bezwada. The right of the first committee to sue for and recover any amount due to that committee did pass to the second committee and the plaintiff is, therefore, entitled to bring a suit.

The next contention of the appellants is that the first committee had only a right to sue Venkayya and a mere right to sue cannot be transferred by reason of the provisions of S. 6 (e) of the Transfer of Property Act. The mere right to sue cannot be transferred. Here what was transferred was not a mere right to sue, but the debt that was due by Venkayya to the first committee, and therefore the transfer does not offend against the provisions of S. 6 (e) of the Transfer of Property Act. The plaint, as laid, contains an averment that Venkayya was indebted to the first committee in the sum of Rs. 3,145-13-8. Venkayya was in possession of the funds belonging to the Hindu High School. He rendered an account which was afterwards found to be false, and according to the plaintiff's case Venkayya was in possession of the funds of the committee and therefore he was bound to pay that amount to that committee, and the second committee, having taken over the management with the rights and liabilities of the first committee, is entitled to sue for and recover the amount due to the first committee. The cases relied upon by the appellant, *Khetra Mohan Das* v. *Biswa Nath Bera* (1) and *Varahaswami* v. *Ramchandra Raju* (2) have no application to the present case. In *Khetar Mohan Das* v. *Biswa Nath Bera* (1) it was held that a right to take accounts and to recover such sums as may be found due is not assignable being a mere right to sue within the meaning of S. 6, Cl. (e) of the Transfer of Property Act. On the construction of the document and from the way in which the suit as framed, it was found that the plaintiff was not entitled to maintain a suit as he had purchased a mere right to sue for account. In *Varahaswami* v. *Ramchandra Raju* (2), it was held that a mere right to recover damages for the negligence of an agent in failing to collect rents cannot be transferred. The mere right to sue for damages is not assignable. In *Varahaswami* v. *Ramchandra Raju* (2) the cause of action was the negligence of the agent. If it was shown that the agent did collect a certain sum of money on behalf of the principal the agent was accountable for the amount actually received by him ; and for what he had with him, he was in the position of a debtor for he had the money of the principal in his hands. The assignment of the amount in the hands of the agent would not offend against S. 6 (e) of the Transfer of Property Act : vide *Madho Das* v. *Ramji Patak* (3). In *Prosser* v. *Edmunds* (4) the Lord Chief Baron held that a naked right to sue was not assignable. In *Hill* v. *Boyle* (5) it was held that a mere right to sue a trustee for interest and profits of a trust fund in his hands was not transferable.

The observations of Parker, J., in *Glegg* v. *Bromley* (6) are applicable to the present case. At page 490 the learned Judge observes:

"It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future

(1) A. I. R. 1924 Cal. 1047.
(2) [1915] 38 Mad. 138=24 M. L. J. 293=13 M. L. T. 218=(1913) M. W. N. 285.
(3) [1894] 16 All. 286=(1894) A. W. N. 84.
(4) [1835] 1 Y. and C. 481.
(5) [1867] 4 Eq. 260.
(6) [1912] 3 K. B. 474=81 L. J., K. B. 1081=106 L. T. 825.

property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass."

This observation is quoted with approval by their Lordships of the Privy Council in *Subhadrayamma* v. *Venkatapathi Raju* (7). In that case the plaintiff's husband advanced certains sums of money for litigation to the defendant on the express agreement that the money borrowed from the plaintiff should have a charge upon the moveable and immovable properties obtained by means of the litigation. Owing to the disputes between the plaintiff and the defendant the plaintiff refused to advance any further moneys. After a time the suit was compromised and the lender's widow claimed that the advance and the interest thereon were a charge on the money paid under the compromise. The Privy Council held that the plaintiff was entitled to a charge on the amount obtained on compromise in the suit. Their Lordships held that the agreement was an assignment of part of the fruits of the litigation, and even if they were to be regarded as non-existing property at the date of the agreement, the agreement attached upon the money being paid. The principle is that if a certain sum of money is due from any person that sum is recoverable on assignment; and if it is to be ascertained only on taking accounts it might be that the right to take the account is not assignable; but where the allegation is that defendant is in possession of funds belonging to a person, or that the defendant is accountable for a definite sum of money to a person, such a claim is transferable. In such a case the right to recover the money is not a mere right to sue, and the transfer of such a right does not offend against S. 6 (e) of the Transfer of Property Act. In the result the appeal is dismissed with costs.

A. A. O. No. 256 *of* 1919.—In view of our judgment in A. A. O. No. 269 of 1919 the appellant does not press this appeal. It is dismissed with costs.

Appeals dismissed.

(7) A. I. R. 1924 P. C. 162.

A. I. R. 1926 Madras 419

WALLER, J.

M. Rama Rao—Petitioner.

v.

K. Rengaswamy Rao—Respondent.

Civil Revision Petition No. 761 of 1922, Decided on 10th October 1924, from the order of the Dist.-J., Nellore, D/- 23rd January 1922.

Guardians and Wards Act, S. 41 (3)—*Court can order investigation of accounts before discharge.*

When the Court orders a guardian under S. 41 (3) to deliver accounts and property in his possession, it can also direct an invistigation into the accounts; 5 *C. W. N.* 207, *Dist.*

[P. 419, C. 2]

M. Patanjali Sastri—for Petitioner.

K. Krishnaswami Iyengar—for Respondent.

Order.—In January 1920 respondent applied to be discharged from guardianship. Two years later the District Judge granted him a discharge under S. 40 of the Act, at the same time directing him under S. 41 (3) to deliver his accounts and all property in his possession belonging to the minor. In doing so, the District Judge expressed the opinion that he could not make an investigation into the accounts. The ruling he relied on *Nabu Bepari* v. *Sheikh Mahomed* (1), has no application here; for it dealt with the case of a minor who had come of age.

When the Court has ordered a guardian under S. 41 (3) to deliver accounts and property in his possession, there is still a further question to be decided, that is to say, whether he is to be discharged from further liability under the next sub-section. I am unable to see how it is to be decided without an investigation into the accounts. I cannot for a moment concede that the Court is bound to accept without scrutiny any account he chooses to submit or to allow him to deliver only such property as he admits himself to possess.

In this case the District Judge has not yet passed any order under S. 41 (4). The records will be returned. The parties may apply to him for further orders. There will be no order as to costs in this Court.

Petition allowed.

(1) [1900] 5 C. W. N. 207.

* A. I. R. 1926 Madras 420

SRINIVASA AIYANGAR, J.,

Arumuga Padayachi and *others*—Accused—Appellants, *In re.*

Criminal Appeal No. 151 of 1925, Decided on 10th August 1925, against the order of the S. J., Trichinopoly, in Case No. 7 of 1925.

* *Criminal P. C. (amended), S. 369—Judgment even of High Court is final when signed—No review is allowed—Judgment is delivered when read out and signed—Drawing up of formal order is a subsequent clerical act.*

A judgment, even of a High Court, when it is signed, becomes final, and it is not thereafter open to review.

In the absence of any definition to indicate anything to the contrary, a judgment must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge, and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court: 21 *All.* 177, *Dist.*; *A. I. R.* 1924 *Mad.* 640, *Foll.* [P 420 C 2, P 421 C 1,]

V. L. Ethiraj and *N. S. Srinivasa Aiyar*—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—In this case I ordered originally that the matter might be posted before a Bench constituted by Venkatasubba Rao, J., and myself, because I was under the impression that the order made by that learned Judge directing notice to the Public Prosecutor amounted, as generally it is understood in criminal matters, to an order admitting the appeal. But I have since ascertained that the learned Judge never intended those words to convey that significance and that as a matter of fact the learned Judge did not admit the appeal and all that he directed notice about was whether once a criminal appeal had been dismissed by one Judge another appeal could be heard at the instance of the same appellant on the ground that on the previous occasion owing to some mistake, counsel did not appear for the appellant. In view, therefore, of there being no order of Venkatasubba Rao, J., admitting the appeal, it has become unnecessary for any matter being heard by a Bench of Judges.

The only question before me, therefore, is whether the learned counsel for the appellant is entitled to be heard with regard to the appeal, that is to say, practically by way of reviewing the judgment previously delivered by me. S. 369 of the Criminal Procedure Code is decisive of the point and there is also the judgment of this Court in *Tadi Somu Naidu, In Re* (1) in which Odgers and Wallace, JJ. held that as soon as the judgment of the Court in a criminal matter is signed it becomes final and the Court is functus officio. The learned counsel for the appellants wished to put it ingeniously in the following way: There was an order by Venkatasubba Rao, J., to the effect that the order of this Court dismissing the appeal should not be communicated to the lower Court until further orders are made by me. But by some inadvertence, and in spite of the order of Venkatasubba Rao, J., the order would appear to have been communicated to the lower Court. Mr. Ethiraj argues that this was against the order of this Court and, therefore, must be treated as a nullity. Assuming it to be so, it comes to this: Have I the power to review my own judgment on the ground that there has been no formal order issued by the Court or communicated by this Court to the lower Court? For this purpose he referred me to the case in *Queen-Empress* v. *Lalit Tiwari* (2) where it was held in a criminal matter that a judgment or order of the High Court is not complete until it is sealed in accordance with R. 83 of the Rules of Court and that up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken. This decision was in 1899 and before the present amendment of S. 369. It is, therefore, very doubtful whether, after the present amendment the same Court would have adhered to the conclusion or decision set out in that case. Further, it appears to me that that decision is based upon a rule of the Allahabad High Court about the sealing of orders. I have not been referred to any such rule in this Court. In the absence of any such rule the words of S. 369 of the Criminal Procedure Code are clear and binding. According to that section a judgment, when it is signed, becomes final In the absence of any definition to indicate anything to the contrary. A judgment must be taken to mean and refer to the judicial

(1) A. I. R. 1924 Mad. 640.
(2) [1899] 21 All. 177= (1899) A. W. N. 15.

act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court. I must, therefore, hold that when I delivered and signed the judgment it became final and that I have no power now to review my order or alter my judgment in any manner or to any extent.

This appeal petition is, therefore, rejected.

Petition rejected.

** A. I. R. 1926 Madras 421

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Rajagopala Pandarathar and *others*—1st Defendant and others—Appellants.

v.

Tirupathia Pillai and *another*—Assignee Decree-holders—Respondents.

Appeal No. 450 of 1924, Decided on 28th August 1925, from the order of the Sub-J., Tanjore, D/- 22nd September 1924.

** (a) *Jurisdiction—Objection to inherent jurisdiction only, cannot be waived, but irregularities in initial procedure can be waived.*

It is a settled principle that where a Court has no inherent jurisdiction over the subject-matter of a suit no waiver on the part of the defendant can confer jurisdiction upon it. But where the Court has jurisdiction over the subject-matter, but there are irregularities in the initial procedure, the defendant who without objection goes to trial upon the merits cannot subsequently dispute the jurisdiction of the Court. S. 99, Civil P. C., embodies the rule. The exceptions to the rule are contained inter alia in S. 11 of the Suits Valuation Act and S. 21 of the Civil P. C. By virtue of these sections, certain defects of jurisdiction are put on a par with "irregularities in the initial procedure." [P. 422, C. 1]

** (b) *Civil P. C., S. 21—Principle.*

The principle underlying S. 21 has been applied to cases which do not strictly fall within its terms: 43 *Mad.* 675 (*F. B.*), *Foll.* 42 *Mad.* 813 (*P. C.*), *Expl.* [P. 422, C. 1, 2]

** (c) *Civil P. C., S. 39—Mortgage decree.*

In the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. [P. 424, C. 2]

(d) *Practice—Procedure.*

In matters of procedure it is more important that the law should be certain than that it should be logical. [P. 424, C. 2]

** (e) *Civil P. C., S. 24—S. 24 applies to execution proceedings—Competency does not refer to territorial or local or pecuniary competency—Execution proceedings.*

In regard to suits competency is not referred to in the section in the sense of territorial or local or pecuniary competency. There may be other kinds of incompetency so far as an executing Court is concerned. S. 24 applies to execution proceedings: [39 *Mad.* 485; 22 *Bom.* 778 and *A. I. R.* 1925 *All.* 276 (2), *Foll.*] Contention that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court, is wrong. This construction is far-fetched and if adopted will render S. 24, so far as execution proceedings are concerned, almost useless. [P. 425, C. 1, 3]

S. Varadachariar and *K. S. Champakesa Aiyangar*—for Appellants.

T. M. Krishnaswami Aiyar and *N. Sivaramakrishna Aiyar*—for Respondents.

Venkatasubba Rao, J.—The question argued in this case is one of jurisdiction, and it has been argued ably by Mr. Varadachariar for the appellants and the Advocate-General for the respondents.

The suit is upon a mortgage and the final decree was passed by the Sub-Court of Tanjore on 23rd March 1917. The execution application with which we are concerned was filed in that Court on 2nd August 1922. On 1st April 1923, the taluk where the property is situate was by a Government notification transferred as and from 1st July 1923, from the local limits of the Sub-Court of Tanjore to the jurisdiction of the District Court of West Tanjore. Notwithstanding this notification the Sub-Court proceeded with the hearing of the execution application. On 6th July 1923, objections were taken to the sale proclamation, but no objection on the ground of want of jurisdiction was raised. On 14th July 1923, the Sub-Court made an order in regard to the objections raised. The decree-holder by this time having realized that the District Court of West Tanjore was the proper Court applied to that Court to withdraw to its own file the execution application. The District Court in its turn formally withdrew the application to its file and re-transferred it to the Sub-Court believing that by this process it conferred jurisdiction on the Sub-Court. After this order of re-transfer, without any objection being taken to jurisdiction,

the Sub-Court made an order directing the sale of the property. On 22nd October 1923, the decree-holder himself purchased the property for Rs. 41,000, the amount due to him being over Rs. 52,000, and thereupon the defendant, under O. 21, R. 90, Code of Civil Procedure, applied to the Sub-Court for the setting aside of the sale and one of the main objections taken was in regard to the jurisdiction of the Court to sell the property. The learned Subordinate Judge disallowed this application, and in the present appeal the correctness of his order is attacked.

I may at the outset observe that though the sale is impeached before us on several grounds, the only point seriously urged is the one relating to jurisdiction.

On three grounds the order of the lower Court may be supported.

First, the defendant did not object to the jurisdiction of the Court, and on the principle underlying S. 21, the objection must be deemed to have been waived. It is a settled principle that where a Court has no inherent jurisdiction over the subject-matter of a suit, no waiver on the part of the defendant can confer jurisdiction upon it. But where the Court has jurisdiction over the subject-matter, but there are irregularities in the initial procedure, the defendant who without objection goes to trial upon the merits cannot subsequently dispute the jurisdiction of the Court: See *Ledgard* v. *Bull* (1). Here then is the rule as well as the exception. Turning to the Indian Statute Law, S. 99, Civil P. C., embodies the rule. The exceptions to the rule are contained inter alia in S. 11 of the Suits Valuation Act and S. 21 of the Civil P. C. By virtue of these sections, certain defects of jurisdiction are put on a par with "irregularities in the initial procedure." In regard to the pecuniary jurisdiction of a Court, S. 11 of the Suits Valuation Act and in regard to its territorial jurisdiction, S. 21, Civil P. C., recognizes that there may be a waiver on the part of the defendant and that the absence of jurisdiction does not render the decree a nullity. As Mr. Varadachariar contends, S. 21 does not in terms apply: but the rule has been held to be of general application and the principle underlying S. 21 has been applied to cases which do not strictly fall within its terms. *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) is an authoritative ruling on the point. In that case the Court had jurisdiction to try the mortgage suit at the time it was instituted. It had jurisdiction at the time the preliminary decree was passed, but lost jurisdiction when it passed the final decree. Objection was taken to the validity of the decree in execution, but it was overruled on the ground that the objection must be deemed to have been waived. S. 21 runs thus:

> "No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement and unless there has been consequent failure of justice."

No objection could have been taken to the place of suing, because the suit was instituted in the proper Court: nor was it the appellate or revisional Court that disallowed the plea of want of jurisdiction. *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2) is, therefore, a clear authority for the position that although S. 21 does not in terms apply, the principle underlying it holds good.

In *Chockalinga Pillai* v. *Velayudha Mudaliar* (3) a final decree was passed without objection in a mortgage suit by a Court which had by then lost territorial jurisdiction by reason of a Government notification. In a subsequent suit brought to set aside the decree on the ground that the decree was void for want of jurisdiction, it was held that the defendant having waived the plea of want of jurisdiction, it was no longer open to him to raise it. I observed in my judgment in that case (page 159):

> "The section in terms no doubt does not apply, because it refers to the disallowing of the objection by an appellate or revisional Court. But the principle is of general application and if in appeal or revision the decree cannot be impeached it is equally reasonable that in a collateral proceeding it should not be allowed to be attacked. I respectfully adopt the statement of the law contained in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2), to the effect that the principle underlying S. 21 is that the objection to territorial jurisdiction is cured not merely for the purpose of the appellate or revisional Court but cured entirely and for all purposes. In my opinion again, this section applies when there is want

(1) [1886] 9 All. 191=13 I. A. 134=4 Sar. 741 (P. C.).

(2) [1920] 43 Mad. 675=39 M. L. J. 203=28 M. L. T. 75=(1920) M. W. N. 400=12 L. W. 217(F.B.).

(3) 47 M. L. J. 448=A. I. R. 1925 Mad. 117.

of jurisdiction not merely at the institution of the suit but at any stage during the progress of it. It is difficult to believe that a more stringent rule was intended to be applied to cases where there has occurred a cessation of jurisdiction than to those where there has been initial absence of jurisdiction."

In the Letters Patent appeal from this decision, No. 57 of 1924, this view was confirmed.

Mr. Varadachariar strongly contends that although the rule has been extended to a certain extent in these cases, still they only deal with objections that could have been taken prior to the passing of the decree, or compendiously put, objections to the place of suing. In the present case it is urged any plea of want of jurisdiction could have been taken for the first time only in execution proceedings and the learned vakil on this ground asks us not to further extend the principle. I cannot accept the contention. If it is conceded that apart from S. 21 there is a principle of general application, I fail to see why we must limit it in the manner suggested. I agree with Sir John Wallis's observation in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2), that the decision of the Privy Council in *Ramabhadra Raju* v. *Maharajah of Jeypore* (4), is not opposed to this view. The Judicial Committee were dealing with the case of a decree which ordered sale of land situate in a scheduled district, and their Lordships held that as the sections of the Code did not apply to a scheduled district, the principle of S. 21 could not be invoked. All that has been decided by the Privy Council is, that if the Code itself does not apply, the principle recognized by it does similarly not apply. I am, therefore, clearly of the opinion that it is now no longer open to the defendant to object to jurisdiction.

The order may next be supported on the ground that the rule of territorial jurisdiction does not apply to execution of mortgage decrees. In *Maseyk* v. *Steel & Co.* (5), a mortgage suit was instituted under S. 19 of the Code of Civil Procedure of 1882 which gives jurisdiction to a Court to entertain a suit in respect of properties partly situated within its jurisdiction and partly out of it. Some of the properties were situated in the district of N and some in the district of R. One property known as Mahal No. 20 was situated partly within the district of R. The suit was brought in the Court at R and the decree was also passed by that Court. In pursuance of that decree, the mortgage properties, including Mahal No. 20, were sold by the R Court. The question that had to be decided was: Was the sale of this Mahal not wholly situated in the R district valid?

Petheram, C. J., observing that execution of a money decree stood on a different footing from execution of mortgage decrees, held that the power of the Court in executing mortgage decrees was not limited by the territorial jurisdiction of that Court. In the case of a money decree, the Court cannot attach property outside its jurisdiction, for, the decree merely awards a sum of money and does not prescribe the method by which that sum shall be recovered. In the case of a mortgage decree, however, the decree itself directs the sale of the property by the Court and it is practically in the nature of a decree for specific performance. On these grounds, the learned Chief Justice held that the rule of territorial competency does not apply to execution of mortgage decrees. The other learned Judge, Mr. Justice Ghose, was also of the same opinion.

Section 19, referred to in the judgment, it will be seen, corresponds to S. 17 of the present Code. If immovable property is situate within the jurisdiction of different Courts, a suit in respect of it may be instituted in any Court within the local limits of whose jurisdiction any portion of that property is situate.

With reference to *Maseyk* v. *Steel & Co.* (5), I must make two observations: first, some passages in the judgment may give the impression that the reason for the decision was that as S. 19 authorized the institution of the suit, the authority extended also to execution proceedings. But the decision is not based on this narrow ground, nor is there any warrant for the position that the section which in terms refers only to the institution of the suit applies also to execution proceedings.

The second observation I have to make is, that the judgment deals only with the actual case that arose, that is to say, the sale of property partly within the Court's jurisdiction and partly outside, and although there are some expressions of doubtful import, there is no definite pronouncement in

(4) [1919] 42 Mad. 813=46 I. A. 151 (P. C.).
(5) [1887] 14 Cal. 661.

regard to the law if the property sold is wholly outside the jurisdiction.

In *Kartick Nath Pandey* v. *Tilakdhari Lal* (6) this principle was recognized and *Maseyk* v. *Steel and Co.* (5) was cited with approval. I may incidentally say that this case is on all fours with the present. At the time of the passing of the mortgage decree the property was wholly situate within the local limits of the Court, and after the decree the district within which the property was situate was transferred to the local jurisdiction of another Court. It was held that the Court which passed the decree had authority to execute its decree and bring the property to sale. I am not now concerned with the wider point whether the Court can in all cases execute its own decree. I am referring to this case only for the more limited position that a Court can execute a mortgage decree passed by itself although the property to be sold is wholly or partly outside its jurisdiction.

Gopi Mohan Roy v. *Doybaki Nundan Sen* (7) is an instructive case. It was decided by a Bench of which Ghose, J. who took part in *Maseyk* v. *Steel and Co.* (5) was a member. The suit was on a mortgage and related to two properties each within the jurisdiction of a separate Court. The Court within whose jurisdiction one of the properties was situate passed the decree and it was held that it could sell the other property also although it was outside its jurisdiction. Ghose, J., observed that he did not intend to lay down a contrary rule in the earlier case of *Maseyk* v. *Steel and Co.* (5). The fact that one item was wholly outside the Court's jurisdiction was held not to make any difference.

In *Tincouri Debya* v. *Shib Chandra Pal Chowdhury* (8), Prinsep and Ameer Ali, JJ. affirmed *Gopi Mohan Roy* v. *Doybaki Nundun Sen* (7) on the broad ground that it would be impossible to give effect to the provisions of the Transfer of Property Act relating to sales if it were held necessary to apply to different Courts to obtain realisation of the mortgage debt.

In *Begg, Dunlop and Co.* v. *Jagannath Marwari* (9) it was held that a Court is not competent in execution of a decree for money to attach a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of the Court. Mr. Justice Mukherjea in the course of his judgment observes that an exception is recognized in the case of mortgage decrees to the general rule that no Court can in execution assume jurisdiction over property outside its territorial limits.

In some of the cases mentioned above [see *Maseyk* v. *Steel and Co.* (5) and *Gopi Mohan Roy* v. *Doybaki Nundan Sen* (7)] the learned Judges tried to overcome the difficulty presented by S. 223, corresponding to S. 39 of the present Code. Under that section the Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court and the section contains four clauses (a), (b), (c) and (d) showing when this procedure is to be adopted. The view that found favour with the Judges was that "may" in the section means "may when necessary." In the case of a mortgage decree, the Court which passes it directs the sale by itself of the property mortgaged and in such a case sending of the decree to another Court is optional and not compulsory. In the case of attachment in pursuance of a decree there is assumption of jurisdiction for the first time after the decree and the section then operates compulsorily.

The Calcutta High Court has thus uniformly held (and there is quite a string of decisions on the point) that in the case of a mortgage decree, a Court which passed it may notwithstanding the fact that the property is outside its jurisdiction, bring it to sale. We have not been referred to any case of the Madras High Court which has refused to follow this rule. In matters of procedure it is more important that the law should be certain than that it should be logical and whatever my own view may be, if the question has to be decided on principle, I am content to follow the Calcutta decisions not only for the reason that some very eminent Judges have taken part in them but also because, what with the defective provisions of Code relating to jurisdiction and what with the constantly occurring territorial re-distribution, there is scarcely a question free from doubt and the view of the Calcutta High Court, in the circum

(6) [1888] 15 Cal. 667.
(7) [1891] 19 Cal. 13.
(8) [1894] 21 Cal. 639.
(9) [1911] 39 Cal. 104=14 C.L.J. 228=16 C.W.N. 402.

circumstances, affords some measure of protection to decree-holders.

I shall now deal with the last of the three grounds I have mentioned. S. 24 gives the High Court or the District Court power to transfer suits and other proceedings. The material part of the section reads thus :

"The High Court or the District Court may transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same."

Mr. Varadachariar's contention is that this does not apply to execution proceedings. He puts his argument thus : The test of competency in the case of execution proceedings is territorial jurisdiction. How can then an execution petition be transferred from a Court to a Court which has no such jurisdiction ? It can be transferred only under the section to a Court competent to dispose of it. A Court without local jurisdiction is not competent to dispose of the execution application. He thus contends that the words of the section by implication show that the section is not intended to deal with execution applications. I am not prepared to accept this argument. Under the section a suit pending in any Court may be transferred to any other Court competent to try it. To take a concrete instance : the High Court may transfer a suit pending in the District Court of Tinnevelly to the District Court of Rajahmundry. The District Court of Rajahmundry is not strictly competent to try the case as it is wanting in territorial jurisdiction. Does it then mean that a suit cannot be transferred to a Court not having local jurisdiction ? If this view be adopted, the very object of the section will be defeated, and possibly very few suits, if any at all, can be transferred. This consideration makes it clear that in regard to suits competency is not referred to in the section in the sense of territorial or local competency.

Now, coming to execution applications, the scheme of the Code seems to indicate that pecuniary competency in a Court need not exist. Mr. Varadachariar asks, if in the case of execution application pecuniary competency is always out of the question and S. 24 is to be held as authorising transfer to a Court not possessing territorial competency, what possible meaning can reasonably be given to the words "competent to dispose of the same?" It seems to me that this objection does not take count of the fact that there may be other kinds of incompetency so far as an executing Court is concerned. To take an instance, under O. 2, R, 4, a decree directing delivery of possession of immovable property cannot be transmitted to any Presidency Court of Small Causes for execution. I am therefore of opinion that S. 24 applies to execution proceedings : see *Velliappa* v. *Subramaniam* (10) ; *Nassarvanji* v. *Kharsedji* (11) and *Muhammad Habib-ullah* v. *Tikam Chand* (12).

Mr. Varadachariar next contends in the alternative that should S. 24 be held to apply to execution proceedings they can be transferred only to Courts competent under S. 39, Civil Procedure Code, to dispose of them. In other words, he urges that the only Courts to which decrees can be transferred are those mentioned in S. 39, because they are the only Courts possessing jurisdiction. In effect, his contention is that S. 39 gives to the Court that passed the decree a power to transfer, whereas S. 24 gives a similar power, and no higher power to a superior Court. This construction is far-fetched and if adopted will render S. 24, so far as execution proceedings are concerned, almost useless.

A fourth point is raised by the learned Advocate-General who appears for the respondent that on a right construction of Ss. 37, 38 and 39 the Court which passed the decree, as well as the Court which has jurisdiction owing to territorial re-distribution, both these Courts have jurisdiction to execute the decree. This argument extends to all decrees, money decrees as well as mortgage decrees. It is very difficult to reconcile the decisions that have been cited on the point and *Seeni Nadan* v. *Muthuswami Pillai* (13), a judgment of three Judges, illustrates the range of conflict of opinion on this subject. As my decision on the previous points disposes of this appeal, I would prefer to express no opinion on

(10) [1915] 39 Mad. 485=29 M.L.J. 172.
(11) [1897] 22 Bom. 778.
(12) A. I. R. 1925 All. 276 (2).
(13) [1919] 42 Mad. 821=37 M. L. J. 284=26 M. L. T. 223=11 L. W. 63=(1919) M. W. N. 640 (F. B.).

this question. I may repeat what I said on a cognate matter in *Chockalinga Pillai* v. *Velayudha Mudaliar* (3) that in view of the great uncertainty that prevails on this subject, the Legislature should, in clear and unequivocal terms, lay down as to which Court possesses jurisdiction in such cases. The appeal fails and I would dismiss it with costs.

Madhavan Nair, J.—I have had the advantage of reading the judgment of my learned brother. I agree with him in holding that this appeal should be dismissed with costs, but I prefer to rest my judgment on the short ground that since the appellant did not object to the jurisdiction of the Court at the earliest opportunity, he is now precluded from raising that question on the principle underlying S. 21 of the Code of Civil Procedure. Under that section, unless objection is taken to the place of suing at the earliest possible opportunity, no objection can be taken in appeal or in revision. As contended for by Mr. Varadachariar in his able argument, the section in terms does not apply: but the decisions of this Court have on different occasions applied the general principle underlying S. 21 to cases which do not fall strictly within its scope. The most recent decision on the question is the one reported in *Chockalinga Pillai* v. *Velayudha Mudaliar* (3), by Phillips, J. and my learned brother. In that case a suit upon a mortgage was instituted in the Kumbakonam Court when that Court had jurisdiction over the place where the mortgaged property was situated. Owing to the transfer of jurisdiction from that Court to the Mayavaram Court, the former Court lost the jurisdiction over the place where the mortgaged properties lay at the time of the passing of the final decree. No objection was raised as to the competency of the Court to pass the final decree. In a suit brought to set aside the decree on the ground that it was void for want of jurisdiction, it was held that since the objection was not taken at the earliest possible opportunity, it must be deemed to have been waived. Both the learned Judges expressed the opinion that, though the section in terms does not apply because it refers to the disallowing of the objections by an appellate Court, or revisional Court, still the principle is of general application and that the validity of the decree then under consideration could not be impeached in a suit brought to set aside the decree. It is stated by Phillips, J., that "the principle underlying the section is that waiver of territorial jurisdiction is recognized by law whereas it has been consistently held that other forms of jurisdiction such as jurisdiction of the subject-matter or pecuniary jurisdiction cannot be waived by consent of parties." For holding that the principle underlying the section is of general application, reliance was placed on the Full Bench ruling reported in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty* (2). In that case the Court which passed the final decree in a mortgage suit had no jurisdiction to pass the decree and objection was taken in execution to the validity of the decree. In overruling the objection it was pointed out by the Full Bench that "the effect of the section is that objections which the appellate or revisional Court is thereby precluded from allowing must be considered cured for all purposes unless taken before the passing of the decree in the original Court, that the ordinary way of questioning a decree passed without jurisdiction is on appeal or in revison, and that, if this is forbidden, a Court of first instance cannot in execution do that which the appellate or revisional Court is precluded from doing."

Mr. Varadachriar's contention that since his plea as regards the want of jurisdiction could have been taken for the first time only in execution proceedings in this case S. 21 of the Code of Civil Procedure which deals only with the objection as to the place of suing should not be applied, cannot be accepted. As pointed out by my learned brother, no reason is suggested for placing this limitation upon the general principle underlying S. 21. The decision of the Privy Council in *Ramabhadra Razu* v. *Maharaja of Jeypore* (4) does not support the contention of the learned vakil for the appellant. In that case an order for sale of the mortgaged property situated in a scheduled distict to which the Civil Procedure Code did not apply was made by the Subordinate Judge's Court of Vizagapatam. It was held by their Lordships of the Privy Council that the order for sale was bad as made under sections of the Code which did not apply to the

scheduled district and that S. 21 of the Code of Civil Procedure did not apply to the case. As pointed out by Wallis, C. J., they had not to consider the application of S. 21, where all the mortgaged properties were within the jurisdiction of the Courts governed by the Code of Civil Procedure. I am, therefore, of opinion that the appellant in this case is not now entitled to take the objection that the Court had no jurisdiction to sell the property.

I do not express any opinion on the other points dealt with by my learned brother in his judgment.

Appeal dismissed.

A. I. R. 1926 Madras 427

DEVADOSS AND WALLER, JJ.

(Guduthuru) Thimmappa—Plaintiff—Appellant.

v.

V. Balakrishna Mudaliar and *another* Defendants—Respondents.

Appeal No. 166 of 1923, Decided on 5th October 19.5, from the order of the Sub-J., Bellary, in O. S. No. 16 of 1921, D/- 7th March 1923.

Civil P. C., S. 16—Business carried on in two places—Courts in both places can entertain a suit for dissolution of partnership.

Where partnership business is carried on at two places, the cause of action arises in both the places and the Courts have jurisdiction to entertain the suit for dissolution of partnership in either of these places : 4 *M. H. C. R.* 218, *Foll.*

[P. 427, C. 2]

A. Viswanatha Aiyar—for Appellant.

M. Subbaroya Aiyar—for Respondents.

Judgment.—The question in this appeal is whether the Subordinate Judge's Court at Bellary had jurisdiction to try the suit. The suit was filed so far back as 5th March 1921, and the Subordinate Judge decided that the Court had no jurisdiction on the 7th March 1923. The defendant raised the question of jurisdiction in Issue 15. A preliminary issue like this should have been disposed of at the earliest opportunity. The learned Subordinate Judge did not do that, but after a number of witnesses were examined on commission, and after the defendant took time to adduce evidence, he decided this question in favour of the defendant.

The suit is for dissolution of partnership. The plaintiff, who is a resident of Bellary, entered into partnership with the defendant, a resident of Coimbatore, for the purchase and sale of cotton. Under the arrangement they were to share the profits. It is unnecessary to consider what shares the plaintiff and defendant had in the partnership as it is a matter which has to be determined in a suit. The defendant admits that partnership arrangement was entered into and that the plaintiff and he were partners. But his contention is that the partnership business was carried on only in Coimbatore and not in Bellary, and, therefore, the Court at Bellary had no jurisdiction. Under the arrangement the plaintiff was to purchase cotton not only at Bellary but in other places, but the sale of the cotton was to be effected at Coimbatore where cotton mills are situate. The accounts of the business were maintained at Bellary as alleged in para. 20 of the written statement. The defendant, though he denied that the accounts were maintained in Bellary, did not choose to say where the partnership accounts were maintained. His vakil now says no accounts were necessary as it was arranged that the profits of each consignment should be settled at once. This is a very strange arrangement of settling accounts of partnership in which very large consignments of cotton were made. Inasmuch as the defendant chooses to say that no accounts were kept by him at Coimbatore in connexion with the partnership it cannot be said that the partnership was carred on only at Coimbatore. The learned Sibordinate Judge has evidently made a mstake in holding that substantial portion of the business should be carried on at Bellary in order to give jurisdiction to the Bellary Court. Where partnership business is carried on at two places, the cause of action arises in both the places and the Courts have jurisdiction to entertain the suit for dissolution of partnership in either of these places. In this case both the Coimbatore as well as the Bellary Court have jurisdiction to entertain the suit. This suit was filed in the Bellary Court. That Court had jurisdiction to try the case. In *Bavah Meah*

Saib v. *Khajee Meah Sahib* (1), Bittleston, J., observes at page 222:

"As regards a suit of this nature, when it appears that the partnership business is carried on substantially in two or more places, I think that the cause of action does partly arise in each of these places within the meaning of S. 12 of our charter."

Their Lordships of the Privy Council attach importance in connexion with the carrying of the business to the fact that the partnership accounts are kept at a particular place. In *Luckmee Chund* v. *Zorawur Mull* (2) their Lordships observe:

"Where can it be said that the cause of action, supposing it exists for that balance, properly arose. Muttra was, undoubtedly, the central place of business; at Muttra the partnership books were kept; at Muttra the partners would have recourse to those books for the purpose of ascertaining the state of the transactions between them; and if, in the result, a balance was due to the appellants, Muttra would be the place where the payment of that balance would havs to be made. It, therefore, appears clear to their Lordships that if there is a cause of action arising out of the balance resulting from these partnership transactions, that cause of action arose at Muttra."

Here, as already observed, the books of the partnership were maintained by the plaintiff at Bellary. Therefore the cause of action for a suit of this kind did arise within the jurisdiction of the Bellary Court. The Subordinate Judge has entirely gone out of his way in considering whether the accounts have been satisfactorily kept or not. That is a matter which will have to be dealt with when the suit is tried on the merits.

In the result we set aside the decree of the Subordinate Judge and direct him to restore the suit to file and proceed with it according to law. The respondent will pay the costs of this appeal.

Case remanded.

(1) 4 M. H. C. R. 218.
(2) [1859-61] 8 M. I. A. 291=1 W. R. 35 (P.C.).

A. I. R. 1926 Madras 428

PHILLIPS AND RAMESAM, JJ.

Imani Satyanarayana and *others*—Appellants.

v.

Devarakonda Satyanarayana Moorthy and *another*—Respondents.

Appeal No. 184 of 1924, Decided on 24th September 1925, from the decree of the Sub-J., Kistna, at Ellore, D/- 13th December 1923.

Hindu Law—Debts—Son's liability—Previous mortgage—Debt is binding on sons, though father may not be personally liable.

Any prior mortgage debt due by the father is valid as an antecedent debt and it is not necessary that the mortgage debt must also be enforcable as a personal liability: 42 *Mad.* 711 and *A. I. R.* 1924 *All.* 543, *Foll.* [P. 429, C. 1]

A. Krishnaswamy Aiyar and *V. Govindachari*—for Appellants.

N. Rama Rao—for Respondents.

Judgment.—This is an appeal against a decree on a mortgage executed by the 1st defendant, father of Defendants 2 to 5. The mortgage was executed in order to discharge a prior mortgage deed executed by the 1st defendant in 1906, Ex. B, the suit mortgage being Ex. A dated 10-10-1915. The Subordinate Judge has given a decree, holding that the mortgage having been executed to discharge an antecedent debt of the father is binding upon the sons' shares, and he relies on the Full Bench decision of this Court in *Arumugham Chetty* v. *Muthukoundan* (1).

For the appellants it is contended that the decision is not applicable because in the present case a portion of the previous debt could only be enforced as a mortgage debt and not a personal debt of the father. This question has not been considered in the lower Court and it is not at all clear whether the personal liability is barred or not in respect of the first three instalments. Whether it is barred or not, however, the case can be disposed of on another ground. It has definitely been held in *Gouri Shankar Siagh* v. *Sheonandan Misra* (2), that a mortgage debt whether the personal liability is barred or not, is an antecedent debt binding on the son's shares. This same principle has been adopted in *Arumugham Chetty* v. *Muthukoundan* (1), and although it may be said that in that case the personal liability had not been barred and that, therefore, the decision is not strictly in point, yet in view of the form of the questions propounded by the referring Bench it is clear from the judgment that the first of the questions was dealt with as a general question, and in effect the decision of the Full Bench is that any prior mortgage debt

(1) [1919] 42 Mad. 711=(1919) M. W. N. 409=37 M. L. J. 166=9 L. W. 565=26 M. L. T. 96 (F. B.).
(2) A. I. R. 1924 All. 543.

due by the father is valid as an antecedent debt and this decision is not qualified by any expression of opinion that the mortgage debt must also be enforceable as a personal liability.

We, therefore, follow these two cases and dismsss the appeal with costs.

Time for redemption is extended to three months from this date.

Appeal dismissed.

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* A. I. R. 1926 Madras 429

MADHAVAN NAIR, J.

Arunachalam Chetty—Petitioner—Appellant.

v.

Abdul Suban Sahib—Respondent.

Civil Revision Petition No. 971 of 1923, Decided on 25th September 1925, from the order of the Small Cause Court Judge, Trichinopoly, in E. A. No. 1262 of 1923.

** Civil P. C., S. 47—Decree against minor—Minor not represented in suit—Executing Court is not bound to execute : Case-law discussed.*

A minor against whom a decree is passed but who was not represented in the suit, can object to the execution of the decree, and the executing Court can entertain such objection.

[P. 430, C. 1]

K. Rajah Aiyar—for Appellant.

T. V. Muthukrishna Iyer—for Respondent.

Judgment.—The decree-holder in Small Cause Suit No. 3163 of 1919 on the file of the Court of Small Causes, Trichinopoly, is the petitioner. He obtained a decree against the respondent. The respondent was a minor and was not represented in the suit in which the decree was passed against him. In execution of the decree, the petitioner arrested the respondent and then the amount mentioned in the warrant was deposited by his surety in the Court and he was set free. An application was filed by the minor respondent asking the Court not to allow the petitioner to take the money on the ground that, at the time when the decree was passed, he was a minor and as such the decree was a nullity and not binding on him. The lower Court, accepting this contention, allowed his prayer and the present Civil Revision Petition is filed against that order.

On behalf of the petitioner, it has been contended before me that the Court below as an executing Court was bound to execute the decree as it stood and was not entitled to go behind the decree questioning its validity. In support of this contention, reliance has been placed by the learned vakil for the petitioner on a decision in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1). In that case, the plaintiff was a lunatic and was represented by his wife. The suit was dismissed and costs were allowed to the defendant. Execution was sought against the plaintiff's son, the plaintiff having died in the interval. In the execution proceedings the lunatic's widow was appointed guardian ad litem and she objected that when she was appointed guardian for the lunatic in the suit she was a minor. The executing Court overruled this objection. On appeal the High Ceurt affirmed the decision. In the course of the judgment in that case the learned Judges made the following general observations which have been strongly relied upon before me:

"It is indisputable that the Court executing the decree must take the decree as it stands and has no power to go behind the decree or to entertain an objection to the legality or correctness of the decree." This case has been referred to and distinguished by the Patna High Court in *Jungli Lali* v. *Laddu Ram Marwari* (2). In that case, it was held that when at the time of passing of final decree in a mortgage suit, one of the judgment-debtors was dead and his representatives had not been brought on record, it was open to such representatives to object to the execution of the decree on the ground that the decree was a nullity. The learned Judges base their decision on the ground that there is a well-known distinction between voidable decrees and decrees which are absolutely void, and since the decree passed against a dead person is a void decree, it was their opinion that the question of validity of the decree might be raised in execution proceedings. The correct significance of the decision in *Kalipada Sarkar* v. *Hari Mohan Dalal* (1) is pointed out by the learned Judges

(1) [1917] 44 Cal. 627=24 C. L. J. 375=21 C. W. N. 1104.

(2) [1919] 4 Pat. L. J. 240=(1919) P. H. C. C. 105 (F. B.).

by drawing attention to the concluding sentence of the judgment in that case, which runs as follows :—

"This, no doubt, assumes that there is a valid decree in existence, that is, an adjudication by a Court of justice, a decree or order which has not ceased to be operative and is capable of execution."

The question, therefore, to be considered is whether in the case before us, it can be said that there is an operative decree or a decree which is capable of execution. It has been held in *Subramania* v, *Vaithinatha Aiyar* (3) that in a case where a decree was passed after the death of the defendant, and before the legal representatives were brought on record, that the objection raised really related to the jurisdiction of the Court that passed the decree and it might well be considered under S. 47, Civil P. C. As the decree is a void decree, it might be disregarded altogether without taking any proceedings to set it aside.

On the authorities, therefore, it seems to me that the lower Court was right in allowing the respondent to raise the question under S. 47 of the Civil P. C. Arguments based upon the policy of S. 47 might be put forward in support of the arguments advanced on either side. In my opinion, the lower Court's decision is right and I dismiss this petition with costs.

Petition dismissed.

(3) [1915] 38 Mad. 682.

A. I. R. 1926 Madras 430

JACKSON, J.

(*Alampath*) *Krishnan*—Accused—Petitioner:

v.

Municipal Prosecutor, Cannanore Municipality—Complainant—Respondent.

Criminal Revision Case No. 187 of 1925 and Criminal Revision Petition No. 167 of 1925, Decided on 20th October 1925, from the judgment of the Bench Magistrate in S. T. No. 1 of 1925, D/- 10th February 1925.

(a) *Madras District Municipalities Act* (5 *of* 1920), *S.* 249—*Machinery contemplated is that worked by power such as steam—Handlooms are excluded.*

The machinery contemplated in the Act is machinery worked by power such as steam, water, or electrical power, and should be confined to such forms of machinery as may reasonably be held to be in the same category as combustibles and unwholesome or dangerous trades, but machinery worked by hand such as handlooms or sewing machines is excluded. [P. 431, C. 1]

(b) *Madras District Municipalities Act* (5 *of* 1920), *S* 5 (*a*)—*Maggoms is not machinery.*

A collection of maggoms is not machinery under Sch. 5 (q , and so a licence is not necessary for its use. [P. 431. C. 1]

K. V. Reddi—for Petitioner.
N. Govindan—for Respondent.
Public Prosecutor—for the Crown.

Order.—Petitioner seeks to revise the finding and sentence of the Bench Court, Cannanore, fining him Rs. 10 for failure to take out a license under S. 249, Act 5 of 1920.

It is admitted that petitioner has a weaving factory containing nine looms of the sort which the weaver works with his hands and feet, known as a *maggom* or European loom. The Bench has found that he was liable to take out a license for using for an "industrial purpose" machinery as provided in sub-Cl. (q) of Sch. 5, Act 5, 19-0. The question for determination is whether those looms are machinery within the mischief of the Act.

The learned Public Prosecutor argues that the sub-Cl. (q) covers anything which is likely to be dangerous to human life, or health or property, and any machinery used for an industrial purpose which is thus dangerous requires a license. On this interpretation of the clause, the word 'machinery' would be otiose. So long as the industrial process were dangerous it would not matter whether it was performed by hand, instrument or machine ; it would still have to be licensed. Something more than a mere dangerous process is evidently intended by "machinery." but the question is within what limits the word is employed. It cannot have been intended that anything which is commonly called a machine must be licensed. For instance, no one has ever supposed that Singer's sewing machines required license, and the literary sense of the word is too general to afford any guidance. In old English, machine was synonymous with universe, and when Hamlet concludes his letter to Ophelia : "Thine ever more most dear lady, whilst this machine is to him," he treats the word as the equivalent of body. For a long time machine was used

as another word for vehicle, a meaning which survives in "bathing machine," and is still, I gather from the Public Prosecutor, prevalent in the more remote parts of the British Isles, and although such general sense are long obsolete and the term is now confined to some sort of apparatus for applying mechanical power, it has within those limits a very wide application. Not only a handloom but any hand instrument which involves more than one simple mechanical principle is a machine. For instance, though a hammer may be called an instrument, a nail extractor is a machine and a hand ginning apparatus is a machine. Thus even in its ordinary sense "machine" would seem to have a wider connotation than the clause intends. The statute itself affords no assistance by way of definition; but I observe that S. 250 refers to mechanical power and I think that this points to the right interpretation. As observed by Professor Murray in the Oxford Dictionary in recent use, the word tends to be applied especially to an apparatus so devised that the result of its operation is not dependent on the strength or manipulative skill of the workman. In other words, an apparatus driven by other than human and, I would add, animal power; I think that the machinery contemplated in the Act is machinery worked by power such as steam, water, or electrical power; and machinery worked by hand such as handlooms, or sewing machines is excluded. This, of course, is the limited sense in which machinery was understood at the time of the Luddite and similar riots. No doubt this is an arbitrary decision, and it would be better if the statute contained its own definition, but it is the only definition which, after a careful consideration of the matter, seems to afford the licensing officer a clear criterion, and also to confine "machinery" in Cl. (q) to such forms of machinery as may reasonably be held to be in the same category as combustibles, and unwholesome or dangerous trades.

I find that a collection of *maggoms* is not machinery under Sch. 5 (q). The petition is allowed and the conviction set aside. The fine should be refunded.

Petition allowed.

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* A. I. R. 1926 Madras 431

DEVADOSS, J.

Ayyaru Pillai—1st Defendant—Petitioner.

v.

Varadaraja Pillai and *another*—Decree-holder and 2nd Defendant—Respondents.

Civil Revision Petition No. 1124 of 1923. Decided on 30th September 1925, against the order of the Sub-J., Tanjore, D/- 15th September 1923.

* *Limitation Act, Art.* 182 (5)—*Application by assignee to transferee Court, for return of records—Application is step-in-aid*

An application by assignee decree-holder to the transferee Court praying for return of records to the parent Court for further conducting the proceedings, i. e., for his recognition as assignee, is a step-in-aid : 13 *C.W.N.* 533, *Ref.* [P. 432 C. 1]

S. Ramaswami Aiyar—for Petitioner.

K. R. Rangaswami Aiyangar—for Respondents.

Judgment.—This is a petition to revise the order of the Subordinate Judge of Tanjore recognizing the assignment of the decree in favour of the petitioner in the lower Court. The contention of Mr. Ramaswami Aiyar for the petitioner is that it was not competent for the assignee decree-holder to make the application he did to the Court executing the decree. The decree was passed on 12th April 1915, by the Subordinate Judge's Court, Tanjore. It was transferred for execution to the District Munsif's Court of Tanjore by an application dated 18th July 1916. The assignee decree-holder applied to the District Munsif's Court on 10th February 1920 for the issue of notice to the defendant under O. 21, R. 22 and asked "that the records may be transferred along with the certificate to the Subordinate Judge's Court, Tanjore, for the purpose of further conducting the suit." In it he also stated that the decree had been transferred to him by assignment. The question is whether this is an application which it is competent for the assignee decree-holder to make. If he was competent to make the application it would be a step-in-aid of execution under Art. 182 (5) of the Limitation Act. It is well settled that an assignee decree-holder can apply only to the Court which passed the decree for being recognized as the assignee of the

decree, and it is also settled that he cannot make an application only for the purpose of being recognized as an assignee decree-holder. His application must be one for execution and, therefore, if he does not apply for execution, his application would not be considered to be a proper application. In this case he asked that the records be sent to the other Court for the further conduct of what he calls a suit and I suppose he meant by it for the execution of the decree. It has been held in *Krishnayyar* v. *Venkayar* (1) that if a decree-holder applies to the executing Court to send the records to the Court which passed the decree, that application is a step-in-aid of execution and saves limitation. Whether a transferee decree-holder can make a similar application is the question. In order that his claim as assignee decree-holder may be recognized, it is necessary that the papers should be sent back to the Court which passed the decree. It is admitted that the assignee decree-holder was subsequently recognized to have got a proper assignment of the decree by the Subordinate Judge's Court, Tanjore, which passed the decree. In order to get that relief his application to the executing Court to send back the papers to that Court is a competent one. I think, in order to enable the Court which passed the decree to recognize him as the assignee decree-holder, it was necessary for that Court to have the records sent up by the executing Court and an application for that purpose, I think, comes within the expression of "step-in-aid of execution." In this case, the application was not by assignee decree-holder for execution to the executing Court which no doubt he was incompetent to make till his assignment was recognized. But in order that the Court which passed the decree may pass an order under O. 21, R. 16, it was necessary, though it might not be so in every case, at least in this case that the papers should have been sent back. I hold, therefore, that this application was a proper one which the assignee decree-holder was competent to make. In this connexion I would like to refer to the case reported in *Monorathdas* v. *Ambika Kanta Bose* (2). In that case an application which was made by a person who got a title to a decree by operation of law, and who made an application before the Court which passed the decree, recognized him as being entitled to execute the decree, was a proper application. In this view of the case I think the order of the lower Court is correct, and this petition is dismissed with costs.

Petition dismissed.

(1) [1882] 6 Mad. 81.
(2) [1909] 9 C. L. J. 443=13 C. W. N. 533.

A. I. R. 1926 Madras 432

SPENCER AND MADHAVAN NAIR, JJ.

C. R. Subramania Aiyar—Decree-holder—Petitioner.

v.

Official Receiver, Tanjore and *another*—Respondents.

Civil Revision Petition No. 1140 of 1923, and Appeal No. 140 of 1923, Decided on 23rd September 1925, from the decree of the Dist. J., West Tanjore, in A. S. No. 128 of 1921.

(a) *Provincial Insolvency Act* (5 *of* 1920), *Ss.* 28 *and* 29—*Vesting takes place only on adjudication and till then Court is not bound to stay proceedings against insolvent.*

Under S. 28 vesting only takes place upon adjudication, and under S. 29 it is not till then that a Court, in which proceedings are pending against a debtor, is bound to stay proceedings against the insolvent. [P 433 C 1]

(b) *Provincial Insolvency Act* (5 *of* 1920), *S.* 20—*Interim Receiver has not the powers of Official Receiver, but has powers of Receiver under the Civil P. C.*

An interim Receiver does not possess the powers of the Official Receiver and has under S. 20 only the powers of a Receiver appointed under the Civil P. C. and is not clothed even with those powers till he takes possession of the debtor's properties. [P 433 C 1]

(c) *Hindu Law—Debts—Official Receiver can sell son's shares for antecedent debts of insolvent father.*

The Official Receiver can exercise the right of the insolvent father to sell his son's shares in immovable property to pay antecedent debts. [P 433 C 2]

T. R. Ramchandra Aiyar—for Appellant.

S. Subramania Aiyar and *C. A. Seshagiri Sastri*—for Respondents.

Judgment.—We are asked to revise the order of the District Judge of West Tanjore (Mr. Viswanatha Sastri) setting aside a sale held in execution of a decree which had been confirmed by the Subordinate Judge of Kumbakonam. The sale

was held on September 30, 1920. Seven days previously on September 23rd, the first judgment-debtor who is the father of the other judgment-debtors, presented an insolvency petition. An interim Receiver was appointed and he wrote and asked the Subordinate Judge to stop the sale. It was nevertheless held and confirmed by the Subordinate Judge on November 27th. An adjudication order in insolvency was made on December 15th. A year later the adjudication was annulled by the District Judge and the annulment was set aside by this Court on January 23rd, 1923.

At the outset it will be well to clear the ground of two errors. The learned District Judge states in his order that the adjudication took place on September, 1920. The order which is before us is under the hand and seal of the Official Receiver of the Tanjore District and is dated December 15th, 1920. Next the affidavits filed in support of the petition under O. 21, R. 90 to set aside the sale, declare that the properties of the insolvent had become vested in the Official Receiver. Under S. 28 of Act V of 1920 vesting only takes place upon adjudication and under S 29 it is not till then that a Court, in which proceedings are pending against a debtor, is bound to stay them.

An interim Receiver has, under S. 20 only the powers of a Receiver appointed under the Civil P. C., and is not clothed even with those powers till he takes possession of the debtor's properties. This is clear from the section itself. A Receiver appointed under the Code must obtain possession before the leave of the Court is required for disturbing his possession. Until he is actually in possession a creditor is not debarred from proceeding to execution (vide) *Livinia Ashton* v. *Madhabmoni Dasi* (1); *Kanailal* v. *Nanoo Bibi* (2), *Rajah Jagadish Chandra Deo Dhabal Deb* v. *Bhubaneswar Mitra* (3).

The Receiver referred to in Ss. 51 and 52 is a Receiver appointed upon adjudication and the learned District Judge was of opinion that the Subordinate Judge ought to have stopped the sale as soon as he was informed about the appointment of the Official Receiver as interim Receiver. Although the writer of the letter of September 28th, happened to be the Official Receiver of the Tanjore District, he was acting in the capacity of an interim Receiver, and, therefore, as he was not in possession of the debtor's properties, the Subordinate Judge was not bound to stop the sale or to direct the property to be delivered to him under S. 52: vide *Secy. of State* v. *Charanjet Lal* (4). After the sale had been completed there was no reason for setting it aside besides the suggestion that the price fetched was low. The encumbrances on the properties were all set out in the remarks column of the sale proclamation. Instead of requiring evidence as to the value of the items sold, the learned Judge was guided by hearsay information as to the prices of land prevailing in and near the town of Kumbakonam. It was not shown that any material irregularities were committed in the publication or conduct of the sale or that anyone sustained substantial injury thereby. As regards the sale proceeds in Court the Subordinate Judge has told the Receiver that he may make any application that he may be entitled to make in respect of them. As the sale took place after the petition to be declared insolvent was presented, applications for distribution of the assets will be dealt with under S. 51.

As regards the sons' shares the learned District Judge observed that the Official Receiver can exercise the right of the insolvent's father to sell his son's shares in immovable property to pay antecedent debts. This view as to the powers of an Official Receiver under the Provincial Insolvency Act receives support from *Rangayya Chetti* v. *Thanikachalla Mudali* (5), *Nunna Brahmayya Setti* v. *Chidaraboyina* (6), *Kuppusami Goundan* v. *Marimuthu Goundan* (7) and *Narasimula* v. *Basava Sankaram* (8) and is consistent with the acknowledged right of creditors to proceed against the sons' shares for the satisfaction of debts of a Hindu father that are neither illegal nor immoral, and with the principle that in the interests of the creditors the father's power of disposition of property for discharging antecedent debts should not be lost upon his being adjudicated insolvent, but should be

(1) [1910] 11 C. L. J. 489=14 C. W. N. 560.
(2) [1919] 29 C. L. J. 424=23 C. W. N. 952.
(3) A. I. R. 1923 Cal. 121.
(4) A. I. R. 1924 Lah. 594.
(5) [1896] 19 Mad. 74.
(6) [1903] 26 Mad. 214.
(7) A. I. R. 1925 Mad. 52.
(8) A. I. R. 1925 Mad. 249.

vested in the responsible official who is entrusted with the proportional distribution of this estate and payment of his debts.

A different view has been taken by a Bench of this Court as to the powers of an Official Assignee over the son's shares under the Presidency Towns Insolvency Act, in *Offical Assignee of Madras* v. *Ramachandra Ayyar* (9) and by the Judicial Committee of the Privy Council in *Sat Narain* v. *Behari Lal* (10) who had to construe the meaning of S. 2 (c) and 52 (2) (b) of the Act, of which the latter section has no counterpart in the Provincial Insolvency Act, with which we are now concerned. Their Lordships expressed no opinion as to the correctness of *Rangapya Chetti* v. *Thanikachalla Mudali* (5) and *Nunna Setti* v. *Chidaraboyina* (6) which, as they point out, are decisions under different statutes.

It may be that in the light of the Privy Council's decision as to the power exercisable by an Official Assignee under the Presidency Towns Insolvency Act, the correctness of the decisions of this Court as to the powers of Official Receivers under the Provincial Iusolvency Act may some day require reconsideration, but it is unnecessary to discuss the question further in the present case because the learned District Judge was certainly mistaken in thinking that the powers of an Official Receiver, whatever they may be under a correct interpretation of the sections of the Provincial Insolvency Act, was possessed by an interim Receiver, in whom, for want of an order of adjudication, the property of the insolvent had not yet vested.

The Civil Revision Petition is allowed and the order of the Subordinate Judge is restored with costs of the petitioner in this Court including the printing of documents which was done in C. M. S. A. and in the District Court, and the costs in C. M. S. A. No. 37 of 1922 in this Court and the District Court to be paid out of the insolvent's estate.

The Civil Miscellaneous Second Appeal (No. 140 of 1923) is dismissed as a second appeal will not lie by reason of S. 104 (2), Civil Procedure Code.

Appeal dismissed.
Revision allowed.

(9) A. I. R. 1923 Mad. 55.
(10) A. I. R. 1925 P. C. 18.

** A. I. R. 1926 Madras 434

Full Bench

COUTTS-TROTTER, C. J., PHILLIPS AND KUMARASWAMI SASTRI, JJ.

(*Katreddi*) *Ramiah* and *another*—Defendants 2 and 15—Appellants.

v.

Kadiyala Venkata Subbamma and *others*—Plaintiffs and Defendants 1, 3 to 14 and 16—Respondents.

Appeal No. 70 of 1921, Decided on 31st March 1925, from the decree of the Addl. Sub.-J., Ellore, in O. S. No. 35 of 1920.

** (a) *Hindu Wills Act—Will by Hindu re. property in the moffussil—Estate vests in executor on date of death—Non-obtaining of probate does not affect his powers—Probate (Observations of P. C. in 22 Cal. 788 at 796 treated as obiter—Calcutta view dissented from).*

In the case of a Hindu will executed in the moffussil to which the Hindu Wills Act does not apply, the estate vests in the executor, who accepts office, from the date of the testator's death, and the provisions of the Probate and Administration Act are applicable even though probate has not been obtained : (*Case-law exhaustively discussed.*) [P. 447, C. 2.]

(b) *Probate and Administration Act—Probate.*

The Probate and Administration Act is, as it stands, a measure purely permissive so far as the necessity for taking out probate is concerned. [P. 442, C. 2]

A. Krishnaswami Aiyar—for Appellants.

Advocate-General, G. Lakshmanna, V. Suryanarayana, A. Satyanarayana, P. Bapiraju and *Ch. Raghava Rao*—for Respondents.

Order of Reference to a Full Bench.

Spencer, J.—M. Subbanna executed a Will on 22nd September 1914, and died more than two years afterwards on 5th January 1917, leaving no sons, but a daughter, a daughter's son and a widow.

He appointed his wife executrix of his Will, authorizing her to pay his debts out of the proceeds of 1,000 bags of paddy that he had in store in 1914, to recover sums owed to him by others, to sell a certain house and site, to carry out certain charitable and religious dispositions, to adopt a son and to manage the adopted son's one-third share of immovable property till he attained majority, etc. and then follows a general clause : "I authorize my wife to conduct all the remaining affairs in my

stead." Respondent's vakil attempted to argue that 1st defendant was only an executrix for a limited purpose (cf. S. 35 of Probate and Administration Act), and that the intention of the testator was to empower her to transact only those affairs which he specifically mentioned in the Will. The use of the Telegu words (yavattu and tatimma) in this passage is to my mind consistent only with one meaning and that is that the testator intended his wife to be his general executrix. He provided in his Will that his entire immovable property (excluding certain purchases of land which he had dedicated to temple worship) should be divided into three shares, and one share given to his daughter's son (2nd plaintiff), one to his adopted son (16th defendant), and one to his widow (1st defendant) for life, and that after her death her share should be divided between his daughter's son and the son adopted by his widow. The genuineness of the Will is not disputed. Owing to the lapse of time between the making of the Will and the testator's death, and the expense of law suits which he engaged in during his life, the paddy mentioned in the Will as a fund for discharging debts was not available to the executrix, and she consequently had to sell 23 acres 68 cents of wet land under Ex. 1 to the 2nd defendant for the purpose of paying certain promissory notes and decree debts left owing by her husband when he died in 1917, and she further entered into a mortgage in favour of the 15th defendant for a similar purpose during the pendency of the present suit, which was instituted by deceased's daughter and daughter's son to obtain possession of the properties allotted to them under a family settlement alleged to have been arranged 13 days after the testator's death, or in the alternative to recover their legacies under the Will unencumbered by the sale, leases and mortgages to 2nd, 3rd, 6th and 15th defendants, respectively, and mesne profits for two years. The Subordinate Judge found for the plaintiffs and accordingly granted them a preliminary decree subject to the condition of their paying to 1st defendant Rs. 1,946 as their share of tte debts amounting to Rs. 5,000, for which the testator was liable at the date of his death. The purchaser and the mortgagee (Defendants 2 and 15) from the widow appeal. The argument put forward on their behalf was that, as the estate vested in the executrix from the date of the testator's death by virtue of the Will, she could sell or mortgage his property to pay off his debts and could give the purchaser or mortgagee a good title.

As the Will, with which we are concerned, was not executed by a Hindu within the City of Madras and does not relate to immovable property situate within this Court's Original Side jurisdiction, the Hindu Wills Act has no application to it, and consequently it was not made imperative by S. 187 of the Succession Act that the executrix should take out probate in order to establish her right to deal with the deceased's estate. Section 179, which speaks of vesting, does not apply to the Will of a Hindu, but S. 4, which is the corresponding provision of the Probate and Administration Act, applies. Section 12 of that Act states that probate of a Will, when granted, establishes the Will from the death of the testator and renders valid all intermediate acts of the executor as such, thus implying that they are not valid until probate is granted. I take this to mean that the executor of a Hindu Will may do all acts which the Will enjoins or permits him to do without any risk of having his authority to act qua executor questioned, but that if he exceeds his authority and does acts which the Will does not expressly authorize him to do, such as the disposal of immovable property requiring the permission of Court which can only be given under S. 90 (2), such acts are voidable at the instance of any person interested, unless and until the executor obtains probate or letters of administration and gets an order of Court to validate what he has done in the interval between the testator's death and the issue of probate or letters of administration. What acts an executor can under English Law do before obtaining probate are set out in Willims on Executors, Vol. I, at pp. 213 to 215. They include the payment of debts owing by the deceased and the disposal of the testator's goods and chattels and real estate. An executor could always sell personalty in order to pay debts, and since 1897 he can sell, lease, or mortgage realty for that purpose : vide pages 693

to 704. His power of disposal is absolute, but as he cannot maintain an action before probate though he can be sued if he has intermeddled with the estate, it becomes necessary for probate or letters of administration (if he dies first) to be obtained in order to justify his actions as executor.

There appears to be some divergence of opinion between the Calcutta and Bombay High Courts in the view taken by them as to the position of the executor of a Hindu or Muhammadan Will who does not take out probate, Mr. Justice Pugh, in Calcutta, regarding him as a mere manager for the purpose of paying the debts and distributing the estate : [*Sakina Bibee* v. *Mahomed Ishak* (1)] and Mr. Justice Russel and Mr. Justice Marten in Bombay treating him as an executor in whom the estate vests by virtue of S. 4 of the Probate and Administration Act ; [*Narrandas Ramji* v. *Narrandas Ramji* (2)] and *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3).]

So far back as 1878 Markby, J., in *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4) and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5) held that the executor of a Hindu Will did not represent the deceased by virtue of the Will until he had obtained probate and the property did not vest in him by his mere appointment as executor in the Will, and Maclean, C. J., in *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) expressed an opinion that the inclusion of the vesting section under the chapter relating to the grant of probate and letters of administration was an indication that the vesting followed from the grant of probate and that till then the executor held the property only as manager. There is also an observation of the Judicial Committee in *Administrator-General of Bengal* v. *Premlal Mullick* (7), that prior to the Hindu Wills Act (the case before them being one of a Will made in 1889 by a Hindu resident of Calcutta City) the powers and functions of the executor of a Hindu estate were those of a manager rather than those of an executior of an English Will. that he did not require probate and that probate if obtained would not have vested him with any title to the estate, either real or personal, which he administered. The decision of the same tribunal in *Kurrutulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (8), which by referring to Ss. 4, 59 and 90 of the Probate and Administration Act draws a distinction between executors under the Act and other executors who fail to take out probate, throws light on this debated question. The Courts of Madras, Bombay and Calcutta seem to be all agreed that the executor of a Hindu Will made in the mofussil derives his title from the Will and that he can perform any of the duties cast on him by the Will without taking out probate [vide *Ganapathi Aiyar* v. *Sivamalai Goundan* (9); *Balakrishnudu* v. *Narayanaswamy Chetty* (10) ; *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (11)]. Even the learned Judges who decided *Sir Mahomed Yusuf* v. *Hargovandas Jivan* (3) were agreed in thinking that an executor who did not take out probate would be subject to any restriction in the Will as to the disposal of immovable property. Such a disposal as would interfere with the literal performance of the trusts imposed by the Will on the executor in respect of the specific bequests of immovable property would not be valid unless the executor obtained probate and obtained the directions of the Court under S. 90 (2). The executor of a Hindu Will has not in my opinion the general powers of an executor of an English Will, as there is no section in the Probate and Administration Act giving an executor the wide powers conferred by S. 269 of the Succession Act. In *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), Sundara Aiyar and Sadasiva Aiyar, JJ., observed, "We can see nothing in the Act as it stands to prevent the executor from from acting as executor and exercising the powers given to him under

(1) [1910] 37 Cal. 839=15 C.W.N. 185.
(2) [1907] 31 Bom. 418=9 Bom. L.R. 287.
(3) A.I.R. 1922 Bom. 392.
(4) [1879] 4 Cal. 342=3 C.L.R. 154.
(5) [1879] 4 Cal. 455=3 C.L.R. 315.
(6) [1898] 25 Cal. 103.
(7) [1895] 22 Cal. 788=22 I.A. 107=6 Sar. 603 (P.C.).
(8) [1906] 33 Cal. 116=32 I.A. 244=7 Bom. L.R. 876=9 C.W.N. 938=2 A.L.J. 758=1 C. L. J. 594=15 M. L. J. 336=8 Sar. 839 (P.C.).
(9) [1913] 36 Mad. 575=23 M.L.J. 306=(1912) M.W.N. 1112.
(10) [1914] 37 Mad. 175.
(11) A.I.R. 1922 Mad. 457.

the Act without obtaining probate." My learned brother, whose judgment I have had the advantage of reading, apparently thinks that this observation goes too far and that an executor of a Hindu Will in the mofussil has none of the powers of an executor under the Probate and Administration Act, unless he first takes out probate. This is in effect the Calcutta view. I would not go so far as to say that an executor appointed by Will, who does not take out probate, is not an executor within the Act, as I think that S. 90, Cl. (2), recognizes the existence of two classes of executors: (1) those executors who get probate and obtain orders of Court for disposing of immovable property; and (2) those executors who not do so and are restricted to the terms of the Will. The section speaks of even the former class as having the property vested in them, although probate has not been granted to them.

As the 1st defendant, by disposing of 23 acres 68 cents of wet land under Ex. 1 in favour of the 2nd defendant for a price of Rs.4,500, disabled herself from carrying out the testator's wishes in their entirety as to the division of his immovable property among his heirs in the manner set out in the Will and as she did not, either before or after the sale, validate her act by taking out probate and obtaining permission of the Court to dispose of the testator's immovable property for discharging his debts, the learned Subordinate Judge was right in my opinion in declaring the sale-deed in favour of the 2nd defendant to be not valid and binding on the heirs under the Will. Similarly the mortgage must also have been invalid so far as it interfered with their obtaining a distribution of their shares, but being executed pendente lite the plaintiffs were entitled to ignore it.

I am inclined to treat the 1st defendant as an executrix who has exceeded the limited authority given to her under the Will as regards the disposal of immovable property and has failed to invest herself with the power that she might have got by taking out probate and applying to the Court to permit her to dispose of that property in a manner not authorised by the will.

Whether when the assets set apart under the will were not available for discharging the testator's debt, the 1st defendant, either as executrix without probate or as the manager or person in actual possession of the estate, would have power to sell any portion of it for the necessary purpose of discharging the deceased's debts and could give a good title to the purchaser is a question that has not been argued before us. As the determination of this question will largely depend on the answer to be given to the question of law formulated by my learned brother, I agree to the reference to a Full Bench in the terms proposed in his judgment.

Srinivasa Aiyangar, J.—The main question that arises in this appeal is one of considerable difficulty and at the same time of great general importance. The difficulty of the question has been immensely increased by the wide divergence in the views, with regard to the question, of the various High Courts in this country.

The daughter and the daughter's son of one Venkatasubbanna, the testator, instituted the suit from which this appeal has arisen. The 1st defendant is the widow of the testator and the 16th defendant is the son adopted by the 1st defendant to her deceased husband, the testator, under a power given to her by his will. Defendants 2 to 15 may all be regarded as alienees claiming through the 1st defendant.

The plaintiff's claim was for having these alienations set aside and delivery over to the plaintiffs of certain lands alleged to have been agreed to be given to them under a family arrangement entered into by the 1st defendant, subsequent to the death of the testator, or, in the alternative, for a partition and delivery over to them of their shares in the estate of the deceased according to the terms of the Will. On behalf of the contesting defendants, namely, Defendants 1 to 15, it was inter alia pleaded that the 1st defendant was the executrix appointed by the testator and that as such she was entitled to sell and dispose of the property of the deceased testator and that therefore, the alienations could not be set aside. The learned Subordinate Judge in the Court below found on a construction of the Will that there was no appointment of the 1st defendant in the Will as general executrix either expressly or by necessary implication. On this finding

the lower Court set aside the alienations and holding that the family arrangement set up by the plaintiffs was not proved, gave a decree in their favour for their shares of the properties bequeathed to them under the Will subject, however, to a direction that the plaintiffs should pay to the 1st defendant a fifth share of the total amount of the debts of the testator discharged by the 1st defendant.

The first question, therefore, that arises is whether there is in the Will an appointment of the 1st defendant as executrix by necessary implication. The learned vakil for the appellants has addressed to us a lengthy argument to show that the lower Court was wrong in holding that there was no such appointment. It seems to me that on a perusal of the entire Will and all its various clauses there can be no doubt whatever of the appointment of the 1st defendant as executrix by the necessary implication. There is no other person to whom the execution of the will is confided. Wherever the testator thought there was anything to be done by way of carrying out his intentions, he has directed that the same should be done or carried out by the 1st defendant. Thus the debts due to him are directed to be recovered by her. It is she that is authorized to obtain proper documents in respect of lands purchased by him, but the sale deeds for which had not been obtained by him during his lifetime, and she it is also that is directed to execute deeds of gifts and other documents in respect of certain grants made by him. She is also directed to sell certain properties and utilize the sale proceeds for the purpose of certain charities. She is also the person that is directed to get the Will registered within three months of his death. Over and above all these, there is about the end of the Will the following sentence: "I authorize my wife to conduct all other affairs in my stead." The other affairs referred to there should necessarily signify and include affairs other than those in respect of which he has given particular directions. It is impossible to regard this sentence as not amounting to a constitution of the 1st defendant as his legal representative and the authority to conduct all other affairs undoubtedly amounts to confiding the execution of the Will to her within the meaning of the definition of "executor." It almost seems to me that even apart from this sentence, the intention may be clearly gathered that she was the person to whom it was the intention of the testator that the execution of the Will should be confided. But this sentence amounts almost to an express appointment. The lower Court was, therefore, clearly wrong in coming to the conclusion that the 1st defendant was not the general executrix appointed by the Will. There was no reason whatever to suppose, as the Subordinate Court seems to have done, that the 1st defendant was appointed an executrix only for certain limited purposes.

The lower Court having arrived at the conclusion that the 1st defendant was not the executrix at all, it became unnecessary for that Court to discuss the question whether if she were executrix what her powers were as such executrix to make the alienations sought to be set aside. This leads me to the consideration of the main question in this appeal, namely, whether an executor appointed by a Will made in the moffussil of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the will or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act. It was unnecessary for the learned Subordinate Judge in the Court below to consider this question because on his finding that the 1st defendant was not appointed as executrix at all, no such question arises for decision by him. As we have, however, found that there is an appointment of the 1st defendant as executrix, if only by necessary implication, it has become necessary to determine the nature and extent of her powers over the estate of the deceased. If it should be found that even though no probate may be obtained by the executor the estate becomes vested in him from the moment of the death of the testator as indicated in S. 4 of the Probate and Administration Act and that he has all the powers of an executor as set out in that Act, then the tests to be applied for the purpose of determining whether or not the alienations made by him would be valid and binding would be entirely different to the tests applicable

if the correct view should be that unless and until an executor obtains probate his powers are only those of a mere manager. The present appeal, it seems to me, cannot be properly determined without coming to a decision with regard to this main question. If ultimately the view should prevail that the Probate and Administration Act is merely an enabling Act laying down the procedure for applications for probate and letters of administration and their grant, and setting out the consequences that would follow on such grant being made or obtained and that therefore an executor of a Will made in the moffussil, of the presidency has, till he obtains the probate, the powers only of a mere manager as though the Probate and Administration Act had not been passed, then in the view we have taken that the 1st defendant is the properly appointed executrix of the Will the case will have to be remanded to the lower Court for the purpose of determining the question what the powers are of such a mere manager with regard to the disposal of the property of the testator and whether having regard to the nature and extent of such power the particular alienations in this case were within or beyond such powers. If, however, the true view should be held to be that in the case of Wills made in the moffussil the executors have, whether they obtain probate or not, all the powers of the executors as set out in the Act, then the question of the validity of the alienations might require to be determined with reference to the various sections of that Act and the provisions of the Will in question. I may at once state that the case of *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), is a direct authority for the position contended for by the appellants with regard to the main question of the powers of an executor under the Probate and Administration Act. The learned Judges Sundara Aiyar and Sadasiva Aiyar, JJ., say at page 578 as follows: "But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate The reasoning on which the learned Judges proceeded to arrive at that conclusion may be summed up as follows (1) There is no provision in the Probate and Administration Act which compels a person appointed as executor under a Will to take out probate or letters of administration whereas there is such a provision in the Indian Succession Act as incorporated in the Hindu Wills Act (2). Under S. 4 of the Act all the property of the deceased vests in the executor as such. (3) Neither the preamble nor the heading of Chapter II in the Act, nor S. 12 requires that a different construction should be placed on S. 4. (4) Probate is not necessary to make a person an executor as his title as executor is derived under the Will. (5) Probate is merely the authentic evidence of the Will and not the source of the title of the executor. The learned Judges in coming to that conclusion, followed the decisions of the Bombay High Court in the case of *Shaik Moosa* v. *Shaik Essa* (12) and the case of *Mathuradas Lowji* v. *Goculdas Madhowji* (13). The case of *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6) was also cited to their Lordships but has been attempted to be distinguished on a ground which I shall advert to latter. It may be convenient here to observe that the view of the Bombay High Court in the said two Bombay cases has been maintained in several recent decisions of that Court. In *Narrondas Ramji* v. *Narrondas Ramji* (2), Mr. Justice Russell merely follows the earlier Bombay view citing the earlier decisions. In the case of *Sir Mahomad Yusuf* v. *Hargovandas Jivan* (3) two Judges of the Bombay High Court after considering a great deal of the case-law on the point reiterate the Bombay view and follow it. In the case of *Narrondas Ramji* v. *Narrondas Ramji* (2) Mr. Justice Russell referred to certain observations of Mr. Justice Markby in the case of *Komollochun Dutta* v. *Nilruttun Mundle* (14). Those observations are as follows: "The property vests in the executor by virtue of the Will, not of the probate. The will gives the property to the executor; the grant of probate is the method which the law specially provides for establishing the will." That same learned Judge Mr. Judge Markby, in the case of *Prosunno Chander Bhuttacharjee* v. *Kristo Chytunno Pal* (4) states as follows at page 345: "The executor does not represent the deceased by virtue of the Will until he has obtained probate." In the case of *The Administrator-General of*

(12) [1884] 8 Bom. 241.
(13) [1886] 10 Bom 468.
(14) [1875] 4 Cal. 360=4 C. L. R. 175.

Bengal v. *Premlal Mullick* (7) their Lordships of the Judicial Committee, state as follows: " It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The Will of the late Nundo Lal Mullick was executed in August 1889, and his executors, therefore, *on t heir obtaining probate*, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease." Though in that case their Lordships were not referring to the Probate and Administration Act, they were considering the terms of S. 179 of the Succession Act, which is identical with S. 4 of the Probate and Administration Act. In the case of *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), Chief Justice Maclean and Justice Banerjee while holding that an executor under a Hindu Will, before the Hindu Wills Act came into force, is not in the same position as an English executor under an English Will, decided that the property does not vest in him, and that he holds it only as manager. The learned Judges referring to the preamble of the Act and the heading of Chap. II of the Act states as follows: Where the estate is unadministered, if anyone desires to come in and prove the Will and get the benefit of the Act in that sense, he may have the opportunity of doing so, and the effect would be that the estate from that time would vest in such executor under S. 4. Again in the case of *Sakina Bibee* v. *Mahomed Ishak* (1), Mr. Justice Pugh concludes his discussion of the subject as follows: " It appears to me that in the case of a non-probated Will, if I may use the expresion, the position must be as it was before legislation, that is, the Will is a gift from the testator, to the legatees, and the executor is merely a manager to carry out the intentions of his testator . . . . . In my judgment, therefore, the position of an executor who does not take probate is the same as that of a Hindu or Muhammadan executor before the Succession Act."

In this conflict of views between the various Courts, I am personally inclined to consider that the view taken by the learned Judges in the Calcutta High Court is the correct view. That view is, to my mind, really in accordance with the view of their Lordships of the Judicial Committee in the case of *The Administrator-General of Bengal* v. *Premlal Mullick* (7). Considering the question, however, not on the authorities but with reference to the Probate and Administration Act, it has to be noticed that the Act is called: " An Act to provide for the grant of Probates of Wills and Letters of Administration to the estates of certain deceased persons." And the preamble runs as follows: " Whereas it is expedient to provide for the grant of Probate of Wills and Letters of Administration to the estates of deceased persons in cases to which the Indian Succession Act of 1865 does not apply, etc." It is significant that the object of the Act is not stated to be to legislate about Wills or to codify or modify the law relating to Wills. S. 4 of the Act is as follows: " The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such." It is true that, reading the section by itself, it would rather seem to indicate that on the death of the testator the executor becomes his legal representative for all purposes and that the property of the deceased person vests in him as such. But it must be remembered that this section refers also to an administrator, and it cannot possibly be pretended that there can be any administrator till letters of administration are obtained, though the letters, when obtained, relate back to the date of the death of the intestate deceased. There is, therefore, no reason to suppose why, in the case of an executor, a similar result should not have been intended. It is however, significant that S. 4 appears in Chapter II entitled: " Of grant of Probate and Letters of Administration." This heading of the chapter, therefore, further strengthens the view that both the representative character and the vesting accrue only on probate being taken. Then we have S. 12 which is as follows: " Probate of a Will, when granted, establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such." This makes the meaning of the Legislature, it seems to me quite clear. It is only theprobate ofa Will, when granted

that is said to establish the Will from the death of the testator and renders valid all intermediate acts. The clear implication is that if the probate is not granted or obtained, the Will is not established from the death of the testator and all intermediate acts of the testator will not be rendered valid. In S. 59, it is provided that probate or letters of administration shall have effect over all the property, moveable or immovable, of the deceased throughout the province in which the same is (or are) granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him. The Legislature, after providing in Chapter V regarding the practice in granting and revoking probates and letters of administration, proceeds in Chapter VI to enumerate the powers of an executor or administrator. S, 90 of the Act runs as follows: "(1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under S. 4; (2) the power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the Will appointing him, unless probate has been granted to him and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order." There is no doubt that the clause in sub-section (2) "unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order" would seem to suggest that even in the absence of probate, the property vests in the executor and that he has power to dispose of immovable property subject only to any restrictions which may be imposed in that behalf by the Will. There is real difficulty in construing this clause consistently with the other parts of the Act, and, for my part, I am inclined to think that it was a case of mere confused expression and that what the Legislature meant to lay down was that if a person appointed executor by a Will should wish to dispose of property contrary to the directions containkd in the Will, he should first obtain probate and then apply to the Court and obtain an order from it authorizing him to do so.

I am, therefore, of the opinion that the Probate and Administration Act is a mere enabling Act and that persons desirous of obtaining the rights created by that Act should first proceed under the Act and clothe themselves with the right by obtaining either probate or letters of administration.

I am confirmed in this view all the more because I cannot possibly imagine that the Legislature virtually altered the law of Wills in the mofussal without expressly saying so or that the Legislature meant to place an executor in the mofussal without probate practically for all purposes in the same position as an executor with probate in Presidency towns.

None of the learned Judges either of this Court or of the Bombay Court who have decided to the contrary have really given any satisfactory explanation either with regard to the preamble of the Act or the heading of Chapter II or the very clear terms of S. 12.

In view, therefore, of the decision in the case of *Ganapathi Aiyar* v. *Sivamalai Goundan* (9), and the conflict of judicial opinion between the Bombay and the Calcutta High Courts in the same matter, I deem it necessary to refer to a Full Bench the question already propounded, namely, the main question in this appeal, "whether an executor appointed by a Will made in the mufassal of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the Will or whether his powers, unless he obtains probate, are only those of a manager as held in respect of executors previous to the Probate and Administration Act."

Opinion of the Full Bench.

Kumaraswami Sastri, J.—The question raised in this reference is "Whether an executor appointed by a Hindu Will made in the mufussal of the Presidency has vested in him the estate of a testator aud has all the powers of an executor as set out in the Probate and Administration Act even though such executor does not obtain probate of the Will or whether his

powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act.

Before the passing of the Hindu Wills Act of 1870, the estate of a deceased Hindu did not vest in the executor even though he obtained probate, and in cases not governed by the Act the right of the executor or legatee could be established either by production of probate or by other proof of the Will, probate being only treated as one of the modes by which a Will can be proved in Court, and District Courts had no power to grant probate or letters of administration to Hindu Wills which were not groverned by the Hindu Wills Act. Supreme Courts, however, reserved to themselves the power to grant probate but it was recognized that the grant of probate did not of itself confer any additional powers on executors not governed by the Hindu Wills Act. The position of such an executor was merely that of a manager in so far as the powers which were not expressly conferred on him. In *the Administrator-General of Bengal* v. *Premlall Mullick* (7), their Lordships of the Privy Council, in dealing with rights of Hindu executors prior to the passing of the Administrator-General's Act of 1867, observe: "His powers and functions were not those of an English executor but rather those of a manager, but he did not require probate and probate if obtained would not have vested him with any title to the estate, either real or personal, which he administered." In view of these observations it is unnecessary to refer in detail to the decisions of the High Courts on the subject. I need only refer to *Kherodemoney Dossee* v. *Doorgamoney Dossee* (5); *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6); *Amulya Charan Seal* v. *Kali Das Sen* (15); *Maniklal Atmaram* v. *Mancherski Dinsha Coachman* (16).

As regards grants of probate and the proof required of a Will not governed by the Hindu Wills Act it was held in *Bharati* v. *Bharati* (17) that before the passing of the Probate and Administration Act, it was not competent to District Courts to grant probate or letters of administration; but as pointed out in *Krishna Kinkur Roy* v. *Rai Mohun Roy* (18), the passing of the Probate and Administration Act has altered this. It has, however, been held that there is no obligation cast on a Hindu or Muhammadan executor of Wills not coming under the Hindu Wills Act to take out probate and that he can prove the Will during the course of the suit just as if he was proving any other document requiring proof. Probate was regarded only as one mode of proving a will. I need only refer to *Krishna Kinkur Roy* v. *Rai Mohun Roy* (18), *Krishna Kinkur Roy* v. *Panchuram Mundul* (19), *Bhagvansang Bharaji* v. *Bechardas Harjivandas* (20), *Shaik Moosa* v. *Shaik Essa* (12): *Sakina Bibee* v. *Mahomed Ishak* (1). The Probate and Administration Bill as originally drafted and introduced in the Council, proposed to make the production of probate or letters of administration necessary in all cases where the property exceeded Rs. 1,000; but when the Bill was in the Select Committee this provision was deleted. The result is, that the Probate and Administration Act is as it stands a measure purely permissive so for as the necessity for taking out probate is concerned.

The question is whether the Probate and Administration Act is only confined to cases where such permission is availed of and a person applies for probate or letters of administration or whether it applies to all cases. So far as the decided cases are concerned, there is a difference of opinion between the view taken by the Madras and Bombay High Courts on one side and the Calcutta High Court on the other. In *Fatima* v. *Shaik Essa* (21). West, J., held that the executor of a Will of a deceased Muhammadan executed after the Probate and Administration Act had come into force could not claim to represent the estate of his testator until he had taken out probate. His view was that all classes of executors with regard to the necessity of taking out probate were on the same footing, that S. 12 of the Act showed clearly that the idea at the bottom of the scheme of the Act was that a Will was not to be considered until probate had been taken out and that till probate there was no will "established," that is there was no

(15) [1905] 32 Cal. 861=1 C. L. J. 270.
(16) [1875-77] 1 Bom. 269.
(17) [1880] 6 C. L. R. 138.
(18) [1887] 14 Cal. 37.
(19) [1889] 17 Cal. 272.
(20) [1881] 6 Bom. 73.
(21) [1883] 7 Bom. 266.

"Will," at all, exacting recognition of the dispositions made and the authority conferred by it. He held that the Act, read as a whole, established that probate was necessary in all cases. This view of West, J., was however, overruled by Sir Charles Sarjent, C. J., and Bayley, J. in *Shaik Moosa* v. *Skaik Essa* (12), and it was held that by reason of the omission from the Probate and Administration Act which applies to Hindus and Muhammadans of any section corresponding to S. 187 of the Succession Act which requires the production of probate or letters of administration, a right of suit may be established by a Hindu or Muhammadan without taking out probate. Sir Charles Sargent, C. J., was of opiuion that S. 12 of the Probate and Administration Act was merely intended to be a condensed statement of the English Law which regards probate as the authenticated evidence of the Will itself from which the executor derives his title and by virtue of which the property of the testator vests in him from the death of the testator and not as a condition precedent to establishing his claim. In *Mathuradas* v. *Goculdas Madhowji* (13) it was held following the decision in *Shaik Moosa* v. *Shaik Essa* (12), that an executor who has not taken out probate has the powers of alienation which the English Law confers on executors. In *Narrondas* v. *Narrondas* (2) it was held that the estate of the deceased vested in the executor appointed under the Will even though he did not obtain probate. Russell, J., observed as follows: "The plaintiffs were his executors and by S. 4 of the Probate and Administration Act all his estate vested in the plaintiffs as such." This Court has held S. 4 applicable before probate: see *Shaik Moosa* v. *Shaik Essa* (12) approved in *Mathuradas Lowji* v. *Goculdas Madhowji* (13) and in *Bai Harkor* v. *Maneklal Rasikdas* (22). It seems to have been assumed that the effect of S. 4 would have been to vest the property in the executor of a Will made before the passing of the Act, and not governed by the Hindu Law, although probate had not been granted. In *Sir Mahommed Yusuf* v. *Hargovandas Jivan* (3) Marten and Fawcett, JJ., after reviewing the case law on the subject held that the estate vests in the executor under S. 4 of the Probate and Administration Act and that he can convey the property by virtue of the power conferred upon him by S. 90 of the Act even though he has not obtained probate. All the authorities are reviewed by the learned Judges in their judgment.

So far as Madras is concerned the view of the Bombay High Court has been accepted as correct. In *Ganpathi Aiyar* v. *Sivamalai Goundan* (9), Sundara Aiyar and Sadasiva Aiyar, JJ., held that an executor under the Will of a Hindu who has not obtained probate is governed by the provisions of the Probate and Administration Act and can clothe a vendee with full title. Dealing with the argument that the property of the testator would vest in the executor only if he took probate or letters of administration the learned Judges observed "We are unable to uphold this contention. There is no provision in the Probate and Administration Act which requires a person appointed as executor under a Will to take out probate or letters of administration. S. 187 of the Indian Succession Act which provides that no right as legatee or executor under a Will can be enforced unless probate or letters of administration have been taken out has not been enacted in the Probate and Administration Act. It was imported into the Hindu Wills Act, but it was apparently for very good reasons considered undesirable to embody it in the Probate and Administration Act. Under S. 4 of the Act all the property of the deceased vests in the executor as such. Probate is not necessary to make a person an executor. His title is derived under the Will. If S. 187 of the Succession Act had been imported into the Probate and Administration Act, then neither the executor nor any person claiming as alienees under him would be entitled to enforce any right as executor or alienee. But we can see nothing in the Act as it stands to prevent the executor from acting as executor and exercising the powers given to him under the Act without obtaining probate. This was the view taken in *Shaik Moosa* v. *Shaik Essa* (12) and *Mathuradas Lowji* v. *Goculdas Madowji* (13). The learned Judges distinguish *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), on the ground that it related to the validity of a sale made by an executor under a Hindu Will in the year 1864 long before the Probate

(22) [1888] 12 Bom 921.

and Administration Act was passed and they observed that they could not assume that the learned Judges would have taken the same view in respect of Wills made by a person who died after 1881. In *Balakrishnudu* v. *Narayanaswami Chetty* (10), Wallis, C. J., held that the estate of a deceased vests in the executor even though probate has not been taken out, and observed as follows: "The Will is not governed by the Hindu Wills Act and S. 187 of the Indian Succession Act is therefore not applicable. Under S. 4 of the Probate and Administration Act the estate of the deceased vested in the plaintiff as her executor on her death in January 1904, and there is nothing in that Act to prevent him suing the defendant at once. No doubt if he had omitted to take out probate he could not have obtained a decree without producing a succession certificate, but there is nothing in that Act to prevent his instituting the suit and afterwards obtaining the certificate before decree." In *Rajah Parthasarathy Appa Rao* v. *Rajah Venkatadri Appa Rao* (11) it was assumed both by Sadasiva Aiyar and Phillips, JJ., who originally heard the appeal and by the Full Bench that the Probate and Administration Act applied to unprobated Wills in the mufassal to which the Hindu Wills Act did not apply.

A different view has been taken by the Calcutta High Court. In *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), it was held that an executor under a Hindu Will executed before the Hindu Wills Act came into force is not in the same position as an English executor under an English Will and that the property does not vest in him but that he holds it only as manager. As pointed out by Sundara Aiyar and Sadasiva Aiyar, JJ., in *Ganpathi Aiyar* v. *Sivamalai Goundan* (9), the Will in question was executed before the passing of the Hindu Wills Act and the Probate and Administration Act; but I have little doubt that there are observations in the judgment which support the view taken that the Probate and Administration Act does not apply to cases where probate has not been granted to the executor. Sir William Maclean, C. J., refers to the preamble of the Act and the fact that S. 4 comes in under Chapter II of the Act headed "Of grant of Probate and Letters of Administration" ane observes that this indicates that the vesting was only to follow upon the grant of probate of the will in the one case, or grant of letters of administration in the other and that the section applies not only to executors but to administrators who obtain letters of administration under the Act. Banerjee, J., thinks that the provisions of the Act must be taken to be controlled by the preamble of the Act and states that where probate has not been obtained the provisions of the Act would not apply. In *Prosunno Chunder Bhuttacharjee* v. *Kristo Chytunno Pal* (4), a decree was obtained against a person who was not the proper legal representative. Subsequent to the decree under the Will of the deceased he took out probate and he filed a claim to the property attached in execution of the decree against the defendant in that suit who was only the concubine of the deceased. Markby, J., held that a person who took possession of the estate of a deceased Hindu who had left a Will which was not probated must be treated for some purpose as his legal representative until some other climant comes forward. In the course of his judgment the learned Judge observes that the executor does not represent the deceased by virtue of the Will until he has obtained probate, that somebody must have represented the deceased, and must represent the deceased and that the person who was in possession of the estate and managed it till probate was obtained might be treated as the person who was representing the estate. The same learned Judge, however, in *Komollochun Dutt* v. *Nilrutun Mundle* (14), observed: "When the probate is granted it operates upon the whole estate, and (by S. 188) it establishes the Will from the death of the testator and and renders valid all intermediate acts of the executor as such. The property vests in the executor by virtue of the Will, not of the probate. The Will gives the property to the executor, the grant of probate is the method which the law specially provides for establishing the Will. So long as the probate exists it is effectual for that purpose." The question for determination there, however, was whether when once probate was granted it can be set aside by a separate suit and it was held that the only way to set it aside was to apply to the Court which granted the prebate to

revoke the grant. In *Sakina Bibee* v. *Muhammad Ishak* (1) it was held by Pugh, J., following *Sarat Chandra Banerjee* v. *Bhupendra Nath Bosu* (6), that the powers conferred by the Probate and Administration Act do not apply to an executor who has not taken out probate and that the powers of the executor under such a Will must be the same as it was before the passing of the Act. The observations of the learned Judge were, however, obiter as the question did not arise for determination.

I may refer to two Calcutta cases decided by their Lordships of the Privy Council which were referred to in the course of the argument. The first is *Administrator-General of Bengal* v. *Premlal Mullick* (7). The question in that case was whether a Hindu executor who had obtained probate of a Will can transfer the administration to the Administrator-General by virtue of the provisions of the Administrator-General's Act, II of 1874. The Will was executed in 1889 after the passing of the Probate and Administration Act. Their Lordships of the Privy Council were of opinion that the right conferred by S. 31 of the Administrator-General's Act was not confined to any particular class of executors and that the executor under a Hindu Will can take advantage of the provisions of the Act. In the course of their judgment their Lordships of the Privy Council, after pointing out that S. 31 of the Administrator-General's Act of 1874 is a re-enactment, without verbal alterations, of S. 30 of the Administrator-General's Act, 1867 (Act No. XXIV of 1867), make the following observation at p. 796: "It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position and chose to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator in so far as concerns the taking out of probate and the vesting in him of the estate of the deceased. The Will of the late Nundo Lal Mullick was executed in August, 1889, and his executors, therefore, on their obtaining probate, became immediately vested, by force of statute, with the whole estates which belonged to him at the time of his decease." The words "the executors, therefore, on their obtaining probate immediately vested by force of statute" are relied upon as supporting the view that the powers of an executor only arise on probate being taken. I do not think that we can hold that these observations which were obiter can be taken as an authoritative interpretation of S. 4 of the Probate and Administration Act. The only question for decision was whether a Hindu who obtains probate of a Will executed after the passing of the Probate and Administration Act was a person who came within the class of persons empowered to transfer the estate to the Administrator-General under S. 31 of the Administrator-General's Act. There is great force in the following observations of Sir E. J. Trevelyan in his book "The Law relating to Hindu Wills": "Although it was unnecessary to decide this question, these observations would show that an estate does not vest in an executor until probate. It is submitted that their Lordships have omitted to consider the words "unless probate has been granted to him," in S. 90 (2), the omission from S. 4 of any reference to probate and the expression of the effects of probate in Ss. 12 and 59 which, it is submitted suggest that the powers of an executor are not dependent upon probate." I may also point out that Sir Rowland Wilson in his work on Muhammadan Law is also of opinion that the powers of an executor of a Muhammadan under a Will which is not probated are subject to the provisions of the Act and that without probate he is an executor within the meaning of the Probate and Administration Act except where the contrary appears from the context: see page 232, 5th Edition.

Reference has also been made to *Kurru Tulain Bahadur* v. *Nuzbat-ud-dowla Abbas Hossein Khan* (8). That was a case where a Muhammadan left a Will which under the Muhammadan Law would be invalid to the extent of two-thirds of the estate. The Will was executed in 1893 after the passing of the Probate and Administration Act and the question was what the effect of the Probate was as regards two-thirds of the estate which the testator under Muhammadan Law had no power to dispose of. It was held that the grant of probate did not estop the plaintiff from pleading that the Will did not operate on two-thirds of the estate. Their Lordships of the Privy Council at page 130, state that, although the Supreme Courts granted probates of Hindu and

Muhamadan Wills, those Courts never applied the English rule as to the necessity for probate to such Wills; nor did they attribute to such probates, when granted, the English doctrines as to the operation of probate, and observe as folllows: "Under that system a Hindu or Muhammadan executor took no title to property merely as such by virtue of the probate." I do not think this decision throws much light on the question before us.

So far as legislation in Madras is concerned there are two regulations which deal with this matter. One is Regulation III of 1802, and S. 16 gave power to executors of Muhammadans and others to take charge of assets and to execute the trusts mentioned in the Will and forbade Courts interfering except on complaints. This section, however, was repealed so far as Hindus were concerned by Regulation 5 of 1829 and the preamble states that the provisions of S. 16 of Regulation 3 of 1802 were contrary to the provisions of Hindu Law and the authorities prevalent. S. 4 of Regulation 5 of 1829 says that Wills left by Hindus shall have no legal force whatever except so far as their contents may be in conformity with the provisions of the Hindu Law, according to the authorities prevalent in the respective provinces under this Presidency.

I am of opinion that the view taken by the Bombay High Court and by our own Court in *Ganapathi Aiyar* v. *Sivamalai* (9) is correct. As regards the vesting of the estate on the executor before probate is obtained I think the observations of their Lordships of the Privy Council in *Meyyappa Chetty* v. *Subramanyam Chetty* (23) are clear. They observe "It is quite clear that an executor derives his title and authority from the Will of his testator and not from any grant of probate. The personal property of the testator including all rights of action vests in him upon the testator's death." I think there are many practical difficulties in coming to the opposite conclusion. S. 12 of the Probate and Administration Act says that probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such; so that it will be open to the executor to defer taking out probate and after administering the estate with the limited powers of a manager to apply for probate and clothe himself with rights which are far more extensive and which would have retrospective effect. For example, if he sells property before obtaining probate, the sale would not be binding unless there was an express provision in the will or unless it were necessary and beneficial to the estate within the meaning of *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweri* (24), but if he takes out probate the alienation would be valid from the date of death of the testator because under S. 90 unless there is an express prohibition, there is no question of necessity. It is not in every case that a purchaser can apply for letters of administration with will annexed. As the view taken by the Madras High Court has always been that the provisions of the Probate and Administration Act apply to cases where probate has not been obtained and as it would unsettle many titles if a contrary view were held we should not do so unless we are satisfied that the view taken till now is clearly erroneous.

Turning to the Probate and Administration Act, I do not think there is anything in the Act which clearly indicates that it is only applicable to executors who take out probate. Executor is defined generally in S 3 as a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided. S. 4 enacts that the executor or administrator, as the case may be, of a deceased person, is the legal representative for all purposes and allthe property of the deceased person vests in him as such. No doubt this section comes under Ch. 11 which is headed "Of grant of probate and letters of administration," but I do not think that this fact has much bearing on the general words of the section, nor do I think that the fact that an administrator gets title only from the date of the grant of letters of administration throws much light on the question. I think the meaning of the section is that property will vest in both of them but that in the case of an executor it vests from the date of the death of the testator, but by virtue of Ss. 14 and 15 an administrator being merely a person to

(23) [1916] 43 I. A 603=18 B. L.R. 642 (P. C.).

(24) [1854-57] 6 M. I. A. 393=18 W. R. 81 Foot-Note=2 Suther. 29=1 Sar. 552 (P. C.).

whom the Court confides the management of the estate the property vests in him from the date of the grant of letters of administration and not before. I do not think there is much point in the contention that because executors and administrators are both referred to in S. 4 and because an administrator's rights commence from the date of the grant a similar restriction should be placed upon the executor who derives title from the will of the testator. S. 90, I think, makes the point clear. It distinctly applies to both executors who have taken out probate and those who have not. Cl. (1) gives the executor or administrator power to dispose of all or any of the property for the time being vested in him under S. 4 and Cl. (2) says that if the will contains a restriction and the executor wants to sell property, he should obtain probate and get the leave of the Court. It is difficult to read S. 90 as not applying to unprobated wills. It clearly contemplates the vesting of property in the executor who has not obtained probate. It is no doubt true that in the preamble it is stated that it is expedient to provide for the grant of probate, wills and letters of administration to the estates of deceased persons in cases to which the Indian Succession Act does not apply but I do not think that this fact alone should be taken as conclusive on the question. It seems to me that if the legislature intended that only wills which are probated should be governed by this Act, it would have said so in unequivocal terms and in the absence of any such statement I do not think I will be justified in holding that the Act is not applicable to cases where probate has not been obtained. There are several sections in the Act which have nothing to do with probate and which are general in their character and there is no reason why such provisions should not be applied to Hindu wills of which probate has not been obtained. I think there is great force in the observations of Sir Charles Sargent, C. J., in *Shaik Moosa* v. *Shaik Essa* (12) where the learned Judge observes that the object of the legislature in enacting the Probate and Administration Act seems to have been to frame an act which would be applicable to all natives of this country whilst leaving the existing law as to those Hindus, to whom the Hindu Wills Act apply untouched.

I would answer the reference by stating that in cases of Hindu wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death and that the provisions of the Probate and Administration Act are applicable even though probate has not been obtained.

Coutts-Trotter, C. J.—I agree.

Phillips, J.—I agree.

Reference answered.

A. I. R. 1926 Madras 447

KUMARASWAMI SASTRI, J.

Sabapathy Mudaliar—Defendant—Petitioner.

v.

Manikkammal—Plaintiff—Respondent.

Civil Revision Petition No. 288 of 1924 Decided on 12th March 1925, from a decree of the Dist. Munsif, Chingleput, in Small Cause Suit No. 489 of 1923.

Pro-note — Guardian executing pro-note and accepting personal responsibility to pay—Pro-note is valid and enforceable against guardian personally.

It is open to the guardian to undertake to pay personally a debt due by the estate and there is no want of consideration if creditor agrees to accept the guardian's personal responsibility instead of having recourse against the estate.

A person executing a negotiable instrument will be personally liable unless there is a clear indication in the document that he does not intend to incur personal liability but limits the recourse of the payee or holder to the person whom or the estate which he represents as trustee, executor, guardian or agent: 33 *M. L. J.* 631 *Rel. on.*

[P 447, C 2; P 448, C 1]

T. S. Anantharaman—for Petitioner.

T. Pattabhirama Iyer—for Respondent.

Judgment.—I think the decree of the Munsif is correct. The promissory note after reciting that the executant was the guardian of the minor and that Rs. 125 was due by the father of the minor proceeds as follows: "I shall pay these Rs. 115 to you or order, on demand, with interest at 1 per cent per mensem. I execute the promissory-note in these terms with my consent." It is signed by the defendant without any qualification or description. It is difficult to see how I can in the face of the express personal promise to pay and the unqualified way in which the note is signed hold that the defendant is not liable on the note. It is open to the guardian to undertake to

pay personally a debt due by the estate and there is no want of consideration if creditor agrees to accept the guardian's personal responsibility instead of having recourse against the estate.

Reference has been made to *Padma Krishna Chettiar* v. *Nagamani Ammal* (1), but as pointed out by Wallis, C. J., in *Palaniappa Chettiar* v. *Shanmugam Chettiar* (2) the case does not decide that the executant who was the mother was not personally liable.

I have in *Ammalu Ammal* v. *Namagiri Ammal* (3) held that a person executing a negotiable instrument will be personally liable unless there is a clear indication in the document that he does not intend to incur personal liability but limits the recourse of the payee or holder to the person whom or the estate which he represents as trustee, executor, guardian or agent.

In the present case I see no such limitation.

The petition fails and is dismissed with costs.

Petition dismissed.

(1) [1915] 39 Mad. 915=18 M. L. T. 216.
(2) [1919] 41 Mad. 815=35 M. L. J. 90=8 L. W. 317.
(3) [1918] 33 M. L. J. 631=6 L. W. 722 = (1918) M. W. N. 1[illegible]0.

A. I. R. 1926 Madras 448

VISWANATHA SASTRI, J.

(*Dewan Bahadur*) *G. Krishnamachariar* —Plaintiff—Petitioner.

v.

The Municipal Council, Srirangam—Defendant—Respondent.

Civil Revision Petition No. 740 of 1923, Decided on 19th August 1925, from the decree of the Small Cause Judge, Trichinopoly, in Small Cause Suit No. 5450 of 1922.

Madras District Municipalities Act (5 *of* 1920), *S.* 354(2)—*Recovery of profession tax levied under mistake in respect of residence—Suit is barred by S.* 354 (2) *and 4th Sch., Cl.* (28).

Where a person carrying on moneylending business at Hyderabad and spending his vacation at S, was charged professional tax for carrying on the business within S Municipality and it was not proved that he resided within the S Municipal limits for 60 days:

Held: that his suit to recover the tax paid under protest was incompetent in view of S. 354(2) and 4th Sch., Cl. 28; 19 *Mad.* 10, *Foll.*[P 448 C 2]

K. R. Rangaswami Aiyangar—for Petitioner.

N. Rajagopalachariar — for Respondents.

Judgment.—Petition by the plaintiff in S. C. S. No. 5450 of 1922, on the file of the Court of Small Causes, Trichinopoly, to revise the decree, dated 16th April 1923.

The suit was to recover back professional tax collected from the plaintiff. The plaintiff is a resident of Hyderabad and has a house within the municipal limits of Srirangam where he comes and spends a portion of his vacation. He was called upon to pay professional tax for carrying on money-lending business at Srirangam and paid a sum of Rs. 50 under protest. It was urged before me that as he did not reside within the municipal limits of Srirangam for 60 days in the half-year for which the tax was collected he was not liable to be assessed. It was conceded that during the half-year for which the tax was levied the plaintiff did come and reside at his house at Srirangam for some days. Such being the case he was a person liable to be assessed, in case he came under S. 95 of the District Municipalities Act. The term "residence" is defined in S. 3, Cl. 25 of the Act, and the plaintiff must therefore be deemed to reside within the limits of the Srirangam Municipality. Now assuming for a moment that he ought to have resided for 60 days in the half-year for which he was assessed, S. 354(2) of the Act read with Cl. 28 of Sch. IV bars the suit. The case appears to me to be on all fours with the case of *Municipal Council of Nellore* v. *Rangayya* (1) which was followed in *Municipal Chairman, Virudupatti*, v. *Saravana Pillai* (2). There a house which was completed only on 15th August 1893, was assessed on 11th September 1893, and tax collected for the half-year ending 30th September 1893. It was held that although the building was not in a habitable state for 60 days in the half-year, it should not be said that there was any illegal levy, and that the remedy lay only by way of appeal to the Municipal Council. I dismiss the petition with costs.

Petition dismissed.

(1) [1895] 19 Mad. 10.
(2) [1919] 10 L. W. 592.

** A. I. R. 1926 Madras 449
Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

***Sheik Hussain Sahib*—Plaintiff—Appellant.**

v.

***Pachipulusu Subbayya* and *another*—Defendants—Respondents.**

Second Appeal No. 1076 of 1922, Decided on 10th November 1925, against the decree of the Sub-J., Kistna, in A. S. No. 380 of 1921.

** *Natural rights—Upper and lower lands—Owner of lower land cannot obstruct flow of surface water from higher land—Easements Act, S. 7.*

Where two contiguous fields belong to different proprietors, one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is without the positive constitution of any servitude, bound to receive that body of water on his property. The lower heritor cannot object so long as the flow whether above or below ground is due to gravitation unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means; and there is no distinction in principle between water raised from a mine below the level of the surface of either property and water artificially conveyed from a distant stream. One landowner cannot by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. The distinction between rural and urban areas drawn in 29 *Mad.* 539 arises from the accident that illustration (a) to S. 7 of the Easements Act instances a case of land in an urban area because it wishes to safe-guard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. Really there is no such distinction.

[P 451 C 2; P 452 C 1]

V. Suryanarayana—for Appellant.

B. Satyanarayana—for Respondents.

Order of Reference to a Full Bench

Phillips and Ramesam, JJ.—The plaintiff (appellant) is the owner of a piece of a land which lies on a higher level than the land of the defendant and he seeks to prevent the defendant from erecting a bund on his land, which has the effect of preventing the flow of surface water over the plaintiff's land on to the defendant's land which is its natural outlet. The lower appellate Court following the ruling in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1), has held that the defendant is entitled to prevent water flowing over his land by erecting a bund. It is now argued for the appellant that this decision in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1), is only applicable to cases were the lands are situated within a town and he relies on subsequent cases of this Court, *Ramaswami* v. *Rasi* (2) and *Gopala Krishna Yachandrula* v. *Secretary of State* (3). In *Ramaswami* v. *Rasi* (2), the prior decision in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1) was distinguished on the ground that it referred to land in a town and was therefore not applicable to agricultural land outside a town. The decision in *Gopalakrishna Yachandrula* v. *Secretary of State* (3), was with reference to the right to bund a natural stream and Seshagiri Aiyar, J., prefers to base his decision on Illustration (H) of S. 7 of the Easements Act (V of 1882) rather than Illustration (I) which deals with surface water, Illustration (H) dealing with natural streams. He, however, adds that if the learned Judge in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1) intended to lay down that the principle regarding the conflict of rights should be extended to agricultural areas in rural parts, he dissents from the proposition and Wallis, Officiating C. J., takes the same view. Subramania Aiyar, J. in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1) laid down the proposition that the natural right mentioned in illustration (i) namely, " the right of every owner of upper land that water naturally rising in or falling on such land and not passing in defined channels, shall be allowed by the owner of adjacent lower land, to run naturally thereto," was not an absolute right but was the right to pass such water without incurring any liability for damages caused thereby and held that when that right came in conflict with the right mentioned in illustration (a) namely, " the exclusive right of every owner of land in a town to build on such land, subject to any municipal law for the time being in force " the latter must prevail. If this proposition

(1) [1906] 29 Mad 539=16 M. L. J. 582.
(2) [1913] 38 Mad. 149=(1913) M. W. N. 640.
(3) [1915] 28 M. L. J. 98=2 L. W. 45.

is correct, it would be illogical to hold that the natural right to pass water over a lower land cannot prevail in a town, whereas it must prevail in the country.

In S. 7 we have the definition of what an easement is, namely, "restriction of one or other of the following rights" which are mentioned. Because illustration (a) mentions the right of an owner of land "in a town" to build on such land, it does not necessarily exclude the right of an owner of land in the country to build on such land. In fact S. 7 itself deals with the exclusive right of every owner of immovable property, subject to any law for the time being in force, to enjoy and dispose of the same and also the right of every owner of immovable property, subject to any law for the time being in force, to enjoy without disturbance by another the natural advantage arising from its situation. Prima facie the owner of immovable property is entitled to do what he pleases with his land and can only be restrained by law or by the superior right of some other person. There can be no distinction between such a right in a town and the same right in the country, unless it is subject to any law for the time being in force. We find it difficult to realize the distinction drawn between such rights in *Ramaswami* v. *Rasi* (2) and *Gopala Krishna Yachandrula* v. *Secretary of State* (3) unless there is some law or custom having the force of law which restricts the right in rural areas but not in urban areas. The difficulties of cultivating land are referred to and it is suggested that owing to these difficulties the natural right of an owner of land to do on it what he pleases is subject to restrictions, but this can only be if the restrictions are imposed by law or custom having the force of law. If the right of an owner to pass his surface water on to the lower land is an absolute right which the owner of the lower tenement cannot resist, it is undoubtedly an easement right enjoyed by him over the tenement, but we find in the Act that the right is given as an illustration of a right against which an easement may be acquired and is not described as being in itself an easement right. It is doubtful whether the Legislature would have given a right which is in itself an easement right as an illustration of a natural right in restriction of which an easement right can be acquired. We may mention that the observations in *Gopala Krishna Yachandrula* v. *Secretary of State* (3), with reference to illustration (i) of S. 7 are obiter inasmuch as it was found in that case that the water which was interfered with was the water of natural stream. The decision, however, in *Ramaswami* v. *Rasi* (2), distinctly limits the proposition put forward in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1), to urban areas although in the earlier judgment there is no language to lead one to suppose that the learned Judges meant to confine the decision to urban areas. They no doubt refer to illustration (a) which deals with land in a town, but the right mentioned is only an illustration of the rights referred to in S. 7 and does not exclude other rights ex jure naturae appertaining to an owner of land. An owner of agricultural land is undoubtedly entitled to raise the level of his land if he so wishes, provided there exists no legal restriction of such act. It might thus happen that a lower land when raised would become higher in level than the adjacent land which had formerly been on a higher level. The right to pass water would thereby be reversed and the owner of the originally lower land would be entitled to pass water on to what was originally the higher land. If the owner of the lower land has such a right to raise his land over the whole of it, it is strange that he cannot raise the level over only a part, such raising having the effect of stopping the flow of water through the adjacent land but whether he has such right must depend on the extent of the right of the owner of the land which was originally higher. Three other authorities have been cited before us from other parts of India, the first being *Ambica Saran Singh* v. *Debi Saran Singh* (4), in which it was decided that the owner of higher land had the right to pass his surface water over lower land so long as it continued to be on a lower level, apparently dissenting from the decision in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1), although in terms it does not purport to do so. In the other two cases of Calcutta and Patna respectively, the Easements Act does not apply: *Ramadhin Singh* v. *Jadunandan Singh* (5) and *Sarban* v.

(4) [1914] 12 A. L. J. 685.
(5) [1915] 19 C. W. N. 54.

Prudo Sahub (6). The former case is of no assistance here, for it merely deals with the right of a party to abstain from passing water falling on his land to the lower land and to collect it on his own land. The Patna case does not refer to any authorities and the Court came to a conclusion differing from that taken in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1).

Inasmuch as the authority of *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1), which was followed in *Sangana Reddiar* v. *Perumal Reddiar* (7), has been questioned in *Ramaswami* v. *Rasi* (2), and *Gopala Krishna Yachandrula* v. *Secretary of State* (3), we think that it is advisable that the whole question should be considered by a Full Bench of this Court and accordingly we refer the case to a Full Bench for decision.

Opinion.

Coutts-Trotter, C. J.—This appeal raises certain questions of fact with which we are not concerned. The question of law to which our attention has been directed is whether the owner of a plot of land on a lower level on to which water flows in the ordinary course of nature from adjacent land on a higher level is entitled in law so to deal with his land as to obstruct the escape of water from the higher land. It is said that any right which the owner of the higher land has is not in the nature of an easement and that terms such as dominant and servient tenements are inapplicable. That may be true in the abstract but it seems to me that the Privy Council and the House of Lords have clearly recognized a very close analogy between the two classes of cases and that if the owner of the land at the lower level raises an obstruction to the natural flow of the water he will be restrained if it causes or tends to cause damage to the owner of that on the higher. *Gibbons* v. *Lenfestey* (8) is a direct authority of the Privy Council binding upon us. In the judgment of the Committee which was delivered by Lord Dunedin we have at page 57 :

The right of the superior proprietor to throw natural water on the lower land is not an ordinary servitude to which this rule can apply. It is a natural right inherent in property ; it is a question of nomenclature whether it is or is not called a servitude.

Later on we have

Where two contiguous fields belong to different proprietors one of which stands upon higher ground than the other, nature itself may be said to constitute a servitude on the inferior tenement by which it is obliged to receive the water that falls from the superior. If the water which would otherwise fall from the higher ground insensibly without hurting the inferior tenement should be collected into one body by the owner of the superior in the natural use of his property for draining or otherwise improving it, the owner of the inferior is without the positive constitution of any servitude, bound to receive that body of water on his property.

In *John Young and Co.* v. *Bankeir Distillery Company* (9), Lord Watson says at page 696 :

The right of the upper heritor to send down, and the corresponding obligation of the lower heritor to receive, natural water whether flowing in a definite channel or not, and whether upon or below the surface, are incidents of property arising from the relative levels of their respective lands and the strata below them. The lower heritor cannot object so long as the flow, whether above or below ground, is due to gravitation, unless it has been unduly and unreasonably increased by operations which are in *aemulationem vicini*. But he is under no legal obligation to receive foreign water brought to the surface of his neighbour's property by artificial means ; and I can see no distinction in principle between water raised from a mine below the level of the surface of either property, which is the case, here and water artificially conveyed from a distant stream.

And then His Lordship quotes Lord Giffard in *Blair* v. *Bunter Finlay and Co.* (10).. "Although there is a natural servitude on lower heritors to receive the natural or surface water from higher grounds, the flow must not be increased by artificial means, although reasonable drainage operations are permissible."

The same principle clearly underlies the decision in *Smith* v. *Kenrick* (11) and in that case Mr. Justice Cresswell in delivering the judgment of the Court, said :

"There are many cases in which the principle has been recognised, that one land owner cannot, by altering the condition of his land, deprive the owner of the adjoining land of the privilege of using his own as he might have done before. Thus, he cannot by building a house near the margin of his land, prevent his neighbour from excavating his own land, although it may endanger

(6) A. I. R. 1923 Patna 65.
(7) [1910] M. W. N. 545.
(8) 118 L. T. (N. S.) 55.
(9) [1893] A. C. 691.
(10) 9 Court. Sess.Cases, 3rd Series, Macpherson 207.
(11) [1849] 7 C. B. 515=18 L. J. C. P. 172=13 Jur. 362

the house, nor from building on his own land, although it may obstruct windows, unless indeed by lapse of time the adjoining land has become subject to a right analogous to what in the Roman Law was called a servitude. So also in *Acton* v. *Blundell* (12), where the subject was very much discussed, the Court held that one landowner having dug a well on his own lands could not maintain an action against a party who afterwards sunk a coal-pit in the neighbourhood which had the effect of drawing the water away from his well: the act not being done by defendant negligently or maliciously, but in a proper manner for the purpose of winning his own coal. We think that the same principle is applicable to the present case. The water is a sort of common enemy, as was said by Lord Tenterden in *Rex* v. *Commissioners of Sewers for Pagham* (13), against which each man must defend himself. And this is in accordance with the civil Law by which it was considered that land on a lower level owed a natural servitude to that on a higher, in respect of receiving without claim to compensation the water naturally flowing down to it."

This last case also touched on the distinction between natural and artificial accumulations of water which was later in 1888 made the basis of the celebrated decision in *Rylands* v. *Fletcher* (14). The reference seems to have been made on account of the conflict of views expressed in *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1) and *Sangana Reddiar* v. *Perumal Reddiar* (7), on the one hand and *Ramaswami* v. *Rasi* (2), on the other. The referring Bench in accepting the distinction drawn in *Ramaswami* v. *Rasi* (2) held that the decision in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam* (1) only referred to urban areas, and we agree that no such distinction arises. It doubtless came from the accident that illustration (a) to S. 7 of the Easements Act instances a case of land in an urban area because it wishes to safeguard the statutory rights of urban authorities to restrict unapproved methods of dealing with land and buildings. In our opinion *Mahamahopadyaya Rangachariar* v. *Municipal Council of Kumbakonam* (1) was wrongly decided and the reasoning on which it is based is clearly at variance with the decisions of the Privy Council and the House of Lords to which we have referred; and the same observations apply to *Sangana Reddiar* v. *Perumal Reddiar* (7). It cannot be that the law recognises two inconsistent rights in adjacent owners, the exercise of one of which would necessarily destroy the other.

It was contended by the respondent that, if the argument of the appellant should be correct, the owners of the adjoining lands at a lower level would be prevented from improving their lands; but this is clearly not so as the adjoining owner can improve his lands to any extent he pleases even to the extent of raising the level of his lands, provided that he makes suitable arrangements for carrying off the water from his neighbour's land. We are confirmed in our view by the fact that the decision in *Ramaswami* v. *Rasi* (2) was referred to by the Privy Council in *Maunga Bya* v. *Maung Kyi Nyo* (15), with approval as being consistent with the authorities.

We refer the case back to the Division Bench for final disposal with this expression of opinion.

(12) [1843] 12 M. and W. 324 = 13 L. J. Ex. 289.
(13) [1828] 8 B. and C. 360 = 14 Q. B. D. 561.
(14) [1868] 3 H. L. 330 = 1 Ex. 265.

(15) A. I. R. 1925 P. C. 236.

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* A. I. R. 1926 Madras 452

DEVADOSS AND WALLER, JJ.

(*Akella*) *Kesavaramayya* and *others*—Plaiutiffs—Appellants.

v.

Visamsetti Venkataratnam and *others*—Defendants—Respondents.

Second Appeal No. 1356 of 1919, Decided on 1st September 1925, from the decree of the Dist. J., Kistna, at Masulipatam, in A. S. No. 122 of 1918.

* *Limitation Act, S. 19—Pro-note failing as pro-note serves as acknowledgment of liability—Promissory note.*

When a person borrows a certain sum of money and executes a promissory note, he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note and the acknowledgment can give rise to a cause of action, if the pro-note fails as pro-note for any

cause: 6 *L. W.* 630 and *A. I. R.* 1922 *Mad.* 181, *Ref.* [P 453 C 2]

A. Krishnaswami Aiyar—for Appellants.

S. Varadachariar, K. Krishnamachariar and *K. Venkataswami Naidu*—for Respondents.

Judgment.—The only question in this second appeal is whether the suit is barred by limitation. The plaintiffs are the sons of Venkayya Garu and sue the defendants who are the members of the committee called Sri Kannika Parameswari Visamsetti Venkataratnam Hindu High School Committee for a certain sum alleged to be due to the plaintiffs. The Subordinate Judge gave a decree in favour of the plaintiffs. On appeal the District Judge at Masulipatam dismissed the suit on the the ground that it was barred by limitation.

The defendants, who are the members of the Sri Kannika Parameswari Visamsetti Venkataratnam Hindu High School Committee took over the management of the Hindu High School at Bezwada with all its assets and liabilities from another committee called the Sri Kannika Parameswari Hindu High School Committee in November, 1915. Both the committees were registered under the Registration of Societies Act, 1860. Venkayya advanced considerable sums of money for the upkeep of the school and for certain buildings connected with the school, and the committee of the school authorized two of its members to execute a promissory note in his favour for the amount due. Ex. E was executed on 18th November 1913. The suit was filed on 14th November 1916. The promissory note was found to be invalid as itwas made payable to bearer. The plaintiffs rely upon S. 19 ofthe Limitation Act and wish to treat Ex. E as an acknowledgment in writing and signed by the agent of the debtors duly authorized in their behalf. The contention of Mr. Varadachariar for the respondents is that the executants of Ex. E were not authorized to make an acknowledgment and therefore it cannot be treated as an acknowledgment under S. 19 of the Limitation Act. Ex. D-3, which is dated 17th November 1917, he contends, is not an acknowledgment for it only authorises two members of the committee to execute a promissory note. D-3 is the resolution of the committee authorising the President and the Secretary and a member of the committee (Gopala Rao) to execute a promissory note for the sum of Rs. 3,500 to Venkayya Pantulu. D-3 is not an acknowledgment of liability. In pursuance of the authority Ex. E was executed on 18th November, 1913. Ex. E therefore is an acknowledgment of liability of the committee to the extent of Rs. 3,500 to Venkayya It is not necessary that in the promissory note itself the fact that it is an acknowledgment should be recited; the execution of the note itself is in acknowledgment of the liability. When a person borrows a certain sum of money and executes a promissory note he executes it for the consideration received by him and when it is executed in respect of a consideration already passed it is an acknowledgment of the liability to pay the amount mentioned in the note. It was held in *Nachimuthu Chetty* v. *Audiappa Pillai* (1) that though a promissory note cannot be enforced as offending against S. 26 of the Paper Currency Act it can nevertheless be used as evidence of an acknowledgment of liability. This case was followed in *Natarajulu Naicker* v. *Subramanian Chettiar* (2). Ex. E mentions the proceedings of the committee and recites the fact that it is executed on behalf of the committee. Ex. E, therefore, is an acknowledgment of liability within the meaning of S. 19 of the Limitation Act and the suit filed within three years of it is not barred by limitation.

The appeal is allowed and the lower Court will try the other issues in the case. The appellants will be entitled to the costs of this second appeal.

Appeal allowed and case remanded.

(1) [1917] 6 L. W. 630=(1917) M. W. N. 778.
(2) A. I. R. 1922 Mad. 181.

* A. I. R. 1926 Madras 453

DEVADOSS AND WALLER, JJ.

Pattannayya—Appellant.

v.

Pattayya alias Krishnayya Shanbhaga and *others*—Respondents.

Letters Patent Appeal No. 106 of 1924. Decided on 9th Oct. 1925, from order of Jackson, J., in A. A. A. O. No. 38 of 1923.

* (a) *Limitation Act, Arts.* 181 *and* 182—*Execution application recorded for satistical purposes—Application remains pending.*

The Court passed an order on an execution application as follows: "The 3rd item was delivered

to the petitioners and the petition was recorded." There were some proceedings in Court relating to item 2 and a temporary injunction prevented its delivery. Subsequent to the removal of the temporary injunction, an execution application was put in.

Held : that the original application should not be regarded as dismissed. It was still pending and the latter application was only intended to call the attention of the execution Court to the fact that the execution application had to be proceeded with. Hence there was no bar to the original execution application being proceeded with (*Case law discussed.*)

Practice of striking off or lodging execution applications for statitiscal purposes, strongly disapproved. [P. 454, C. 1, P. 455, 1]

(*b*) *Limitation Act, Art.* 182—*Joint decree, meaning of—Any one relief being joint, decree is joint though other reliefs are given separately.*

The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately. [P. 456, C. 1]

T. M. Krishnaswami Aiyer and *K. P. Sarvothama Rao*—for Appellant.

K. Srinivasa Rao and *B. Sitaram Rao* for Respondents.

Devadoss, J.—The only question in appeal is whether the decree-holders' application for execution is barred by limitation. The facts are briefly these : The respondents herein obtained a decree in O. S. No. 77 of 1903 on 28th September 1903. It is admitted that the application for execution in R. E. P. No. 323 of 1915 on 11th March 1915, was within time. The Court ordered delivery of the properties to the decree-holders on 21st July 1915. Third persons objected to the delivery. The objection was removed and item 3 was delivered to them on 27th March 1916, and the Court passed an order on that day : the 3rd item was delivered to the petitioners and the petition was recorded." A suit was filed by the obstructors and a temporary injunction was granted against the delivery of item 2. The suit was ultimately dismissed on 18th December 1916 and consequently the temporary injunction ceased to be in force from that date. The respondents filed an execution application on 3rd September 1921 and prayed for delivery of item 2 from the 10th defendant. Both the lower Courts dismissed the application as being barred by time and Jackson, J., held in C. M. S. A. No. 38 of 1923 that the application was within time. Hence this appeal by the 10th defendant.

The first contention is that the present application, filed nearly six years after the application of 1915 is barred by limitation and it is urged that if this application is to be treated as an application to revive the execution application of 1915, it should have been filed within three years of 18th December 1916, when the obstruction to execution was removed. The order of the District Munsif on the application of 1915 is " the third item was delivered to the petitioners and the petition was recorded." The question is whether this order amounts to a dismissal of the application. The present Code of Civil Procedure does not contemplate the passing of such an order. When an execution application is filed, if it is in order, it has to be disposed of on the merits ; if it is barred by limitation or if the decree has been satisfied, or if the applicant is not the decree-holder's assignee or his legal representative, or if the decree-holder does not help the Court in executing the decree, or omits to do anything which the Court directs him to do, the application will have to be dismissed unless for proper reasons the Court adjourns the application. If the decree-holder is not able to do a thing directed to be done within the time allowed by the Court, the Court has to give him further time. There is no provision of law by which the executing Court could lodge the petition or record it, or strike it off for what is commonly called the statistical purposes. The executing Court is bound to follow the procedure laid down in the Code and it cannot dismiss the application for the reason that it is long pending. If there is obstruction to the execution of the decree the Court ought to adjourn the petition till the removal of the obstruction. If does not matter how long the obstruction continues. If a temporary injunction is issued against a Court executing a decree, the Court should stay its hands till the injunction is dissolved or till the suit in which it is granted is disposed of. If a permanent injunction is granted against the execution of the decree, then the application for execution will have to be dismissed. If the executing Court adjourns the petition from time to time it will enable the decree-holder to inform the Court as to the progress of the suit or proceeding in which the temporary injunction is granted and as soon as it is informed that the obstruction has been removed the Court should proceed to dispose of the applica-

tion according to law. It is to prevent dilatory proceedings and the long pendency of execution applications that O. 21, R. 57 has been enacted. It lays upon the decree-holder the duty of helping the Court to execute the decree in his favour, and if by reason of the decree-holder's default the Court is unable to proceed further with the execution application, it shall either dismiss the application or for sufficient reasons, adjourn the proceedings to a future date. Upon the dismissal of such an application the attachment shall cease. Under the old Code, if the properties were once attached and the application for execution was subsequently dismissed, the attachment did not necessarily cease to have effect. If, instead of following the procedure laid down by the Code, if the executing Court orders that the petition be lodged or recorded, or be struck off, such an order is not one sanctioned by the Code and it only amounts to this: petition is adjourned sine die. In this view the petition of 1915 is still on the record of the executing Court and the petition of 1921 is not a further application for execution, nor is it an application to revive that of 1915; for that is still on the file and no application is required to revive an application which is pending. It is an incorrect use of the language to speak of reviving a petition which has not been dismissed. If the application has been improperly dismissed an application would be necessary to revive it, viz., where the dismissal is not on the merits or for the default of the decree-holder but for statistical purposes or on account of obstruction which would take time to remove. As the application of 1915 is still pending the application of 1921 was only intended to call the attention of the executing Court to the fact that the execution application had to be proceeded with. The argument that if a Court lodges or records an execution application it should be regarded as pending there will be no time-limit for asking the Court to proceed with it obviously overlooks the fact that it was not the decree-holder that stood in the way of the execution being proceeded with but, that the Court kept the matter pending without taking the necessary steps. When a Court keeps a matter pending, a party should not suffer by reason of the dilatoriness of the Court or by an action of the Court not sanctioned by the law. The remedy to prevent long pendency of applications for execution is to adjourn the applications from time to time, and to have them brought up for orders. If that is done, the Court would be in a position to know whether the execution could be proceeded with or not, and as soon as the obstruction is removed the Court would be able to proceed with the execution according to law.

Great reliance is placed by Mr. T. M. Krishnaswami Aiyar on *Suppa Reddiar* v. *Avudai Ammal* (1), where a Full Bench of this Court held that if an execution application is improperly dismissed a subsequent application to revive or continue the application is governed by Art. 178 of the old Limitation Act corresponding to Art. 181 of the present Act. This case is distinguishable from the present, for here the application of 1915 was not dismissed. In *Chalavadi Kotiah* v. *Poloori Alimelammah* (2) the executing Court dismissed an execution application without notice to the parties on the ground that the execution had been stayed by the order of the District Court. Miller and Munro, JJ., held that the order of dismissal amounted to no more than a direction to the officers of the Court to remove the proceedings from the pending list, and observed at page 76:

"That so long as proceedings initiated by the decree-holder are pending, his right to apply for their continuance accrues from day to day, i. e., on every day on which the Court does not suo motu continue them. The right to apply will then not be barred till three years have elapsed after the proceedings have ceased to be pending."

In *Subba Chariar* v. *Muthuveeran Pillai* (3), Benson and Abdur Rahim, JJ., follow the decision of Miller and Munro, JJ., in *Chalavadi Kotiah* v. *Poloori Alimelammah* (2). The principle of these cases is that if an execution application is pending a subsequent application is not an application under Art. 181, but an application asking the Court to continue the proceedings in a pending application. The decision in *Ayissa Umma* v. *Abdulla* (4), to which one of us was a party is in

(1) [1904] 28 Mad. 50=14 M. L. J. 401 (F. B.).
(2) [1907] 31 Mad. 71=18 M. L. J. 46=3 M. L. T. 329.
(3) [1912] 36 Mad. 553=24 M. L. J. 545.
(5) A. I. R. 1924 Mad. 178.

point. It was held in that case that an order of dismissal of an execution petition for statistical purposes did not amount to a dismissal of the petition but that the petition should be considered as pending. I hold that the application of 1915 is still pending, and, therefore, there is no bar to its being proceeded with.

In this connexion I must express my strong disapproval of the practice of striking off or lodging an execution application for statistical purposes. The sooner it is stopped the better it would be for the parties as well as for the Courts executing decrees.

The next point urged is that the decree is not a joint decree and therefore the application of 1918 and of 1920 for execution against the 9th defendant do not save the bar of limitation so far as the 10th defendant is concerned. In view of my decision on the first point it is unnecessary to deal with this point at length. The relevant portion of the decree is as follows:

"Plaintiffs do recover from Defendants 9 and 10 possession of the plaint property with buildings thereon described below; plaintiffs do recover from the 9th defendant future rental, etc., and plaintiffs do recover from the 10th defendant future rental, etc."

The argument is that inasmuch as the decree directs the 9th and 10th defendants to pay mesne profits severally, it is not a joint decree but a several decree, and the application for execution against the 9th defendant cannot be treated as an application in a joint decree. Where a defendant is directed to pay a certain sum to plaintiff and another defendant is directed to pay a similar sum or a different sum to the plaintiff, the decree is not a joint decree; but where a decree directs that *A* and *B* shall pay a certain sum to the plaintiff and further directs that *A* should pay another sum and that *B* should pay another sum and that *A* and *B* should bear their own costs, the decree is a joint decree against *A* and *B*. The decree is a joint decree if any one of the reliefs given in the decree is against the defendants jointly even though some other reliefs may be given against each defendant separately. Explanation 2 to Art. 182 of the Limitation Act is in these terms:

"But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all."

This explanation should be literally interpreted and according to its terms the present decree is a joint decree. In *Subramania Chettiar* v. *Alagappa Chettiar by Agent Palaniappa Chettiar* (5), it was held that where a decree awards mesne profits against *A* and *B* jointly and costs jointly against *A*, *B* and *C*, an application to execute the decree for mesne profits against *A* and *B* keeps alive the right to execute the decree for costs against *C* under part 2 of paragraph 2, Explanation 1 to Art. 179 of Sch. 2 to the Limitation Act. This case was followed by a Bench of the Calcutta High Court in *Barroda Kinkar Chowdhury* v. *Nabin Chandra Dutta* (6). The facts of that case are very similar to those of the present. The decree in this case is a joint decree and the present application against the 10th defendant is not barred by limitation by reason of the applications of 1918 and 1920. I find this point against the appellant.

In the result the Letters Patent appeal is dismissed with costs.

Waller J.—On the first point I agree that, on the authorities no other conclusion is possible, though the position does seem to me to be highly unsatisfactory. If the decree-holder had presented an application directly after the close of the intervening litigation (as he should have been forced to do), and that application had been dismissed early in 1917, his present application would have been long out of time. Having done nothing to prosecute his first application for six years, he is, on the authorities, still in time.

Something should, of course, be done to put an end to this method of adjourning execution applications sine die. If they are held up by some other proceedings, they should be adjourned either to definite periods of six months each, or till the date of the closing of the other proceedings.

On the second point also I agree.

Appeal dismissed.

(5) [1906] 30 Mad. 268=2 M. L. T. 189.
(6) [1909] 11 C. L. J. 83=14 C. W. N. 465.

A. I. R. 1926 Madras 457

ODGERS AND VISWANATHA SASTRI, JJ.

(*Vemulapalli*) *Seetharamamma* and *others*—Defendants—Appellants.

v.

Maganti Appiah and *another*—Plaintiff and 6th Defendant—Respondents.

Second Appeal No. 444 of 1923, Decided on 6th October 1925, from the decree of the Sub-J., Masulipatam in A. S. No. 7 of 1922.

(a) *Hindu Law — Alienation by de facto guardian not for necessity is only voidable—One for necessity is binding.*

An alienation by a de jure guardian or a natural guardian is voidable and as the powers of natural and de facto guardians are similar, a transaction entered into by a de facto guardian not for necessity is only voidable at the option of the minor on attaining his age. But an alienation for necessity is binding. [P 459, C 1]

(b) *Hindu Law—Alienation by guardian—Possession given before alienation becomes adverse to minor only from date of alienation.*

Even though possession is given to the alienee from a minor's guardian before the date of the alienation, such possession of the alienee can become adverse to that of the minor only from the date of the alienation. (*Case Law considered*). [P 461, C 2]

V. Ramadoss—for Appellants.

P. Satyanarayana—for Respondents.

Odgers, J.—The question in this case is whether an alienation by a de facto guardian is valid under the Hindu Law. The person in question is the maternal uncle of the plaintiff and of course is neither the natural nor the legal guardian. The District Munsif dismissed the suit which was a claim for a declaration that the alienation made during the minority of the plaintiff did not bind him. The Subordinate Judge reversed this decision holding that the alienation made by the maternal uncle was a void transaction.

It has been argued at length for the respondents that a de facto guardian is unrecognized in the Hindu Law. It may be at once said that, if there is such a recognition I am satisfied that the recognition is more or less modern and possibly, to some extent, the recognition, if it is legally recognized at all, has come about by necessity. The earliest case, as far as I know, is the well known case in *Hunooman Persaud Panday* v. *Mt. Babooee Munraj Koonweree* (1) where their Lordships of the Privy Council say:

"Upon the third point it is to be observed that under the Hindu law, the right of a bona fide incumbrancer who has taken from a de facto manager a charge on lands created honestly, for the purpose of saving the estate or for the benefit of an estate is not (provided the circumstance would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure."

It has been said that this dictum is *obiter* as the Rani in the case under discussion was undoubtedly the natural guardian. It might perhaps also be said that the third point was not absolutely essential to the decision. However that may be, any dicta that may fall from the Privy Council are naturally entitled to great weight and, if the powers of a de facto guardian under the Hindu Law have been recognized in other decisions, it must, I think, be taken that a de facto guardian is known to that law. Much stress has been laid for the respondents on the Privy Council case in *Imambandi* v. *Mutsaddi* (2) where it is clearly laid down that a de facto guardian is unknown in the Muhammadan Law. The decisions of the Courts on this point of Muhammadan Law are fully examined and, in their Lordships' judgment delivered by Mr. Ameer Ali, a person who may be conveniently called a de facto guardian has no power under the Muhammadan Law to convey to another any right or interest in immovable property which the transferee can enforce against the infant. Nothing can be clear than that. But it has to be observed that not only there but all through the judgment only the question as arising under the Muhammedan Law is dealt with. On the other hand, in Gour's Hindu Code, S. 906, it is asserted that the powers of a natural and de facto guardian are the same as those of a legal guardian. Any act done by the de facto guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. See also S. 913 where the learned author expressly states that the Muhammadan Law is different.

In *Mohanund Mondul* v. *Nafur Mondul* (3) grandmother purported to sell a minor's estate. The Court found that she was a de facto guardian, and relying

(1) [1854-57] 6 M. I. A. 393=18 W. R. 81 Foot Note=2 Suther 29=1 Sar. 552 (P. C.).

(2) [1918] 45 Cal. 878=45 I. A. 73 (P. C.).

(3) [1899] 26 Cal. 820=3 C. W. N. 770.

on *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (1) it held that not only might a de facto guardian mortgage but also sell. Bannerji, J., points out that there may be cases where the sale of a part of the minor's estate might be more beneficial to him than a mortgage. In *Adhar Chandra Dutta* v. *Kirtibash Bairagee* (4), it is said in the judgment:

"It is conceded by the learned Doctor who appeared for the appellants that the powers of a de facto guardian are the same as those of a legal guardian."

It appears that the Court adopted that admission which was that of Dr. Rash Behari Ghose. In *Bai Amrit* v. *Bai Manik* (5), which is a case of a transaction by the mother as gurdian of her son and of her minor daughter-in-law, she would of course be the natural guardian of the son, but the case is treated as if she was the manager de facto of the family. Any sales for valuable consideration the proceeds of which were applied to meet the family necessities were held to be unquestionable. *Nathuram* v. *Shoma Chhagan* (6) was a case of the father's cousin taking charge of a minor and borrowing money to meet the funeral expenses of the deceased father. It was held that he had sufficient authority to bind the minor by a loan if it were necessary. Sadasiva Aiyar, J., in *Vembu Iyer* v. *Srinivasa Iyengar* (7) citing *Hanoomanpersaud Panday* v. *Mt. Bobooee Munraj Koonweree* (1) says that when the act is done by the person who is not the guardian but who is the manager of the estate in which the minor is interested the latter will equally be bound if under the circumstances the step taken was necessary, proper or prudent.

On the other hand, no case has been cited, except possibly one, which lays down that a de facto guardian has no power to deal with the property of a minor for necessity. On the other hand in *Arunachela Reddi* v. *Chidambara Reddi* (8) it is said:

"It is well settled that an alienation may be validly made by a de facto guardians"—(assuming of course the necessity.)

(4) [1910] 12 C. L. J. 586.
(5) 12 B H. C. R. 79.
(6) [1890] 14 Bom. 562.
(7) [1919] 23 M. L. J. 638=12 M. L. T. 547.
(8) [1903] 13 M. L. J. 223.

It is true that there the guardian in question was a natural guardian. But, in my view, having regard to the authorities I have cited, that can make no difference.

Arumugam Chetti v. *Durasinga Tevar* (9) which was referred to by the learned vakil for the respondents, merely lays down that, once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished. It will be noticed at p. 41 the learned Judges say that there is no proof that the 1st defendant's mother was the de facto guardian. In *Gopi Ram* v. *Jeot Ram* (10) the mother did not mortgage the property on behalf of her son and no question of necessity arose. *Mata Din* v. *Ahmad Ali* (11) is again, like *Imambandi* v. *Mutsaddi* (2) a case under the Muhammadan Law. The family were Muhammadans and were governed by the Muhammadan Law relating to guardianship. It is pointed out by their Lordships that the question was whether, according to Muhammadan Law, a sale by a de facto guardian if made for necessity. . . .and if beneficial to the minor is altogether void or merely voidable; but it was unnecessary to decide the question as the appellant had not shown that the sale was for necessity or was beneficial to the minor. Reliance is also placed for the respondent on a remark of Sadasiva Aiyar, J., in *Thaymmal* v. *Kuppanna Koundan* (12) that nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled, as a matter of natural right, to be and to act as a guardian of a minor's person and propety. Recourse must be had to the Court representing the rights of the King which are paramount to even the rights of the parents where there is no natural guardian alive. I am unable to see how this helps the respondent in the present case as the relation in question was the maternal uncle, who is, therefore, a direct male ancestor of the minor. The decision was that the paternal aunt was not a natural guardian. A decision much relied on is *Narayanan Nambudri*

(9) [1914] 37 Mad. 38=21 M. L. J. 1077=(1911) 2 M. W. N. 461.
(10) A. I. R. 1923 All. 514.
(11) [1912] 34 All. 213=39 I. A. 49 (P. C.).
(12) [1915] 38 Mad. 1125=27 M. L. J. 285.

v. *Ravunni Nair* (13) by a single Judge of this Court where in the case of a Nambudri Illom, the step-mother of the minors, who was managing the household and looking after them, borrowed money for necessity. On the assumption that the parties were prima facie governed by Hindu Law and that no special custom had been set up in the pleadings it was held that the step-mother had no legal authority. The learned Judge said :

"It is not contended that the de facto guardianship gave her, i. e., the step-mother any right to mortgage the estate."

With great deference I am unable to see first how the dictum applies to the facts of this case and secondly, if necessary, I would take leave to say that if the parties were governed by the Hindu Law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld.

The Court below has found that, as to one of the sales evidenced by Ex. IV, which is the only one in question before us, there was necessity to the extent of Rs. 275 out of a total consideration for Rs. 400. It is said by the appellants that there has been a ratification by Ex. III by the minor on attaining his age of this alienation by his de facto guardian. On the other hand, it is said that any alienation not for necessity is void and not voidable and as there can be no ratification of a void transaction it is of no effect in this case. It is, I think, clear that an alienation by a de jure guardian or a natural guardian is voidable and as I am inclined to hold the powers of these guardians are similar, I think a transaction entered into by a de facto guardian not for necessity is only voidable and can, therefore, be ratified by the minor on attaining his age. In *Chetty Colum Comara Venkatachella Reddyar* v. *Rajah Rungasawmy Iyengar Bahadoor* (14), the minor recognized a transaction made during his minority by his adoptive mother and guardian. This was upheld without determining the question as to the power of a Hindu widow as guardian to create a charge during the minority of the minor son.

Further, it is said that this suit is barred by limitation. The sale is dated 28th February 1907. The suit was brought on the 1st March 1919, which is admittedly the last day of the 12 years allowed. But it is said in the letter Ex. III, that the transferee had had possession delivered to him some time before the date of the sale deed. The words which have been re-translated are, "whether before the delivery of possession to you in pursuance of the sale *before now or after*" The words 'before now' are indefinite but they might refer to possession being given on the same day. There is further some contention on the other side that these persons were already in possession as tenants. However that may be, the matter is much too indefinite for us to attach the slightest weight to those words. I, therefore, think that this point fails. This question of limitation though dealt with by the District Munsif and found in favour of the defendants was not considered by the learned Subordinate Judge. In my view, there is nothing in the point.

I think the learned Subordinate Judge is wrong in holding that the alienation made by the de facto guardian is a void transaction. In my view, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Viswanatha Sastri, J.—Defendants 1 to 5 are the appellants. The suit was for a declaration that the alienations made by plaintiff's maternal uncle during his minority were not binding on him, and for recovery of the items alienated.

The alienations were made under two sale deeds of the dates 28th February 1907, (Ex. IV), and 7th October 1913, and the suit was instituted (it was said on the last day of limitation) in 1919. The District Munsif dismissed the suit : and on appeal the Subordinate Judge gave plaintiff a decree for possession. The contentions urged in second appeal are :

1. That the alienations by way of sale, by the maternal uncle who was not the de jure guardian of plaintiff were void, and,

2. That the suit was barred by limitation with respect to the items covered by Ex. IV, as defendants were placed in possession prior to the date of Ex. IV. The second appeal first came on for

(13) A. I. R. 1925 Mad. 260.

(14) [1859-61] 8 M. I. A. 319=4 W. R. 71=1 Suther. 437=1 Sar. 785 (P. C.).

hearing before Ramesam, J., who referred it to a Bench "as the matter (which forms the subject-matter of the first contention) was not concluded by authority so far as the Hindu Law is concerned.

It was argued before us that under the Hindu Law the father, the mother, and failing them the King were the guardians of an infant; that no other relation was the guardian; that de facto guardians were no better than intermeddlers and that alienations by de facto guardians were void as was laid down by the Privy Council in *Imambandi* v. *Mutsaddi* (2). That case related to a Mahomedan minor; their Lordships based their decision on Mahomedan Law texts: and so far as I am able to see, I do not find reference in the judgment to any decided cases concerning Hindu minors. Alienations by the de facto guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was *per se*, void, apart from any question as to whether it was for legal necessity or not. It was said that this may be due to the fact that the point was not raised in those cases, but, observed by Maclean, C. J., in *Mohanund Mondul* v. *Nafur Mondul* (3).

"the absence of judicial authority suggests that the point has not been regarded as open to serious argument."

So far as Hindu Law goes, it appears to me that there is nothing in it which limits guardianship only to the father, the mother, and failing them the King. Macnaghten in his Principles and Precedents of Hindu Law says:

"that in default of the father and mother, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relations, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardian universally rests with the ruling power." See Vol. 1, pp. 103, 104.

And in Vol. II (Precedents) Case III at p. 204 gives the opinion of Pandits based on the authority of the Dayabhaga, Dayatatwa, Dayakrama Sangraha, that the husband's sister's son is the guardian of a childless widow who is a minor. It was said that in the absence of the father and mother "recourse must be had to the Court representing the rights of the King, which are paramount to even the rights of the parents where there is no natural guardian alive:" as observed by Sadasiva Aiyar, J., in *Thayammal* v. *Kuppanna Koundan* (12). But it must be remembered that the learned Judge in the previous sentence includes among natural guardians the elder brother and the direct male and female ancestors of the minor, although, according to respondent's vakil, they would not be the natural guardians under Hindu Law. Applications to Courts can only be made under the Guardians and Wards Act, and it has been by a Full Bench of the Calcutta High Court in *Ram Chunder Chuckerbutty* v. *Brojonath Mozumdar* (15) that this act would not affect or alter any provision of Hindu Law as to guardians who do not avail themselves of the Act. It is then said that in that case the person who acted as guardian of the minor was the mother; but this circumstance would not, in my opinion, make any difference.

Coming to decided cases, it was held in *Mohanund Mondul* v. *Nafur Mondul* (3) on the authority of the Privy Council case in *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj Koonweree* (1) that a sale by a de facto guardian (it was the grandmother) in case of necessity was valid. And in *Arunachela Reddi* v. *Chidambara Reddi* (8), White, C. J., and Benson J., held that: "it is well settled that an alienation may be validly made by a de facto guardian" (assuming of course necessity). "In *Gunjayya* v. *Ramaswami* (16) it was held that the natural mother was a "lawful guardian" for the purpose of S. 21 of the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act. In *Nathuram* v. *Shoma Chhagan* (6), a debt contracted by the father's cousin for necessary purposes was held to bind the minor. Although it is no authority in the sense of its being a judicial decision, I may state that in *Adhar Chandra Dutta* v. *Kirtibash Bairagee* (4) such an eminent lawyer as Dr. Rash Behary Ghosh conceded that the powers

(15) [1879] 4 Cal. 929=4 C. L. R. 247 (F. B.).
(16) [1913] 24 M. L. J. 428=(1913) M. W. N. 364.

of a de facto guardian (of a Hindu) were the same as those of a de jure guardian. Our attention was drawn to the observations of Sadasiva Aiyar, J., in *Thayammal* v. *Kuppanna Koundan* (12) wherein the learned Judge holds that :

"Under Hindu Law, nobody else than the father and mother of a minor with probable exception in favour of the elder brother and the direct male and female ancestors of the minor, is entitled as a matter of natural right to act as guardian of his person and property."

In that case the alienation by the paternal aunt was found to be "for no necessity" and the second appeal could have been decided only on this finding without considering the question whether she was a natural guardian under Hindu Law. I may also state that the "probable exceptions" which the learned Judge recognizes, supports the view that guardianship under the Hindu Law is not confined only to the father, mother, and the King, as contended for by respondent's vakil. The learned Judge relies on the decisions of the Calcutta High Court *Kristo Kissor Neoghy* v. *Kadermoye Dossee* (17) and *Mt. Bhikuo Koer* v. *Mt. Chamela Koer* (18), in support of his view. They were both cases in which the Court was moved to appoint a guardian, and there was no question as to the binding nature of an alienation made by de facto guardian. It may here be stated that the case in *Mohanund Mondul* v. *Nafur Mondul* (3) is referred to with approval by Sadasiva Aiyar, J., in *Vembu Aiyar* v. *Srinivasa Iyengar* (7). Reference was made to a case in *Narayanan Nambudri* v. *Ravunni Nair* (13) a single Judge of this Court held that a de facto guardian of a Hindu Nambudri minor (a stepmother) was no better than an intermeddler, and had no right to represent a minor. It does not appear that any of the cases referred to were brought to the notice of the learned Judge. Decisions under the Mahomedan Law have no bearing on the present question; and I am clearly of opinion that the right of a de facto guardian to deal with the property of a Hindu minor has been recognized by our Courts ever since the decision of the Privy Council in *Hunoomanpersaud Panday* v. *Mt. Babooee Munraj* (1) provided the alienation was for necessity.

I may here state that in the present case the de facto guardian was the maternal uncle who took charge of the minor after his mother's death; and the evidence of D. W. 1, is to the effect that the paternal aunt with whom the minor was for a time was not in a position to maintain herself. So far as Hindu society in South India goes, the maternal uncle is treated as the closest relation of a person, next to his father and mother; and at all ceremonies at which presents are given, it is his that is first handed over.

Appellants' vakil next contended that the alienations now sought to be set aside was ratified by plaintiff; and that they were, therefore, valid, apart from any question of maternal uncle being only the de facto guardian. Exs. II and III are two letters passed on by plaintiff to the vendees on 9th November 1918, wherein he approved of the sale deeds of the dates 7th October 1913 and 1st March 1907. That such a ratification would make the alienation binding will be clear from the decision in *Chetty Colum Comara Vencatachella* v. *Rajah Rangasawmy* (14).

It was also urged before us that so far as the alienation under Ex. IV went, the suit was barred by limitation, as possession was, as stated in it, given before its date (28th February 1907) that the evidence was that it was given during the previous cultivation season (August 1906) and that time ran from August 1906. The question under Art. 144 of the Limitation Act would be when the possession became adverse to the plaintiff? The District Munsif held that it became adverse when possession was given, but the Subordinate Judge did not consider the question. Since possession was given in view of a contemplated sale it cannot be said that it became adverse to the vendor from the date it was given in case the sale was held not binding on the minor.

The sale to the father of Defendants 1 to 3 has been found by both Courts to be binding to the extent of Rs. 275 and the sale to the 5th defendant has been held to be wholly binding. In my view the effect of the ratification evidenced by Ex. III is to make the sale to the father of Defendants 1 to 3 wholly binding on plaintiff.

I would, therefore, allow the appeal: and reversing decree of the Court below, dismiss the suit with costs throughout.

Appeal allowed.

(17) 2 C. L. R. 583.
(18) [1897] 2 C. W. N. 191.

A. I. R. 1926 Madras 462

COUTTS-TROTTER, C. J., AND BEASLEY, J.

Rathan Singh—Petitioner—Appellant.

v.

The Commissioner of Income-tax to the Government of Madras—Respondent.

Original Side Appeal No. 15 of 1925, Decided on 8th September 1925, from the order of Kumaraswami Sastri, J., D/- 13th August 1924.

(a) *Income Tax Act,* (11 *of* 1922), *S.* 10 (2) (*vii*)—*"Obsolete", meaning of—New car broken to pieces in accident is not "obsolete".*

Obsolete machinery means machinery which, though it is able to perform its function has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery would discard it and install more modern and more labour-saving machines. The word "obsolete" is quite inapplicable to a new motor car which is only useless for its purpose because it has been broken to pieces in an accident. [P. 462, 27]

(b) *Income Tax Act,* (11 *of* 1922), *S.* (10)2, *Cl.* (*ix*)—*Separate heads of reliefs are disjunctive not alternative—Old car purchased for using parts and bits for repairs of other cars—Cost is deductible under Cl.* (*ix*)

The various reliefs by way of deductions specified in S. 10 of the Act are cumulative and disjunctive and not alternative and exclusive. If any deduction claimed falls within the express words of any one of the sub-sections it is not open to Government to say that it is really covered by the general provision of sub- S. (vi). The cost of an old car for the sole purpose of using bits and parts of it for carrying out repairs to the owner's other cars on the road, stands on the same footing as if he had obtained and used new parts for repairing his fleet of motor-cars from time to time. Such costs fall within the scope of S. 10 (2), Cl. (ix). [P. 463, C. 1, 2.]

K. V. Sesha Aiyangar—for Appellant.

M. Patanjali Sastri—far Respondent.

Judgment.—This reference raises two points. The assessee's business is that of an owner of motor-cars plying for hire. Only two points were raised before the learned Judge, though the first was raised under two heads. We propose first to dispose of the second contention.

The assessee was the owner of a new car which very shortly after it was purchased met with an accident and had to be sold as scrap iron, and the learned Judge has held that this entitles him to claim a deduction under S. 10 (2) (vii) of the Indian Income Tax Act of 1922 on the footing that this may be treated as having become, in the words of the Act, obsolete. It seems to us that this is contrary to the plain meaning of the language used. Obsolete machinery means machinery which, though it is able to perform its function, has become in common parlance out of date and performs its function so indifferently or at such a cost that a prudent man instead of continuing to use such machinery, would discard it and install more modern and more labour-saving machines. In our opinion the word obsolete is quite inapplicable to a new car which is only useless for its purposes because it has been broken to pieces in an accident and in our opinion this cannot be allowed as a deduction and we disagree with the learned Judge.

A much more difficult point is raised with regard to the second matter which relates to certain items which were disallowed by the income-tax authorities as being of the nature of capital expenditure which is excluded from deduction by S. 10 (2) (ix). That sub-section allows any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning the profits or gains of the business. The latter comes to a total of Rs.3,296-2-2, and it seems reasonably clear that the first three items were additions to the machinery and plant used by the firm, which can clearly be classed under the head of capital expenditure. The largest item is one of Rs. 1,925 which is described as the cost of an old car purchased from Tirali Srinivasa Aiyangar. The evidence of the assessee about that, which seems to have been accepted, is that he bought the car not to use it as a car but to resolve it into its component elements and use the parts for casual repairs to his existing fleet of cars. The remaining items are for the renewal of various parts of the cars actually engaged in the business of the assessee.

The income-tax authorities rely upon a decision in Scotland under the statute in vogue at the time, viz., S. 12 of the Customs and Inland Revenue Act of 1878, 41 Vic. C. 15. That section directs the Commissioners in assessing the profits and gains of a trade to allow such

deductions as they may think just and reasonable to represent the diminished value by reason of wear and tear during the year of any machinery or appliances used for the purpose of the concern and belonging to the person or company by whom the concern is carried on. Upon that it was held in the case of *Caledonian Railway Co.* v. *Banks* (1) decided in the Court of Exchequer in Scotland that the assessee could not deduct the actual expenses of occasional repairs and renewals and then proceed to claim an additional deduction under the general section of the statute for the same thing under the guise of wear and tear. With that decision no one wishes to quarrel; but it is argued for the assessee that the position under the Indian Statute is quite different because the sections relating to deductions and the sub-sections allowing deductions must be taken to be disjunctive, and it is not an answer to a claim which clearly falls within the words of any one of the sub-sections to say to the assessee that he must be deemed to have obtained that deduction under some other sub-section. Deductions are allowed such as are material for the decision of this case under S. 10 (2) v, vi and ix. Cl. (v) allows a deduction in respect of current repairs to buildings, machinery, plant or furniture, the deduction permitted being the amount paid on account thereof. It is said in this case that the renewal of parts of a machine cannot be treated as a current repair, but must be treated as a new addition of capital to enable the machine to be kept in proper running order. It is pointed out that by Cl. (vi) of sub-S. (2) a deduction is allowed in respect of depreciation which has been assessed by Government at the not ungenerous figure of 20 per cent. and it is said that the assessee having had the benefit of this large deduction under Cl. (vi) cannot get the same deduction over again in another form by having recourse to Cl. (v). In our opinion, if the Legislature meant the various reliefs by way of deductions specified in S. 10 of the Act to be alternative and exclusive they could very easily have said so and in our opinion if any deduction claimed falls within the express words of any one of the sub-sections it is not open to Government to say that it is really covered by the general provision of sub-S. (vi). It is obviously arguable that most of the repairs in this case can be described as current repairs though of course the matter is one of degree. If a carburetter of a motor-car ceases to function, we should incline to the view that the renewal of the carburetter in order to enable the car to keep the road is properly described as a running repair. On the other hand, if a car, as a result of an accident, had nothing left but a wheel and everything else had to be renewed, clearly the sensible view would be that the renewal of the car could only be described as an increase of capital. But apart from that, we have the provision of sub-section (2) (ix) which speaks in general terms of any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains. Without committing ourselves to a view as to what are current repairs within the meaning of Cl. (v) we think it reasonably clear that the cost of repairs set forth in the list that was handed up to us must be treated as an expenditure incurred for the purpose of earning the profits or gains of the business, and we do not think that it can properly be treated as capital expenditure which is excluded from the operation of Cl. (ix). If this view be correct, the cost of an old car for the sole purpose of using bits and parts of it for carrying out repairs to cars on the road which is the main item in the assessee's claim for deductions being nearly two-thirds of the whole, stands on the same footing as if he had obtained and used new parts for repairing his fleet of motor-cars from time to time. In this case we feel that the Legislature has done that which is so often done in Indian Acts and that by enumerating too much and trying to cover every possible case, they have per incuriam given more than one remedy in respect of what is really one ground of deduction But until and unless the Act is amended, we think that separate heads of reliefs must be treated as disjunctive and cumulative and hold that the deductions claimed, except as regards the first three items, fall within the express words of S. 10 (2) (ix) and that the Scottish case

(1) Tax Cases 487.

is inapplicable in India because the Act which the Scottish case interprets was an Act which only contained deductions for depreciation and did not, like the Indian Act, specify under separate heads other deductions differently described. We do not think it would be right to hold that what I may call the omnibus clause (Cl. vi) can be coustrued as extinguishing the right to deductions which are specifically outlined and defined in other sub-sections of the Act. We feel the result to be unsatisfactory and to be one which gives more to the assessee than was intended or indeed is just ; but the fault is that of the draftsman of the Indian Act, who threw into the section the omnibus clause modelled on S. 12 of 41 Vic. C. 15 without reflecting that such a clause was not wanted in an Act which contained the specific deductions taken from the later English finance Acts. The result will be that the appeal is allowed with costs. On the reference, there will be judgment for the Commissioner with costs to be fixed at Rs. 150.

Appeal allowed.

A. I. R. 1926 Madras 464

DEVADOSS, J.

P. Kuthalinga Mudaliar—1st Defendant—Appellant.

v.

M. M. Shanmuga Mudaliar and *others*—Plaintiffs and 2nd Defendant—Respondents.

Second Appeal No. 578 of 1923, Decided on 23rd October 1925, from the decree of the Addl. Sub-J., Tinnevelly, in A. S. No. 53 of 1922.

Hindu Law—Widow—Property being incapable if yielding appreciable income—Widow can sell it for her maintenance.

There is no hard and fast rule that a widow cannot alienate property for future maintenance. Each case would depend upon its circumstances. If there is no other property and the only property is not capable of yielding any appreciable income she is entitled to sell it for maintaining herself : 9 *M. L. T.* 307, *Dist.* [P 464 C 2]

S. Ramaswami Aiyar—for Appellant.

K. Venkataswaran—for Respondents.

Judgment.—The only point in this appeal is whether the sale should be upheld in view of the findings of fact of the learned Subordinate Judge. He has found that out of the consideration of Rs. 600, Rs. 300 went towards discharging the debts binding on the reversioner and the other Rs. 300 was for the maintenance of the 2nd defendant. The 2nd defendant, who is a widow, was unable to maintain herself out of the income of her husband's property, which consisted only of the plaint house, and was obliged to borrow. It has been proved satisfactorily and has been found by the Judge that she did incur a debt of Rs. 300 in order to maintain herself. The property left by the husband was only a house which produced no income. She had to sell the house for the purpose of paying off the debt already incurred and for maintaining herself. It is not suggested that the house was worth more than Rs. 600 paid by the plaintiff for the sale. The Subordinate Judge has set aside the sale of the property with regard to a half and has upheld the sale as regards the other half. It is difficult to see how a house like this could be divided into two halves. No doubt if the house can be divided into two halves it might be said that his order is sustainable. But this being a small house in a town, and in the absence of any evidence that the house could be divided into two equal moieties and that the two moieties could be conveniently enjoyed, such a decree cannot be said to be correct.

The question is whether the sale of the property should be upheld or not. The Subordinate Judge seems to think that a widow cannot alienate property for future maintenance. It is well settled that a widow can alienate her husband's property for paying off the debts incurred for her own maintenance. The question is whether she can do so for future maintenance ? There is no hard and fast rule that a widow cannot alienate property for future maintenance. Each case would depend upon its circumstances. In this case there is no other property and the only property is not capable of yielding any appreciable income. I do not see why the widow should starve herself in order to benefit the reversioners. It is admitted by the plaintiff that the widow (2nd defendant) is living by begging. If that is so, there is every reason why she should find

means to support herself by selling the only property that descended to her from her husband. No doubt if there are other properties from which she could get some income it may be said that she is not justified in selling the house. Where land of considerable extent is sold, and only a part of the consideration is found to be binding on the reversioner, it may be a question for the Court whether a portion of the land should be taken by the alienee and the rest should be released from the sale. But in a case like this, I see no reason why, in order to benefit the reversioner the widow should be prevented from selling the property and maintaining herself from the proceeds of the sale. As I have already observed, it is not suggested that the sale is not a bona fide one. On the other hand it is clear that Rs. 600 was paid in cash before the Sub-Registrar, half of which went towards liquidating the debt incurred for maintenance and the other half was kept for maintaining herself with. It is unecessary to discuss this point at any length as I am quite satisfied that in this case the widow had no other means of maintaining herself than by selling the only property that descended to her.

Mr. Ramaswami Aiyar referred to *Naman Mal* v. *Har Bhagwan* (1) in support of his contention that the sale should be upheld. In that case the learned Judges held that the proposition that a widow cannot anticipate personal necessity is not an inflexible rule. In *Kulak Chandra Das* v. *Kula Chandra Das* (2) a Bench of the Calcutta High Court held that a widow need not borrow at a usurious rate of interest for maintaining herself and then allow the property to be sold by the creditor by bringing a suit against her. I think that a widow borrowing in order to maintain herself and then allowing the property of her husband to be sold for the debt incurred by her for maintenance would not be in the interests of the reversioners ; for the interest and the costs would amount to a large amount and a prudent person would rather sell the property and get ready cash than borrow at a usurious rate of interest and then allow the creditor to file a suit and bring the property to sale and thereby cause loss to the reversioners. The same principle has been laid down in *Kannan Chetty* v. *Amirthammal* (3) and *Bal Krishna Das* v. *Hira Lal* (4). On the other side I am referred to the decision in *Appajee Pantulu* v. *Ramacharlu* (5) as supporting the contention of the respondent that the sale should be set aside inasmuch as a portion of the consideration was for maintenance. On a perusal of the case I am unable to find that any principle was laid down in that case. The learned Judges found that considerable suspicion attached to the transaction, and in the circumstances they set aside the alienation by the widow. There was no question of the maintenance of the widow in that case. A widow is entitled to live by selling the property of the husband if there is no other means available for her maintenance. As I have already observed no widow is bound to starve herself or die in order to benefit the reversioners. Such a proposition would be monstrous and opposed to all principles of Hindu Law. *Dhondhia* v. *Hekayet Pandey* (6) and *Paparayadu* v. *Rattamma* (7) do not apply to the facts of the present case. No doubt, if the sale is not found to be a bona fide sale, the plaintiff would be entitled to have it set aside. But in this case I am quite satisfied that the proper decree would be to allow the sale to stand inasmuch as the transaction was a bona fide one and the consideration was for the purposes which could bind the reversioners.

I allow the appeal and dismiss the plaintiff's suit with costs throughout.

The Memorandum of Objections is dismissed. No costs.

Appeal allowed.

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(1) A. I. R. 1922 Lah. 317.
(2) (1918) 46 I. C. 269.
(3) (1914) 1 L. W. 877.
(4) (1918) 41 All. 388=17 A. L. J. 239.
(5) (1910) 9 M. L. T. 307=(1911) 1 M. W. N. 267.
(6) (1918) 49 I. C. 841.
(7) (1912) 37 Mad. 275=24 M. L. J. 62=(1912) M. W. N. 1176.

* A. I. R. 1926 Madras 466

ODGERS AND MADHAVAN NAIR, JJ.

(Dost) Muhammad Khan Sahib and *others*—Plaintiffs—Appellants.

v.

Kadir Batcha Sahib—Defendant—Respondent.

Appeal No. 88 of 1922, Decided on 24th July 1925, from the decree of the Sub-J., Tanjore in O. S. No. 11 of 1919.

(a) *Mahomedan Law—Religious endowment.* Every Muhammadan is entitled as such to attend any mosque for worship. [P 467 C 1]

* (b) *Civil P.C., S. 92—Interest in trust means clear interest over and above that got by virtue of religion—Interest must be present and substantial —Mere residence in the locality of mosque does not give necessary interest.*

In order to entitle a plaintiff to sue under the section he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion. The words "interest in trust" must mean a clear interest', that is to say, a present and substantial and not a remote and fictitious or purely illusory interest and further that interest, if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India. Proof of residence in the neighbourhood of the institution, will, no doubt be one way of establishing possession of an interest on the simple ground that those who live near to the institution will be most likely to take advantage of its benefits. The test of locality is only to be applied in relation to actual user of the temple or mosque by the inhabitants residing close to it. The question is a pure question of fact, and must be left to the Court to decide on a consideration of the particular circumstances of each case; 42 *Mad.* 360 (*F.B.*) and *A.I.R.* 1924 *P.C.* 221, *Foll.*

[P 467 C 1; 2 and P 468 C 1]

(c) *Mahomedan Law — Wakf — Muttawalli— Religious endowment.*

In the absence of rules laid down by the founder of the mosque, the muttawali for the time being may validly appoint a successor to himself. [P 472 C 2]

P. R. Ganapathi Aiyar—for Appellants.

S. Varadachari and *M. S. Ramanuja Aiyangar*—for Respondent.

Odgers, J.—In this case 4 plaintiffs Muhammadans brought a suit under S. 92 of the Civil Procedure Code for the removal of the defendant from the management of mosque 'Pallivasal in Ellaiammankoil Street, Tanjore, and for consequential reliefs including a scheme for the management of the said mosque. The 1st plaintiff is stated in the plaint to reside at Chunnambukara Street, the 2nd plaintiff at Kollupettai Street, 3rd at Attumanthai Street and the fourth out of Fort, Tanjore.

The appeal has been argued before us on the point of want of interest of the plaintiffs under S. 92 of the Civil Procedure Code and also with a view to establishing certain charges set out in plaint paragraph 8 (f) (g) (i) and (1) in order to prove certain mismanagement in respect of the temple accounts and property. The learned Judge has dismissed the suit on all points and I shall proceed to deal with the first point that of interest as, in my opinion, the appeal can be disposed of on that ground.

The defendant in his written statement alleges that the plaintiffs are not residents of the locality, nor do they live close to the plaint mosque. They have never worshipped in the mosque nor have they any right to do so. By a stone inscription, Ex. B, appearing on the mosque it would seem that Bappu Vaidyar erected the mosque about the year 1847 or 1848. Ex. A is a settlement deed of 1879 by one Amir Khan Sahib, grandson of the founder, in which he settles Rs. 4,000 worth of properties for the benefit of the charity established by his ancestors in the mosque in Ellaiammankoil Street, Tanjore, and appoints his foster son, who is the defendant, to enjoy the trust property and apply the income to it. On the evidence the learned Judge has found that the 1st plaintiff, who is the Duffadar of the District Court of Tanjore lives far away from the plaint mosque, there being three other mosques nearer to his house and that his opportunities for attending the plaint mosque are limited to the occasions when he happens to visit his second wife when she is living in her mother's house. The 2nd plaintiff says that he attended the mosque when he went to his brother's house for meals. As there is ill-feeling between the two it is improbable that he would go to his brother's house for this purpose. He admits that he has not been to the mosque in the month of Ramzan for the past 7 or 8 years or on the 12th day of the Barawafat month, all of which are festive occasions among Muhammadans. The 3rd plaintiff is a native of some village in Pudukottah and admittedly he went for prayer to one or other of the two mosques which are near his shop and would appear to have no occasion to go to this mosque in the

Ellaiammankoil Street. 4th plaintiff lives in the same street as the 3rd. He admits that he had been employed in different places in different capacities for the last 10 or 15 years and consequently he would have had no opportunity of going to this mosque for prayers. There are, further, other mosques near his house, three within half a furlong and one within a furlong. He says he used to go to Ellaiammankoil Street, to collect moneys for his employer. He, however, admits that he has not for the last 2-1/2 years gone to that Street for this purpose. It is, therefore, found by the learned Judge and in fact admitted by the learned vakil for the appellants that none of these plaintiffs can be said to be habitual worshippers of the plaint mosque. Mr. P. R. Ganapathi Aiyar for the appellants contends first that every Muhammadan is entitled as such to attend any mosque for worship, and this may be at once admitted to be correct. He relies not only on this but also on the fact that the plaintiffs are residents of the locality and his contention is that these two points, i. e., right to worship and residence in the locality, taken together, would afford the interest required under S. 92, The test to be applied has been authoritatively laid down as far as we are concerned by the judgment in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1). That was a well-known case in which Mr. T. R. Ramachandra Aiyar claimed interest as a member of the Hindu community and thereby alleged title to institute a suit in respect of a temple in Tellicherry. In the full and instructive judgment delivered in that case by Wallis, C. J., the history of the provision of law is traced and the learned Chief Judge came to the conclusion that in order to entitle a plaintiff to sue under the section :

" he must have a clear interest in the particular trust over and above that which millions of his countrymen may be said to have by virtue of their religion."

The learned Chief Justice after referring to the amendment of the section which originally contained the words " direct interest " was of opinion that even after the amendment the words : " Interest in trust " must still in Lord Eldon's words mean ' a clear interest ' that is to say, a present and substantial and not a remote and fictitious or purely illusory interest and further that interest if the provision is not to be altogether illusory, must arise from some special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India."

On a difference of opinion between the learned Chief Justice and Kumaraswami Sastri, J., who took the view that the right of worship in a particular temple is sufficient interest under the section, the case was referred to three learned Judges of this Court one of whom was Abdur Rahim, J. Had this learned Judge said in his judgment anything particularly applicable to mosques as distinguished from temples it would in my view have carried great weight. He agreed with Kumaraswami Sastri J., and held with him that the section gave the right to institute actions to secure proper administration of temples and mosques to all persons who have a right of attendance and worship at these religious foundations. The majority of the Court, however, Oldfield and Coutts-Trotter, JJ., held otherwise and agreed with the judgment of the Chief Justice. Oldfield, J., in the course of his judgment said :

" Proof of residence in the neighbourhood of the institution will no doubt be one way of establishing possession of an interest, not by any analogy with the rights of parishioners in England, but on the simpler ground that those who live near to the institution will be most likely to take advantage of its benefits."

It would, therefore, seem that the test of locality is only to be applied in relation to actual user of the temple or mosque by the inhabitants residing close to it. Coutts-Trotter, J., was distinctly of opinion that the right to worship in a temple was not equivalent to interest and refused to import the definition in S. 15 of the Religious Endowments Act (as Wallis, C. J., had refused to do before) in order to interpret the meaning of S. 92, Civil Procedure Code. The learned Judge continued :

" In so far as the decided cases suggest a limitation, the limitation suggested is that of living in the neighbourhood of

(1) [1919] 42 Mad. 360=36 M.L.J. 396=25 M.L.T.304=9 L.W.492=(1919) M.W.N. 370(F.B.)

the institution in question and habitually resorting thereto for purposes of worship."

On that one can be asked : What is your definition of neighbourhood ? What is your definition of habitual resorting ? The learned judge confessed that no universally applicable formula in answer to these questions could be discovered. All that can be done is to say that the interest required by the statute must be clear, present and substantial and not a remote and fictitious or purely illusory interest or an existing interest and not a mere contingency. Beyond that the learned Judge was of opinion that the question was a pure question of fact, and must be left to the Court to decide on a consideration of the particular circumstances of each case. The latest case in the Privy Council, *Vaidyanatha Ayyar* v. *Swaminatha Ayyar* (2), does not touch the present matter. It seems to me unnecessary in the light of the judgment of the majority of Judges in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1) to examine the earlier cases on the subject, and applying that case to the facts of this case as previously set out it appears to me that it cannot be said that plaintiffs had anything but an illusory or fictitious interest in this mosque. They either did not worship there at all or worshipped on such rare occasions and such long intervals that they cannot be said to have a real or clear interest as required by the decision. It appears to me perfectly clear that Mr. P. R. Ganapathi Aiyar's suggestion is that the residents of the same town have the requisite interest even if they do not worship at the particular temple or mosque in question. It is, however, clear on the decision in *T.R. Ramachandra Aiyar* v. *Parameswaran Unni* (1) that so long as they have the right to do so, they must be shown to have some interest over and above the rest of the residents of the locality of their own community who are entitled as members of that community to take part in the worship conducted in the institution. This the plaintiffs are not shown to possess. We are referred to one decision in *Garuda Sanyasayya* v. *Nerella Murthenna* (3) where the point arose but is dismissed in three lines of the judgment. It was a case of choultry and the learned Judges held that as the plaintiffs were residents in the locality in which the choultry was situated, and were members of the community for whose benefit the charity was founded was sufficient to give them interest to institute a suit for its management. Wallis, C. J., was one of the Judges who decided that case which was prior to this decision in *T. R. Ramchandra Aiyar* v. *Parameswaran Unni* (1). In my opinion, therefore, the learned Judge in this case was right in dismissing the suit on the point of want of interest in the plaintiffs.

It is unnecessary in the view I take on this point to discuss the question of the charges. But I may add that having carefully considered the matter I should, if necessary, be of opinion that none of the charges have been established against the defendant. On all these grounds, therefore, it appears to me that the appeal must be dismissed with costs.

Madhavan Nair, J.—This appeal by the plaintiffs arises in a suit instituted by them under S. 92, of the Civil P. C., in which they prayed for the removal of the defendant from the management of the plaint musjid (mosque) and its endowments, for the appointment of new trustees, for the taking of accounts and for a scheme for the proper management of the mosque. The plaint mosque is situated in Ellaiammankoil Street Tanjore, and was founded by Bappu Vaidyar in Hijiri 1243 (1847-1848). On the 1st of November 1879, Amir Khan Sahib, the grandson of Bappu Vaidyar, and last of the family of the original founder, made a settlement, Ex. 1, by which he endowed the mosque with some property and appointed his foster son "as the person entitled to enjoy the property endowed for charity and to carry out the charity by means of its income" specifying in the deed the main objects for which the income of the properties was to be utilized. The plaintiffs alleged in their plaint that they resided close to the mosque and were interested in it and in the trusts relating thereto, that the defendant was not the de jure or rightful trustee, that he had committed various breaches of trust and that in consequence, he should be removed from the management of

(2) A. I. R. 1924 P. C. 221.
(3) 1918] 35 M. L. J. 661=9 L. W. 1=25 M. L. T. 86.

the mosque and its properties. The defendant in his written statement, pointed out that the plaintiffs were not residents of the locality, that they had no interest in the plaint mosque as contemplated by S. 92, of the Civil P. C., that he was " not only the de facto but the de jure trustee also " and that he was not guilty of any of the breaches of trust specified in the plaint. Various issues were framed by the Subordinate Judge dealing with the allegations in the pleadings, but the appellants confined their arguments only to the finding of the Subordinate Judge as regards five issues, these being :

Issue 1. Whether the plaintiffs have sufficient interest in the plaint mosque, and is the suit sustainable ?

Issue 2. Whether the defendant is not a de jure trustee.

Issue 5. Whether item 3 of Sch. A of the plaint ever belonged to the trust.

Issue 8. Whether the defendant has committed all or any of the breaches of the trust alleged in the plaint, and is he liable to be removed from the trustee ship, and

Issue 9. Whether a scheme is necessary and, if so, on what terms. "

The learned Subordinate Judge found against the plaintiffs on all these issues and, in consequence, dismissed the plaintiff's suit.

The first question to be considered is whether the plaintiffs or any of them have the " interest " in the trust within the meaning of S. 92 of the Civil P. C., entitling them to maintain the suit. As the decision of this question will to some extent depend upon the facts of the case, it is necessary to state in some detail the evidence bearing on it and my conclusion thereon, before dealing with the cases relied on by the appellants' learned vakil. The 1st plaintiff, who is examined as the 10th witness for the plaintiff, has been in Government service since 1883, and since 1890 he is employed in the District Court of Tanjore as a duffadar. His place of residence since 1902 is Chunnambukara Street which is five or six furlongs off from the plaint mosque situated in Ellaiammankoil Street. He states that his grandfather had a house opposite to the mosque and he lived in it for thirty years and has then gone often and offered prayers in the mosque. The latter statement is not supported by independent evidence. His grandfather's house has been sold to the defendants' brother. He married in 1891 his second wife who has a house in Ellaiammankoil Street. When she lived with her mother for seven or eight years on account of her quarrel with his first wife, he states that he used to visit her and then he used to go to this mosque in the morning on Sundays and in the evening on other days. He admits that there are two mosques within about two furlongs from his house. As duffadar he states that he has to be in Court at 10.30 a. m., and until such time as the District Judge sits and that while on duty in Court he used to make prayers only if he had time. Although according to their religion the Muhammadans have to offer prayer five times a day, the evidence shows that it is not necessary to make these prayers in the mosque as they may be offered at any place where they happen to be at the time. Though this witness says that he has been offering prayers in his mosque regularly, the evidence of the defendant is that this witness has never gone to the plaint mosque for offering prayers. It is to be noticed that there are mosques which are nearer to his present place of residence than the plaint mosque. The evidence in the case seems to suggest that, though he may have offered prayers in this mosque, he might have done so only on those occasions when he happened to visit his second wife when she lived in her mother's house. It may be noticed that he has till now instituted four scheme suits and he does not appear to be a man of means.

The 2nd plaintiff is examined as the plaintiffs' first witness. He has been living in Pambatti or Kalapathi Street, outside the Fort away from the masjid for the past 7 or 8 years. Previous to that, it is true, he lived in Suryappa Lane about one and a half furlong from this mosque but he does not seem to have been a regular worshipper in the mosque. He states that he used to go to the plaint mosque, for prayer once in two or three days for the past 7 or 8 years. It is difficult to believe that he speaks the truth when he makes this statement. He admits that there is in the street, in which he lives a masjid about a hundred yards off from his house, and there are also other mosques nearer to his house. No special reason is assigned for his going to the plaint mosque for

worship than to the mosques nearer to his residence. He states he has shop in the Ayyankadi near the mosque, that his brother lives in the fourth house from the plaint mosque and that he used to go to his brother's house from his shop for meals. It is suggested in the evidence of D. W. 2, his brother, that there is ill-feeling between the two brothers, and it is hardly likely that he would have taken meals in his brother's house. This witness admits that he has not gone into the masjid during the past 7 or 8 years in the month of Ramzan or on the twelfth day of the Barafat month--both important festive occasions in the Muhammadan mosque. On the defendants' side it is stated that this witness used to go very rarely to the plaint mosque for offering prayers. The witness states that he has not been on speaking terms with the defendant in this case for the past ten or twelve years owing to ill feeling. It appears to me from this evidence that this witness might have only occasionally visited the mosque for offering prayers.

The 3rd and 4th plaintiffs are examined as the 8th and 9th witnesses for the plaintiffs. Their evidence is not of much importance. P. W. 8, a native of Pudukottah, is a trader and lives near Pambatti Kara Street, in which there is a mosque and near which also there is another one. He admits that he used to offer prayers there. He has no dealings in Ellaiammankoil Street, in which the plaint mosque is situated and his occasions to go there are few. He does not remember how many years ago he went to the plaint mosque first. P. W. 9, also, like the other witnesses, says that he offered prayers in this mosque, but it is extremely doubtful if he has so done except very rarely. He lives away from the mosque and has been employed in different places which would suggest that he would have had no opportunity to go to this mosque. There are mosques near his place of residence. He states that he went inside this mosque one and a half or two years ago.

My conclusion from the summary of the evidence given above is that, though the plaintiffs may be said to reside in the neighbourhood of the mosque, they are not habitual worshippers in it, nor are they in any manner specially interested in the mosque, though as Muhammadans they, like the others, have admittedly a right to offer prayers there; there are mosques nearer their places of residence which makes it unlikely that they would have gone to this mosque for worship frequently. The evidence also suggests that the plaintiffs, in instituting this suit, are not actuated by considerations relating to the improvement in the administration of the mosque and its properties.

In these circumstances, the question of law to be considered is whether the plaintiffs have the interest in the trust contemplated by S. 92 of the Civil Procedure Code. What is the nature of that "interest" has been elaborately considered in the Letters Patent Appeal in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1). In that case a suit was instituted under S. 92 of the Civil Procedure Code for the removal of the trustees of a temple at Tellicherry and for other reliefs. One of the plaintiffs was Mr. T. R. Ramachandra Aiyar. His interest in the trust entitling him to institute the suit was not based on the fact that he had worshipped in that temple once or twice when he went to Tellicherry in his professional capacity some 8 or 10 years ago, nor upon the fact that he was the President of the Dharma Rakshana Sabha, but solely upon his right which he, as a Hindu, has of worshipping in every Hindu temple throughout India. It was there held that the mere right of a Hindu plaintiff to worship in a temple is not such an interest in the trust as to entitle him to sue under S. 92. It was argued that every Hindu temple must be presumed to be dedicated for the use of all Hindus, and that each of the individuals has, therefore, an interest in the trust of every Hindu temple. This argument was overruled by Wallis, C. J. who after an exhaustive examination of the history of the section and of the case-law relating to it held that interest in the trust must be "a clear interest," that is to say, "a present and substantial and not a remote or fictitious or purely illusory interest," and also that:

"that interest if the provision is not to be altogether illusory must arise from special relation in which the plaintiff stands to the endowment in question as compared with the whole body of religious community throughout India."

regarding the question whether a plaintiff who has a right to worship in a temple or mosque has or has not an interest to institute the suit. The other decisions quoted to us need not be discussed as all of them have been elaborately considered by the learned Chief Justice in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1) in dealing with the history of S. 92 of the Civil Procedure Code. I think that the facts of the case clearly show that though the plaintiffs reside in the neighbourhood, they really have no present and substantial interest in the suit mosque; their interest in it is only fictitious or illusory. Being Muhammadans they are no doubt entitled to worship in the mosque, but they are only occasional worshippers and, in my opinion, do not possess the "interest" entitling them to institute the suit under S. 92, Civil Procedure Code, as explained in *T. R. Ramachandra Aiyar* v. *Parameswaran Unni* (1).

The question raised by Issue 2 is whether the defendant is not a de jure trustee. The learned Subordinate Judge found on this issue against the plaintiffs. The case for the appellants on this issue, presented before us by their vakil is somewhat different from the one raised by them in their plaint and considered by the learned Subordinate Judge. Paragraph 7 of the plaint states:

"The defendant was appointed by the said Amir Khan Sahib to be a person entitled to keep the enjoyment of the properties endowed for the charity and to conduct the charities out of the income of the same. The defendant is not appointed to be the trustee of the masjid (assuming such appointment could be validly made] but he has been the *de facto* trustee of the masjid ever since the arrangement evidenced by the said document and ever since Amir Khan Sahib's death."

No doubt the question as regards the validity of his appointment as trustee is referred to by the defendant in the written statement but the case raised by the plaintiffs (as may be seen from the paragraph quoted) is this: namely, that Amir Khan Sahib did not appoint the defendant as trustee of the masjid but only appointed him "to keep the enjoyment of the properties endowed for the charity and to conduct the charities out of the income," thereby drawing a distinction between a "trustee of the mosque" and a "manager" of the properties. This argument was overruled by the Subordinate Judge and has not been availed of before us by the learned vakil as obviously Ex. 1, the deed of settlement, does not support it and there is no other evidence to justify it. What has been argued before us is this: namely, that Amir Khan Sahib had no power to aqpoint the defendant as his successor. It is true that as foster-son the defendant is not entitled to lay any hereditary claim to the trusteeship, but Amir Khan Sahib was himself a Muthavalli and it is a well known principle of Muhammadan Law that, in the absence of rules laid down by the founder of the mosque, the Muthavalli for the time being may validly appoint a successor to himself. The present defendant was so appointed in 1879 and, in my opinion, he is a validly appointed trustee.

Issue 5 raised the question, whether item 3 of Sch. A of the plaint ever belonged to the trust? (After discussing evidence his Lordship proceeded.) In my opinion, there is no reliable evidence on the plaintiff's side to show that these two shops belonged to the mosque. In view of the admitted facts of the case and Ex. 1, I am satisfied that the learned Subordinate Junge has arrived at a correct conclusion on this issue.

Issue 8 relates to the question, whether the defendant has committed all or any of the breaches of trust alleged in the plaint and is he liable to be removed from the trusteeship.

In the plaint fourteen specific breaches of trust are alleged against the defendant, but the learned vakil for the appellants in his arguments before us has confined his attention mainly to charge (1), namely, that "no proper accounts are maintained by the defendant." Even here he did not deal with all the various circumstances discussed by the learned Subordinate Judge under this head. He has limited his arguments mainly to a consideration of the income and expenditure of the mosque and the general irregularities in the keeping of accounts by the defendant. (His Lordship then scrutinized the evidence and concluded.) The important facts to be noticed are that no specific misappropriation by the defendant of the trust funds has been pointed out, that it has not been shown to us that there is any clear false entry in the accounts or that there has been a failure on the part of the defendant to enter any item of income in them. The correctness of the entries regarding the expenditure has not been challenged. In his reply in

examination by the Court the defendant states that he does not use the trust funds for his private purposes. The correctness of this statement has not been disputed. Though the account book has not been kept in an ideal manner the defendant has not misappropriated any of the funds of the trust and has not written up false accounts. He has admittedly spent large funds of his own for the purposes of the trust. In these circumstances, I do not think that the irregularities pointed out are sufficient to remove the defendant from the management of the trust.

The next charge of breach of trust that has been pressed against the defendant is that he has broken the direction in Ex. 1, the settlement deed, to give in the name of Muhammad Nabi a feast in the month of Ramzan, and this involves an allegation that the defendant has altered the direction contained in the settlement deed to suit his own purposes. If this charge is found to be true that by itself will be enough to remove any trustee. This is not mentioned as a specific charge of breach of trust against the defendant in the items (a) to (n) mentioned in paragraph 8 of the plaint, but it has been dealt with by the lower Court in its judgment, paragraphs 37 and 38 and it has also been argued before us. Ex. 1 contains the following directions :

"Out of the income derived from that property (1) the musjid should be lighted every day ; (2) extra lights should be kept there on festive days ; (3) a kathile should be nominated to recite *vedam* Koran in the musjid on monthly pay ; (4) feeding should be arranged for in the name of Muhammad Nabi in the Ramzan month and (5) one or two persons should be fed every day ;"

The plaintiff's case is that the word "Ramzan" which really is the month referred to in Ex. 1, has been altered into "Rabbisani" by the defendant and that as a matter of fact he has not been complying with the real direction contained in Ex. 1 to feed the Muhammadans in the month of Ramzan. The defendant's case is that he has really made no alteration in Ex. 1, that in the month of Ramzan all Muhammadans fast during daytime ; that no feast can be given during that month and that the feeding referred to in Ex. 1 relates to feeding in the month of Rabbisani. As regards the alteration, the volume containing this document was sent for from the Registrar's office by the Subordinate Judge and in that, it was found that the word written is "Ramzan" and "Rabbisani." Ex. A, the registration copy of Ex. 1 also contains the word "Ramzan." It must be said that there is an alteration in Ex. 1 regarding the month. Whoever made the alteration, I am not satisfied that it was the defendant who made it. If the plaintiffs wanted to charge the defendant with the express alteration of this document in one of its important particulars they should have done so in the plaint, which would have given the defendant an opportunity to meet it. The charges with regard to feeding mentioned in the plaint are Cls. (f) and (g) namely :

(f) No food is given by the defendant to any person daily and no public feeding made by the defendant in Ramzan or any other occasion : (g) nothing is done in Ramzan month either according to Muhammadan religion and custom or according to the terms of the deed of 1879.

These charges are met by the defendant in his written statement. The charge with which I am now dealing viz., that the defendant has altered a direction contained in Ex. 1 seems to have been suggested and that only very very faintly, in the course of the examination of the defendant. The evidence on this point that has been referred to by the learned vakil for the appellants is what is spoken to by the defendant on the last day of his examination (3rd September, 1921) which commenced on the 13th July 1921. When he was recalled on the 3rd of September 1921, he stated thus :

I produced in Court the two copies shown me. My vakil asked me to search and find them out if available. The two copies referred to are Exs. XIX and XIX (a). I got them from my record. They have been in my custody for the past 40 years. I filed Ex. I once before the Tashildar and once on another occasion in the Tanjore Munsif's Court. I also filed it in the Zilla Court ; obtained succession certificate. Sivabiran Pillai, who wrote Ex.1, died 8 years ago I filed Ex. 1 in Courts and offices only after it was registered.

In another place in the evidence given by the defendant we find at p. 52 that he states.

In Ex. I it is written as Rabbijan.

No other evidence has been brought to our notice regarding this alteration. If the plaintiffs wanted to charge the defendant with the alteration in the settlement deed, they should in the first place, have stated it as a specific charge in the plaint itself and really cross-examined the defendant regarding the

same. On the other hand, we find that no such thing has been done. The defendant, while he was in the witness box, was not asked any question by the plaintiff directly as to how the alteration in Ex. 1, which was in his possession was brought about. The document came into his possession from Amir Khan. The evidence is to the effect that feeding on a large scale is generally given in the month of Rabbisani. Amir Kkan himself could have, therefore, made this alteration after the registration of the document and probably it was such an altered document that came into the possession of the defendant. There is absolutely no motive for the defendant to make this alteration. In the absence of clear evidence to show that the defendant has altered Ex. 1, we cannot infer that the alteration complained of was brought about by him. As regards feeding in the month of Rabbisani, I am satisfied from the evidence that the defendant had complied with the provisions of Ex. 1. Though the 2nd plaintiff says that feeding should be done in this mosque in the month of Ramzan he has to admit that feeding is done in other mosques in the month of Rabbisani. It is generally admitted that all Muhammadans fast during day time in Ramzan and during nights they take kanji. The 1st plaintiff states that Amir Khan fed people in the month of Ramzan, but he does not know whether the defendant did as a trustee or in his private capacity or out of what funds, and he also states that according to Muhammadan religion people are fed in the month of Rabbisani.

The evidence on this point is dealt with at great length by the Subordinate Judge in para 38 of his judgment. I do not think it necessary to pursue this point any further, as it is not the case of the plaintiff that the defendant did not feed people in the month of Rabbisani: (see P. W. 10's, i. e., 1st plaintiff's evidence, p. 34). The evidence of the defendant that feeding is generally done in the month of Rabbisani and that he has been so feeding the Muhammadans has been believed by the Subordinate Judge. Charges (f) and (j), though referred to, have not been specially pressed before us by the learned vakil for the appellants for there is abundant evidence that kanji water was distributed to all the devotees who go to the mosque in the evening during the month of Ramzan. On a consideration of the evidence in the case, I am not satisfied that the defendant's continuance in the office, which he has held ever since 1879, is incompatible with the interests of the institution and that he should be removed from its management.

It was suggested that, even if there is no case made out for removing the defendant from the management of the mosque, we should frame a scheme for its management. In view of the evidence in the case that has been put before us we do not think that we are called upon to formulate any scheme.

In the result, the appeal fails and must be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 474

DEVADOSS AND WALLER, JJ.

Secretary of State—Appellant.

v.

Tripurna Sundarammal and *another*—Plaintiff and Defendant—Respondents.

Appeal No. 144 of 1923, Decided on 13th November 1925, against the order of the Dist. J., South Arcot, D/- 7th October 1922.

(a) *Civil P. C., O. 33, R. 10—Court-fee payable is what is payable on the date of plaint.*

Under O. 33, R. 10, the amount of Court-fee payable is that which is payable on the date of the plaint and not on the date of passing the decree. [P. 475, C. 1]

(b) *Civil P. C., O. 33, R. 10—Application for directing plaintiff to pay difference of Court-fee when suit decreed in part need not necessarily be made to trial Court—Appellate Court can pass an order to that effect.*

Where suit is decreed only in part, the plaintiff is bound to pay the difference between the total amount payable on the plaint and the amount which is ordered to be recovered from the defendant on the decreed part of the claim. An application for directions to that effect need not necessarily be made to the trial Court but the appellate Court can pass the necessary order. [P. 475, C. 1]

C. V. Ananthakrishna Aiyar—for Appellant.

K. Balasubramania Aiyar and *M. S. Venkatarama Aiyar*—for Respondents.

Judgment.—The 1st respondent brought a suit in forma pauperis against the 2nd respondent for maintenance. The suit was compromised by the parties

and a decree in terms of compromise was passed. The District Judge held that the Court-fee payable by the 1st respondent was that which was made payable by the recent amendment of the Court Fees Act. Against that order the Government have preferred this appeal. The order of the learned District Judge in calculating the Court-fee payable on the plaint according to the rate prevailing on the date of the decree is bad. Under O. 33, R. 10, the amount of Court-fee payable is that which is payable on the date of the plaint. O. 33, R. 10, says that "the Court shall calculate the amount of Court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper." When a person brings a suit he pays Court-fee on the amount of relief claimed in the plaint, or on the valuation in the plaint, and the Court-fee is paid before the plaint is admitted and filed as a suit, Therefore the amount payable by the 1st respondent in this appeal is that amount which was payable on the date when she filed her plaint.

The next question is whether this Court should vary the decree of the District Judge by directing the plaintiff to pay the difference between the amount decreed and the amount payable. Following the principle of the decision in *Chandrareka* v. *Secretary of State* (1) we hold that the plaintiff is bound to pay the difference between the Court-fee payable by her and the amount which is ordered to be recovered from the defendant; for it is for the plaintiff to pay the Court-fee on her plaint and the defendant is only bound to pay on the amount which is decreed against him. Mr. Venkatarama Aiyar's contention is that the Government Pleader should apply to the lower Court for an order under R. 10. R. 12, no doubt, gives the right to the Government to apply to the Court to make an order for the payment of Court-fees under R. 10 or R. 11. But it is not necessary that an application should be made to the lower Court before the Government can appeal against any of the terms of the decree. Under R. 13, any orders passed under R. 10, R. 11 or R. 12 shall be deemed to be questions arising between the parties to the suit within the meaning of S. 47. There being a decree in which a certain amount is mentioned as due to the Government, it is open to the Government to appeal against that portion of the decree, and, therefore, it is not necessary that an application should previously have been made to the lower Court for what the Government considers as the proper Court-fee. The Court-fee payable by the 1st respondent will be Rs. 315 minus Rs. 20-3-6. It is agreed that the 1st and 2nd respondents will pay in proportion of 5 to 2. As the Government Pleader has appealed against the order of the lower Court & as a matter of principle is involved we leave it to the Government to consider whether in a case like this it would be necessary to get the full amount from tha 1st respondent who is a widow and who brought the suit for maintenance. There will be no order as to costs of the appeal.

Appeal allowed.

(1) [1890] 14 Mad. 163.

A. I. R. 1926 Madras 475

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Seshammal and *others*—Defendants 1 to 3—Appellants.

v.

Kuppanaiyyangar and *another*—Plaintiffs—Respondents.

Civil Misc. Appeal No. 69 of 1924, Decided on 10th February 1925, against the order of the Sub-J., Vellore, in A. S. No. 119 of 1922, D. - 26th July 1923.

(a) *Civil P. C., S. 100—Appeal from remand order—Questions of fact cannot be re-opened.*

In an appeal against an order of remand the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal. [P 476 C 1]

(b) *Evidence Act, S. 50—English Law is different.*

S. 50 enacts a rule different from the law in England. According to English Law general reputation is admissible to establish the fact of parties being married. But S. 50 is limited to opinion as expressed by conduct. [P 476 C 2]

(c) *Evidence Act, S. 50—Family conduct,*

Distribution and devolution of family property is often very valuable evidence of "family conduct" under S. 50. [P 477 C 2]

C. Padmanabha Iyengar—for Appellants.

K. N. Rajagopala Sastri—for Respondents.

Judgment.—The learned Subordinate Judge has reversed the decision of the

District Munsif on the first issue. The District Munsif has found that the plaintiffs have not proved the relationship set up by them. The Subordinate Judge has found that the plaintiffs are the reversionary heirs of the deceased Krishnamachariar and has remanded the suit for trial of the other issues. Although the appeal has taken the form of a civil miscellaneous appeal against an order of remand the Subordinate Judge is a final Judge of fact and the only grounds available to the appellant to attack the judgment are those which would be available to him in second appeal: see *Venganayyan* v. *Ramaswami Ayyan* (1) and *Joseph Armugam Pillai* v. *Muruga Pillai* (2). The question, therefore, is: Is the judgment of the Subordinate Judge one with which we can interfere in second appeal? The argument on behalf of the appellant is mainly that there is no evidence in support of the finding. After carefully going through the judgment and the material on which that judgment is based, we agree with the appellant's contention.

The learned Subordinate Judge purports to act, firstly, on the oral evidence of three witnesses examined for the plaintiffs. Plaintiffs' Witness No. 1 says thus: "I do not know my grandfather or his brothers personally. My father had prepared a genealogy for the relationship. I took information from it." The pedigree prepared by this witness' father would certainly be a statement admissible in evidence under S. 32, Cl. (5) or Cl. (6), but, unfortunately, this has not been produced. No reason has been given for admitting secondary evidence of this document. Plaintiffs' Witness No. 1 says nothing further on this subject. The learned Subordinate Judge observes that P. W. No. 1 was not cross-examined with reference to his omission to produce this pedigree. It is scarcely necessary to say that the plaintiffs who endeavoured to make out that they were the reversionary heirs were bound to produce this pedigree, because according to the evidence of P. W. No. 1 that is the foundation of their case. Without the original of that pedigree, P. W. No. 1's evidence amounts to absolutely nothing. It is unnecessary to examine in detail the evidence of the second witness for the plaintiff. All that he says is this: "Plaintiffs' grandfather Krishnama Chari told me that he had three brothers when I was learning Veda at Punnai." Who are these three brothers? That is not explained. And what is the connexion between Krishnamachariar and Kuppan Iyengar? This is also not explained. His evidence, therefore, is of no use to the plaintiffs. Plaintiffs' Witness No. 3 is a Naicken, whereas the parties to the suit are Vaishnava Brahmins. All that he says in his evidence is: "People say that plaintiffs are 1st defendant's dayadis." The learned Subordinate Judge is of the opinion that this is admissible, but he seems to overlook the provisions of S. 50 of the Indian Evidence Act. "Family conduct," to use a compendious expression, is admissible to prove relationship. But there is no evidence of family conduct here at all. The illustrations to the section make the point very clear. Illustration (a) runs thus:

The question is whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife is relevant. There is a casual observation in the judgment of their Lordrhips of the Privy Council in *Mi Me* v. *Mi Shive Ma* (3): "In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation." But a perusal of the judgment will show that the evidence which was accepted by the Privy Council was evidence of family conduct. As Messrs. Amir Ali and Woodroffe point out in their book on Evidence, S. 50 enacts a rule different from the law in England. According to English Law he says: "General reputation is admissible to establish the fact of parties being married. Accordingly, general evidence of reputation in the neighbourhood, even when unsupported by facts, or when partially contradicted by evidence of a contrary repute, has been held receivable in proof of marriage. The present section is limited to opinion as expressed by conduct, and there appears to be no other provision in the Act, under which such evidence of general reputation would be receivable." We cannot construe the judgment of their Lordships of the Judicial Committee as laying down a

(1) [1896] 19 Mad. 422=4 M. L. J. 263.
(2) [1909] 6 M. L. T. 198.
(3) [1912] 39 Cal. 492=39 I. A. 57=(1912) 1 U. B. R. 111 (P. C.).

rule of law completely at variance with the clear rule of the Indian Evidence Act.

This then is all the oral evidence in support of the pedigree put forward by the plaintiffs. It is noticeable that the 1st plaintiff has not chosen to go into the box to support the case set up.

Turning now to the documentary evidence we have first Ex. D. This is a previous statement made by the 1st defendant in this case. She deposed in O. S. No. 324 of 1918 : "Janaki Ammal is the wife of my senior father-in-law." This is evidence of the fact that 1st defendent's father-in-law had an elder brother whose wife was Janaki Ammal. This proves nothing more. Whether Janaki Ammal is the wife of 'Ilayalwar, brother of Krishnamachariar, or whether she is not, on this point, no light is thrown by this deposition. Then, the plaintiffs strongly rely upon Ex. B. That purports to be a sale-deed by Janaki Ammal in favour of Vijaraghava Iyengar, the father of the plaintiffs. It contains the following statement : "Deed of sale in favour of Vijaraghavachariar son, of Krishnamachariar, by Janaki Ammal, wife of Krishnamachariar's younger brother Ilayalwar." There is no evidence worth the name to establish the identity of Janaki Ammal of this document with Janaki Ammal referred to in the deposition of the 1st defendant. Granting, however, that the evidence is sufficient for this purpose, what do we have? Exhibit B is an unregistered sale deed. No doubt it comes from the custody of the plaintiffs. It is more than 30 years old, but is it really necessary that the presumption under S. 90 should be drawn in favour of its genuineness ? The Court is permitted to presume that an ancient document produced from proper custody is genuine. But the circumstances of the case do not justify such a presumption being made. The District Munsif refused to make that presumption. The document is attested by two persons. We have been told nothing as to whether these persons are alive or they are dead. The document refers to a usufructuary mortgage and a kychit and they have not been produced. In these circumstances, it is extremely difficult to hold that Ex. B is genuine. As regards the kychit, we may observe that the District Munsif says in his judgment that the plaintiffs had "kept back" the kychit. The learned Subordinate Judge points out that the kychit was filed but was not exhiblted at the trial and was later taken back by the parties. An application was made to the Sub-Judge to make it evidence in the appeal, but he refused to allow that.

We were pressed in the course of the argument that we ought to receive this document in evidence. In the first place there is no application before us to receive additional evidence, and, secondly, even the document is not before this Court. It is after all an unregistered cadjan document. The suggestion now made is that the kychit would conclusively have proved the plaintiff's pedigree. If that be so, why was it not filed in evidence ? As we have said, in the lower Court, an attempt was made but unsuccessfully to obtain permission to file this document. We cannot in these circumstances comply with the request that we should permit the kychit to be received in evidence.

There remains only one other matter and it is this. It is said that some of the properties which were at one time in the possession of Krishnamachari are later in the possession of Kuppanna Iyengar the propositus. It is true that distribution and devolution of family property is often very valuable evidence of conduct" under S. 50. But, in this case, the material is wanting from which any inference in favour of the plaintiffs can be drawn. It is possible that Kuppanna Iyengar purchased, as any stranger might have done, the property which was once in the possession of Krishnamachari. It is for the plaintiffs to make out that there was devolution of property which would support their case. The statement of the learned Judge that the natural inference is that there was a family partition is not borne out by any evidence.

For these reasons we are constrained to interefere with what is apparently a finding of fact and we reverse the decision of the Subordinate Judge and allow this appeal with costs. The result is that the suit is dismissed with costs throughout.

Suit dismissed.

✻ A. I. R. 1926 Madras 478

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

Hari Krishna Chettiar—Appellant.

v.

Govindarajulu Naicker—Respondent.

Appeal No. 228 of 1924, Decided on 13th November 1925, against the order of the Dist. J., Coimbatore in I. A. No. 227 of 1923, D/- 20th March 1924.

✻ *Guardians and Wards Act, S. 34 (d)—Court cannot order repayment of more than admitted amount under the section—Regular suit is the remedy to enforce disputed liability—Order not covered by the clause is not appealable unless treated as passed under S. 43.*

This clause does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts exhibited by him. What is contemplated is not a decision of substantive rights of the parties. The words "on those accounts" point to the same conclusion. 67 *I. C.* 309. *Dis.*; 25 *C. L. J.* 149, *Foll.* The juxtaposition of three Ss. 34, 35 and 36 seems to indicate that when the measure of the guardian's liability is put in issue, the proper course seems to apply to the Court under S. 35 or S. 36 and then file a regular suit against the guardian. *A. I. R.* 1924 *All.* 593, *Diss.* An order against a guardian regarding liability not admitted by him may be treated as one under S. 43 and treated as appealable.

Where the guardian mixed his ward's moneys with his own but the moneys had throughout not been lent out on interest,

Held: direction to pay 12 per cent. simple and not compound interest will meet the ends of justice. [P 479, C 1, 2, P 480, C 1]

C. S. Venkatachari and *V. Narasimha Aiyangar*—for Appellant.

S. Muthiah Mudaliar and *M. Krishna Bharati*—for Respondent.

Judgment.—The question of law that is raised is one of some difficulty. The appellant was appointed guardian of the property of his nephew in 1912. On an application in 1923 made by a relation of the ward, the District Judge directed the guardian, the appellant, to file his accounts into Court. They were filed accordingly and scrutinized by the District Judge who found that the sum actually due by the guardian to the minor's estate was Rs. 2,180, a sum considerably more than that admitted in the accounts.

The appellant questions in this appeal the correctness of the finding. Mr. Muthiah Mudaliar for the respondent, the applicant in the lower Court, takes a preliminary objection that no appeal lies from the order in question. His contention is shortly this. The order of the lower Court is made under S. 34 (d) and this does not fall under S. 47 which specifies the orders that are appealable. It is doubtless true that under the Act an appeal does not lie from an order made under S. 34 (d).

The real question, however, is: Does the present order come within the terms of S. 34 (d)? S. 34 may be thus summarized: "Where a guardian of the property of a ward has been appointed or declared by the Court, he shall:

(a) if so required by the Court, give a bond engaging to duly account for what he may receive;

(b) if so required by the Court, deliver to the Court within such time as the Court directs a statement of the property of the ward received by him and of the debts due by the estate;

(c) if so required by the Court, exhibit his accounts in the Court at such times and in such form as the Court from time to time directs;

(d) if so required by the Court, pay into the Court at such time as the Court directs the balance due from him on those accounts or so much thereof as the Court directs; and

(e) apply for the maintenance of the ward such portion of the income of his property as the Court directs and if the Court so directs the whole or part of the property."

We have given a summary of the section, but so far as Cls. (c) and (d) are concerned we have reproduced them verbatim.

Can it be said that the order made falls under clause (d)? There is not even as much as a hint in the section that what are dealt with by it are questions of a contentious nature. On the contrary it seems to refer to proceedings where there can possibly be no conflict between the guardian and his ward, that is, matters which may be regulated by the Court in the exercise of its disciplinary jurisdiction. Executing a bond, filing an inventory, exhibiting accounts and applying the income or corpus for the support of the ward—all these—surely come under this category. In the light of this, now let us examine the section. Under clause (c) the guardian if required by the Court is bound to exhibit his accounts. Clause (d) says that if required

he shall pay into the Court," the balance due on those accounts or so much thereof as the Court directs." This means that he can be called on to pay into Court only either the whole or a portion of what is admitted by himself. The use of the words "on those accounts" is significant. He cannot be required to pay the amount actually found to be due from him but only the amount due "on those accounts," that is, the accounts exhibited by him. If the intention of the Legislature was that the Court should have the power under this section to compel the guardian to pay the actual amount found due, the clause would not have contained these words. If the clause is read deleting these words, then there can be no question that the guardian can be called on to pay the actual amount due. These words must not be treated as merely superfluous but full effect must be given to them. As a question of construction, we are clearly of the opinion that this clause does not empower the Court to direct the guardian to pay into Court more than the amount shown to be due in the accounts exhibited by him.

We must construe the clause having regard to the scope of the whole section and to the place where the section occurs. Can it be said that what is contemplated is a decision of substantive rights of the parties? In this connexion we may also notice S. 45 which prescribes, inter alia, the penalty for disobedience of the order made under S. 34 (*d*). There again the words "on those accounts" are repeated. We cannot lightly disregard the repetition of these words.

In *Radha Kishen* v. *Khushi Ram* (1) the learned Judge having held that a similar order fell under S. 34 (d), felt surprised that under the Act an order of such importance is not appealable. In our opinion the fact that there is no appeal is an additional reason for holding that the order does not really come under S. 34 (d). We are not prepared to impute to the Legislature an intention which leads to such a drastic result.

The view we are disposed to take receives support from the judgment of Mukerjee, J., in *Jagannath* v. *Mahesh* (2). In that case, the lower Court purported to make under S. 34 (d) an order directing the guardian to bring into Court a sum of money not shown in the account filed by him under Cl. (c). The guardian failed to comply with the order and the penal provision of S. 45 was then put in force against him. The Calcutta High Court held that the original order was one not rightly made under S. 34 (d) and consequently it could not be enforced under S. 45.

Then comes the question: Has the Court power under the Act to make such an order at all? In *Sita Ram* v. *Mt. Govindi* (3) the learned Judges observe that to deny to the Court this power would lead to grave inconvenience and possibly injustice, and having said this they seek to find the power in S. 34 (d). We are unable to agree with this reasoning. Immediately following S. 34 are two sections: S. 35 dealing with suits against guardians where administration bond is taken; and S. 36 suits where such bond is not taken. The juxtaposition of these three sections seems to indicate that when the measure of the guardian's liability is put in issue, the proper course seems to be to apply to the Court under S. 35 or S. 36 and then file a regular suit against the guardian.

The sections we have examined point to this: a guardian can be directed under the Act to pay into Court the amount admitted by him; but if it is sought to make him liable for a larger amount than is admitted, the question can be decided only in a regular suit. Were we to decide the point on a rigid interpretation of the sections of the Act, we should feel inclined to hold that it is not competent to the Court to make under the Act an order such as the one in question.

The present order would then be a nullity as having been made without jurisdiction; but this is not the position for which either side has contended.

The cases cited to us show that in several instances it was assumed or decided that such a power is possessed by the Court. We have already referred to *Sita Ram* v. *Mt. Govindi* (3) where considerations are urged in favour of holding that it is within the competency of a Court to make such an order. If it is absolutely necessary to find this power somewhere within the four corners of the Act, S. 43, by straining it somewhat, may be pressed

(1) [1921] 67 I. C. 309.
(2) [1916] 25 C. L. J. 149=21 C. W. N. 688.
(3) A. I. R. 1924 All. 593.

into service. The first clause of that section reads thus :

"The Court may on the application of any person interested or of its own motion make a order regulating the conduct or proceedings of any guardian appointed or declared by the Court."

It may not be quite the right thing to say that an order of the kind under discussion is " an order regulating the conduct of proceedings." of a guardian. But it is only by construing these words in this rather wide sense that we can find justification in the Act for the view that has been uniformly adopted in the cases cited to us, that such an order as this is within the competency of a Court acting under the Guardians and Wards Act. There is, however, this much to be said for this view, that the order in that case is not final but is appealable. The preliminary objection thus fails.

Turning to the facts Mr. Venkatachari objects to the inclusion of two items, namely, Rs. 125-1-0 and Rs. 225-10-0, but we are not prepared to hold that the District Judge's decision on this point is wrong.

His next objection is well founded. There is no sufficient reason given for awarding compound interest at 12 per cent. with yearly rests. The guardian, no doubt, is accountable for the moneys from the date he realized them. Although he failed to keep separate accounts and mixed his ward's moneys with his own, it has not been proved that the profit that he earned by the use of the ward's moneys was such as to justify the direction in question. It has not been shown that the moneys had throughout been lent out on interest. Nor is there and evidence that when interest was realized it was again lent out. For what period any sums were lent out, and how much moneys was so invested, on these matters, there is no evidence worth mentioning. There is no warrant for presuming that every pie of this money had throughout been invested that the interest was annually received, and that it was forthwith from time to time again lent out. In the circumstances, a direction to pay 12 per cent. simple interest will meet the ends of justice.

In regard to the memorandum of objections there is only one point that arises. Before the guardian disposed of the minor's properties he was undoubtedly in possession and for this period he is accountable for the profits. On the evidence we find that Rs. 500 would be a fair estimate and deducting from this Rs. 60 for costs, the appellant will be liable to pay Rs. 440 on this head.

Adding Rs. 440 to Rs. 2,180, the amount allowed by the District Judge, the principal sum which the guardian is liable to pay amounts to Rs. 2,620. This will carry simple interest at 12 per cent. from the 1st November 1913 to this date, and in calculating interest the guardian will be allowed Rs. 60 annually for maintenance expenses from 15th May 1914 to 30th June 1919. Counter-interest will be allowed to the appellant on Rs. 1,010-15-3 from 11th October 1923, the date when he paid that amount into Court. Interest will run at 6 per cent. per annum from this date on the aggregate amount found due. The order of the District Judge will be modified accordingly. Each party will bear his costs. The appellant wants time for payment till the 14th December 1925, and the respondent does not object. The appellant shall pay the amount into the District Court of Coimbatore on or before the 14th December 1925.

Order varied.

A. I. R. 1926 Madras 480

DEVADOSS AND WALLER, JJ.

(*Valluri Srivat*) *Sanka Rao*—Petitioner.

v.

The Ryots of Kalagampudi—Respondents.

Civil Revision Petitions Nos. 262 and 263 of 1924, Decided on 28th October 1925, from the Board of Revenue, Land Revenue and Settlement, Proceedings No. 1441 Mis., D/- 29th June 1923.

(a) *Madras Estates Land Act* (1 *of* 1908), *Ss.* 171 *and* 172—*Orders under, by Board of Revenue—High Court can revise.*

The High Court has revisional jurisdiction over the orders of the Board passed under Ss. 171 and 172 of the Estates Land Act : (*Case-law discussed.*) [P 481, C. 1]

(b) *Madras Estates Land Act* (1 *of* 1908), *S.* 173, *Ch.* 11 *and S.* 30—*Revenue officer acting under Ch.* 11 *and determining fair and equitable rent, considering himself bound by S.* 30—*No remedy by suit exists but High Court can revise his order.*

The High Court does not interfere as a rule with the orders of Courts subordinate to it over which it has revisional jurisdiction in cases where there is another remedy open to the party than by revision. Where a revenue officer act

ing under Ch. 11 and about to determine a fair and equitable rent, erroneously considers himself bound by S. 30 he does not exercise his jurisdiction and as the parties have no right of suit in such a case, the High Court would be justified in exercising revisional jurisdiction. [P 483 C 2]

V. Ramadoss—for Petitioner.

A. Venkatroyaliah—for Respondent.

C. V. Ananthakrishna Aiyar—for the Board of Revenue.

Judgment.—The revenue officer for the settlement of rents in the villages of Kalagampudi and Pedamamipalli, Narasapur Taluk, Kistna District made a record of rights uader Chapter XI of the Estates Land Act. The appeal of the proprietor of.....Pedamamipalli to the Board of Revenue against the record of rights made by the revenue officer has been dismissed. He now moves the High Court to revise the order of the Board of Revenue.

Two points arise for decision in this case : (1) Has the High Court revisional jurisdiction over the orders of the Board passed under Ss. 171 and 172 of the Estates Land Act ? and (2) If the question of jurisdiction is answered in the affirmative, should the High Court exercise its revisional jurisdiction in this case ?

The first point has been fully argued by Mr. Ramadoss for the petitioner and Mr. Venkatrayaliah for the respondents. We have also heard the Government Pleader to whom we gave notice to appear for the Board of Revenue as it was represented to us that a number of civil revision petitions were pending in the High Court in which the question of jurisdiction was involved. After a careful consideration of the arguments in the case I see no reason to change my view expressed in *Appann* v. *Latchayya* (1). I do not wish to repeat here the reasons which I gave in that case, but will deal briefly with the arguments of the learned Government Pleader.

His contention is that the Board of Revenue is nc a civil Court and jurisdiction is given to it under the Estates Land Act to hear appeals from and to revise the orders of the Collector and the Settlement Officer and the High Court cannot revise the orders of the Board of Revenue either under S. 115, Civil P. C., or under S. 107 of the Government of India Act, 1915. His argument is based upon the observations made by the learned Chief Justice in *Abdul Sattar Sahib* v. *Special Deputy Collector, Vizagapatam* (2). In that case it was held that the High Court could not interfere in revision with the order of a land acquisition officer who refused to refer a case to the District Court under S. 18 of the Land Acquisition Act. As the decision is that of a Full Bench I am bound by it ; but I may be permitted to remark : Why could not the High Court interfere with the order of a land acquisition officer if he refused to refer a case to the District Court when the High Court has jurisdiction to determine any question that may arise on a reference being made ? In other words, if the land acquisition officer makes a reference to the District Court an appeal lies from the District Court to the High Court ; but if he does not refer the case to the District Court the High Court is said to have no power to direct him to refer the case to the District Court. If a Collector refused to refer a case to the civil Court, he does something which he ought not to do, and the High Court which has the power to hear and determine matters, on a reference being made to the District Court, cannot be said to have no power to direct the Collector to do what he is bound to do. However, as that case has no application to the present, I refrain from making any further comment. The decision in *Parthasarathi Naidu* v. *Koteswara Rao* (3), has no application to the present case. According to that decision, where the Legislature erects a tribunal for the purpose of determining any question which arises under a particular enactment, the High Court cannot interfere with the decision of that tribunal unless the High Court is empowered under the enactment which erected the tribunal to hear appeals from such tribunal or unless the enactment erecting the tribunal makes it a civil Court within the meaning of Clause 16 of the Letters Patent of the Madras High Court.

When a Settlement officer makes a record of rights under Chapter XI of the Estates Land Act, he determines the right of the parties ; in other words he determines the rights and liabilities of both the landholder and the ryot. His proceedings are governed by the Civil Procedure Code : vide S. 192. Part B

(1) A. I. R. 1924 Mad. 119.

(2) A. I. R. 1924 Mad. 442 (F. B.).

(3) A. I. R. 1924 Mad. 561 (F. B.).

of the Schedule of the Estates Land Act No. 21 provides an appeal to the District Court against an order under S. 137 for the repair of an irrigation work and Nos. 22 and 23 provide for an appeal to the District Court in the case of applications by ryots to execute works in default of the landholder and for the recovery of the costs of the repair of an irrigation work. From a perusal of Parts A and B of the Schedule, it is apparent that wherever civil rights of the parties, i. e., landholder and ryot, are determined an appeal is provided to the District Court. In the case of matters which are entirely within the cognizance of the Revenue Officer an appeal is provided to the Collector and against his decision a second appeal is provided under S. 190 to the Board of Revenue. A record of rights is as important as, if not more important than, the terms of a patta, and S. 173 gives liberty to a party to sue to set aside an order of the Settlement Officer in certain cases. Under S. 172, the Board of Revenue may, on an application or of its own motion, direct the revision of any record of rights or any portion thereof. Ths mere fact that an appeal lies to the Board of Revenue is no argument for saying that the High Court has no power under the Act to revise the orders of a Collector or Settlement Officer acting under Ch. XI. The Calcutta High Court has consistently held that in the case of orders of Collectors or Revenue Officers determining the rights of the landlord and tenant the High Court has power to interfere in revision with them. In *Kartik Chandra Ojha* v. *Gora Chand Mahto* (4) it was held that "Proceedings on applications for enhancement of rent under S. 27 of the Chota Nagpur Tenancy Act are judicial proceedings.....The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act." The learned Judges observed at page 522: "From the very nature of the proceedings themselves, and also from the provisions of the Act as contained, for instance in Ch. XVI, it is clear that proceedings on application for enhancement of rent are judicial proceedings and in view of the express provisions of S. 224 (2), which allows in certain cases a second appeal to this Court, it cannot in our opinion be contended that Deputy Commissioners, in the performance of their judicial duties under the Chota Nagpur Tenancy Act, are not Courts subject to the appellate jurisdiction of this Court."

The learned judges held that notwithstanding that the Board of Revenue had revisional jurisdiction over the orders of Collectors the High Court had revisional jurisdiction over such orders. In *Ram Dayal* v. *Ramadhin* (5) a Bench of the Allahabad High Court held that the High Court has no power under S. 622 to revise an order of a Collector under S. 183 of the North-West Provinces Rent Act, Act XII of 1881 on appeal from an Assistant Collector of the second class. The argument of Straight, J., who delivered the judgment of the Court is that if it were held that the High Court had jurisdiction to revise such orders, it might create a dilemma inasmuch as the Board of Revenue also had revisional jurisdiction. The question is whether the High Court could, and not whether it should, interfere with an order of a Collector after the Board of Revenue had interfered with it. The question does not depend upon any dilemma arising in the exercise of revisional jurisdiction by the High Court as well as by the Board of Revenue. It would be a matter for consideration in each case whether the High Court should exercise its powers or not. If it considers that the case is not a proper case for the exercise of its revisional powers it would refrain from doing so, but if it is a proper case the High Court would interfere with such orders.

In one portion of the argument the learned Government Pleader almost suggested that if the Board of Revenue declined to interfere with the order of a Collector then the High Court might interfere with such order and the High Court had no power to interfere. Such an argument, though not put forward in so many words by the Government Pleader is on the face of it untenable. It is not seriously contended that *Ramaswami Goundan* v. *Kali Goundan* (6), was not correctly decided. The learned Judges who decided 42 *Mad.* 310, decided *Paramaswamy Iyengar* v. *Alamelu Natchiar Ammal* (7).

(4) [1913] 40 Cal. 518=17 C. L. J. 593.

(5) [1890] 12 All. 198=(1890) A. W. N. 59.
(6) [1919] 42 Mad. 310=36 M. L. J. 571.
(7) [1918] 42 Mad. 76=35 M. L. J. 632=9 L. W. 26=(1918) M. W. N. 107.

In considering this question the aim and the scope of the Estates Land Act should be considered. Under the old Recovery Act, Act VIII of 1865, the High Court had no revisional jurisdiction over the orders of revenue Courts. Under the Estates Land Act, Act 1 of 1908, appeals are provided to the District Court against the order of revenue Courts and the Civil Procedure Code is made expressly applicable to the proceedings of the revenue officers and revenue Courts by S. 192. Under S. 202 the High Court is empowered to make rules consistent with the Estates Land Act declaring that any portion of the Code of Civil Procedure shall not apply to suits between landholder and ryot as such or to any specified classes of such suits or shall apply to them subject to modifications specified in the rules. These are innovations which are made in the present enactment and the object of the legislation was to determine the respective rights and liabilities both of the landholder and the ryot. In all cases where the rights of the landholder or the ryot are affected an appeal is given to the District Court. It would be against the scope of the Act and the specific provisions of S. 199 to hold that the High Court has no revisional jurisdiction over the orders of the Board of Revenue. It is unnecessary in this connexion to consider whether the Board of Revenue is a Court subordinate to the High Court. All Courts which are governed by the Civil Procedure Code are civil Courts and, therefore, the High Court as having the right of superintendence over all the civil Courts in the presidency has power over such civil Courts as are erected by any enactment. The Board of Revenue is authorized under Rule 21 framed by the Governor in Council under S. 215 of the Estates Land Act to hear appeals from the decision of the Collector under Chapter 11. The mere fact that appeals lie to the Board of Revenue would not take away the power of the High Court to revise the orders of the Collector or of the Board of Revenue. It is nowhere said, and there is no provision in the Act, or in the rules framed under the Act, that the orders of the Board of Revenue are final. The argument advanced in *Ram Dayal* v. *Ramadhin* (5) cannot apply to this case for the Board of Revenue in this case is only an appellate authority and not a revisional authority. For the above reasons given by me in 47 *Mad.* 250, I answer the question in the affirmative.

Second point :—The Revenue Officer had to determine what was a fair and equitable rent. He thought he was bound by the provisions of S. 30 of the Estates Land Act in determining under Chapter 11 what was fair and equitable rent. The provisions of S. 30 of the Act apply to enhancement of rent at the instance of the land holder. Under Chapter 11 either the landholder or the ryot may apply to the Government for an order directing that a survey be made and a record of rights be prepared by the Revenue Officer in respect of an estate or a portion of an estate. In making a record of rights the Revenue Officer has to be guided by the considerations which are not necessarily the same as those arising under S. 30. A Revenue Officer acting under Chapter 11 should take into consideration the existing rate of rent, the rise in prices, the time when the rate was last settled and the present state of things as regards the facilities of irrigation and other circumstances which would enable him to settle what is a fair and equitable rent. Whatever may be the rate of rent, if he considers that it is not fair and equitable he is entitled to alter it and in doing so he is not bound by the rule in the section that the increase cannot be more than As. 2 in the rupee Under Chapter 11 the Revenue Officer may reduce the rent and settle different rate of rent for land of different value or different fertility. The Revenue Officer therefore, has not exercised the jurisdiction which he had in determining what is fair and equitable in the circumstances of the case. The High Court does not interfere as a rule with the orders of Courts subordinate to it, over which it has revisional jurisdiction in cases where there is another remedy open for the party than by revision. S. 173 provides for suit by a party who feels aggrieved by the record of rights. but none of the Cls. (a) to (*f*) of sub-S. 3 applies to the present case. The parties have no right of suit in this case and, therefore, this is a case in which the High Court would be justified in exercising revisional jurisdiction.

I, therefore, set aside the order of the Revenue Officer for the settlement of rents and direct him to make a proper re-

cord of the rent in the light of the remarks made above. Petitioner will have the costs of this application. The costs of further proceedings will abide the result.

Waller, J.—On the first point I think that the matter is concluded by *Ramaswami Goundan* v. *Kali Goundan* (6), a decision from which I see no reason to dissent. On the second I agree that the Revenue Officer, in settling a fair and equitable rent is not bound by the provision of of S. 30 of the Act. It is obvious that there is no right of suit in regard to the question raised. If there is, we should not be justified in interfering in revision.

I concur in the order proposed.

Order set aside.

A. I. R. 1926 Madras 484

SPENCER AND MADHAVAN NAIR, JJ.

Sethu Konar—2nd Defendant—Appellant.

v.

Ramaswami Konar — Plaintiff—Respondent.

Appeal No. 43 of 1924, Decided on 7th September 1925, from the order of the Sub-J., Negapatam, in A. S. No. 117 of 1923.

Civil P. C., S. 47—Party to suit—Party exonerated but with name not removed from record remains a party.

The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him. The ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record; 40 *Mad.* 964 and 17 *M. L. J.* 416 *Disapp.*; 23 *Mad.* 361 (*F.B.*), *Foll.* [P 485 C 1]

R. Ganapathi Aiyar and *N. Panchapagesa Aiyar*—for Appellant.

K. S. Jayarama Aiyar—for Respondent.

Spencer, J.—O. S. No. 320 of 1918 was a suit brought by the 1st respondent upon a mortgage. The suit was decreed and the plaintiff purchased some of the suit property in Court auction. The 2nd defendant in the suit thereupon filed an application to set aside delivery of the items purchased on the ground that he had a paramount title which prevailed over the title of the mortgagor in consequence of more than 16 years' possession after the property had been surrendered to him by the owner. The District Munsif found in favour of the petitioner and directed release of the property. On appeal to the Subordinate Judge by the decree-holder purchaser, the District Munsif's order was set aside and the petition was dismissed. It is now contended that no appeal lay to the Subordinate Judge on the ground that the appellant, though made a party to the suit, was exonerated as he set up a title paramount to that of the mortgagor, and consequently the decree-holder's remedy, if any, against the District Munsif's judgment was to bring a suit to set aside the order. The Subordinate Judge held that he could dispose of the appeal against the order under S. 47 as the claim petition was preferred by a party to the suit and he thought that the latest decision in *Venkataswami* v. *Chidambaram* (1) was in favour of this view. Reliance is now placed upon *Krishnappa* v. *Periyaswami* (2). The learned Judges who decided that case were inclined to the view that if a party was exonerated from a suit on the ground of misjoinder he would not remain a party to the suit for the purpose of S. 47, and that it was immaterial whether his name was actually removed from the record in pursuance of the order exonerating him. In *Venkataswami* v. *Chidambaram* (1) Sadasiva Aiyar, J., and Phillips, J., took the view that the plain words of the Code were intended to give legal effect to the decision of the Full Bench in *Ramaswami Sastrulu* v. *Kameswaramma* (3) and to overrule the previous decisions which had decided that a defendant whose name appears in the decree without being struck off was not a party to the suit, if he had been exonerated by the decree passed in the suit. In *Sannamma* v. *Radhabai* (4) this case is quoted in the foot-note and Abdur Rahim, J., who was one of the referring Judges, expressed a doubt as to the correctness of *Krishnappa* v. *Periayaswami* (2) and thought it required to be overruled, as it did not give

(1) [1917] 23 M. L. T. 206.
(2) [1916] 40 Mad. 964=21 M. L. T. 121=5 L. W. 369=32 M. L. J. 532.
(3) [1900] 23 Mad. 361=10 M. L. J. 123 (F. B.).
(4) [1917] 41 Mad. 418=34 M. L. T. 17=7 L. W. 234=(1918) M. W. N. 23=22 M. L. T. 532 (F. B.).

sufficient effect to the plain language of the section. The decision of the Full Bench did not actually overrule *Krishnappa* v. *Periyaswami* (2) as it was not necessary to do so in order to answer the questions referred to the Full Bench. The opinion of the Full Bench was that if a person had been properly impleaded as a defendant in a suit and if the plaintiff abandoned his claim against him and the suit was dismissed as against him, such a person would still be "a defendant against whom a suit has been dismissed" within the explanation to S. 47 of the Civil Precedure Code. In *Krishnappa* v. *Periyaswami* (2) the previous decision in *Venkatapathi Naidu* v. *Subraya Mudali* (5) was quoted with approval. This is a judgment of a single Judge given before the amendment of the Code. With due respect I am unable to follow the learned Judge when he says that a party against whom a claim has been abandoned is clearly not a party to the suit. The mere exoneration of a party does not have the result of making him cease to be a party. It may mean only that the plaintiff does not want a decree against him as was the case in *Ramaswami Sastrulu* v. *Kameswaramma* (3). In my opinion the ground upon which a party is exonerated can never determine whether he continues to be a party to the suit or ceases to be a party, but it will depend entirely upon whether his name has been struck off from or retained on the record. In *Krishnappa* v. *Periyaswami* (2) the learned Judges were evidently impressed with the anomaly that might arise out of the Court having to decide in execution proceedings questions which it had refused to determine in the suit. That might be the consequence of exonerating a person who had a superior title to the principal defendant; but the obvious remedy would be for the Court to adopt the procedure provided in S. 47 of treating the petition in execution as a suit and trying it in the regular manner if it had not already taken the simpler course of removing the party from the record under O. 1, R. 10 (2) at an earlier stage. As the appellant in the present case was a party to the suit and the final decree merely states that he is exonerated without removing his name from the record, I think that his remedy lay only by a petition under S. 47, which was the course he adopted, and as the Subordinate Judge has decided against his claim on a question of fact, no second appeal will lie. The appeal is dismissed with costs of the respondent. We direct each party to bear his own costs in the Courts below.

(5) [1907] 17 M. L. J. 416.

Madhavan Nair, J.—I agree. In *Ramaswami Sastrulu* v. *Kameswaramma* (3) it was decided that the defendant, in whose favour a suit is dismissed, he being exonerated from the suit, must be regarded as a party to the suit within the meaning of S. 244 of the old Code. The Explanation to S. 47 of the present Code, viz.: "For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit" gives effect to this decision; an appeal, therefore, clearly lies in the present case. The question raised before us was, no doubt, left open in the Full Bench decision reported in *Sannamma* v. *Radhabai* (4). But it appears to me that the opinion of the learned Chief Justice is to the effect that, in cases of this description, unless a party's name has been struck out and removed from the records, he would remain "a party to the suit." That has not been done in this case and, therefore, though the 2nd defendant (appellant) has been exonerated in the judgment, in my opinion, he must still be regarded as a party to the suit within the meaning of S. 47, Civil Procedure Code.

As the other question raised is one of fact, I agree that this Civil Miscellaneous Second Appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 485

COUTTS-TROTTER, C. J., AND VISWANATHA SASTRI, J.

S. R. Muthuswami Ayyar and Sons Firm—Plaintiffs—Appellants.

v.

V. V. C. Ramalinga Mudaliar and *others*—Defendants—Respondents.

Appeals Nos. 46 and 99 of 1924 Decided on 21st September 1925, against the decrees of the 2nd Addl. Sub-J., Madura, in O. S. No. 21 of 1922.

Contract—Sale of goods.

Where plaintiff was one of the vendors in the chain of purchasers and was also the last pur-

chaser from defendant of certain goods which were the product of certain mills which cancelled their contract with their first purchaser, and where each purchaser had made an advance, the fact that the plaintiff made default in giving delivery to his vendee at some anterior link in the chain of purchasers does not disentitle him from claiming the return. [P 486 C 2, P 487 C 1]

A. Krishnaswami Aiyar and *K. V. Sesha Aiyangar*—for Appellants.

S. Varadachariar and *N. Chandrasekhara Aiyar*—for Respondents.

Coutts Trotter, C. J.—This appeal has given rise to a very interesting argument none the less so that both Mr. Alladi Krishnaswami Aiyar and Mr. S. Varadachari, who argued the appeal with great ability, agreed in saying that whatever the result of the case was to be, the judgment of the learned Judge, which was a sort of compromise between the case of the plaintiffs and the defendants, could not possibly stand.

The facts are very short: The contract relates to a batch of bales of yarn and the contract in question in this suit is one of 28th August, 1918, for the sale of 86 bales by the defendants as sellers and the plaintiffs as buyers. The plaintiffs paid on the contract an advance of Rs. 6,966 and their claim is for that money with interest.

The point that arises in the appeal is best shown by an account of the history of these bales. There was a sale in the first instance by the Madura Mills to Venkatachalapathy Ayyar & Sons, who sold them to the plaintiffs, who sold to Hanumantha Ayyar, who sold to P. S. N. Muruganathan Chettiar & Sons, who sold to Arumuga Mudaliar & Sons, who again sold to the defendants, who sold in their turn to the plaintiffs, so that the plaintiffs occur twice in the chain. What happened, of course, was that the market was in a highly speculative state and that each one of these sales was made at a profit. But at the end the market price had fallen and the goods were not worth what the various buyers had paid for them. In these circumstances the plaintiffs brought the action in which they did not claim damages based on the difference between the contract and the market price, but agreed to treat the contract as a nullity on the return of the advance they had paid together with interest. The answer of the defendants is that the plaintiffs cannot sue them because they themselves were in default higher up in the chain of buyers and sellers. Plaintiffs did not take delivery from Venkatachalapathy Ayyar or give delivery to Hanumantha Ayyar, and all the contracts down to the goods reaching the defendants were settled in one way or another, the ultimate result being that the bales were never delivered to anybody because the ultimate buyer Venkatachalapathi Ayyar obtained a cancellation of his contract with the Madura Mills and the defendants themselves settled with Arumuga Mudaliar who got some money out of them. The short point put for the defendants is that as the plaintiffs themselves were in default higher up in the chain of buyers and sellers they cannot have any remedy against the defend ants.

The first thing that emerges is that this was in effect a contract for specific goods. The bales are described and their whole history is given. On that it would be possible for Mr. Varadachariar to argue that the contract on its true construction was a contract for specific goods conditional on their reaching the hands of the defendants. But that argument is of no assistance to him, because the position would then be that its impossibility of performance having arisen, though through no fault of the defendants, they could not under Indian law retain the moneys they had received from the plaintiffs by way of advance. I am putting it in favour of the defendants, because, it is quite obvious, that it would be equally arguable to say that as the defendants had agreed to deliver certain bales of yarn they had put themselves in the position of warranting that the sellers in all the preceding links in the chain would fulfil their contract. In order to succeed in this suit, which I have already pointed out is not one for damages, the defendants have to go further and say that by reason of the plaintiff's default to deliver to Hanumantha Ayyar the plaintiffs are disentitled to take the attitude that this contract must be looked at by itself, as they were indirectly responsible by their failure to fulfil the contract with a third person for the default—the inevitable default—of the defendants.

The point is not covered by any direct authority, but it appears to me that the law on the subject is clear. The defendants undertook to deliver bales to the plaintiffs and ran the risk of a break of any one of the links of the chain which

preceded their contract. In my opinion, it is a mere accident that one of those links—it may be the defaulting link—is the plaintiffs themselves. If I am right in my view that the defendants took the risk of all previous contracts being duly executed they took the risk of the breach of the plaintiffs' contracts, either with Venkatachalapathi Ayyar as buyer or with Hanumantha Ayyar as seller, as well as any other of the link. I may further point out that if the defendants were right in their contention, it would be difficult for them to justify the fact that having brought a suit against Arumuga Mudaliar & Sons they settled it on terms whereby they put money into their pockets for this breach. In my opinion, the defendants having contracted to deliver these bales to the plaintiffs they cannot be heard to say that the plaintiffs are out of Court because they had been in default at an earlier stage of the series and broken a contract not with the defendants but with somebody else.

Although we listened to a very able and interesting argument from both the learned vakils, I do not myself think that it is really a matter of very great difficulty, and it seems to me, for the purpose of this case that it may be treated as an accident that the plaintiffs' name recurs twice in the series of buyers and sellers because I think that for the purpose of adjusting the rights of parties each contract must be considered solely by itself.

The result is that the appeal will be allowed with costs throughout and the defendants ordered to return the deposit.

I see no justification for the plaintiff claiming interest at the rate of 12 per cent. and I think the justice of this case will be met if the defendants, who have had the plaintiff's money in their pocket all these years, be ordered to pay interest at the rate of 6 per cent. from the date of default which is the 2nd September. 1921, till do-day and further interest at the rate of 6 per centotill payment.

The other Appeal No. 99 of 1924, will in consequence be dismissed without costs.

Viswanatha Sastri, J.—I agree with my Lord.

Appeal No. 46 of 1924 allowed.
Appeal No. 99 of 1924 dismissed.

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* A. I. R. 1925 Madras 487

RAMESAM, J.

(*Angadi*) *Malappa* and *others*—Appellants.

v.

Neelana Gowdra Kare Gowd and *another*—Respondents.

Second Appeals Nos. 198 and 199 of 1925, decided on 1st December 1925, from the decrees of the Sub-J., Bellary, in Appeal Suit No. 27 of 1924.

(a) *Civil P. C., O. 6, R. 17—No new party added—Amendment dates back the suit.*

Where no party is added, the effect of an amendment of plaint is to date back the suit.

[P. 488, C. 1]

* (b) *Decree—Suit on a pro-note by deceased against a wrong person not in possession of deceased's estate—Decree against such person is not binding on real heir.*

Where in a suit on a pro-note by the deceased the decree is against the person in possession of the deceased's estate it is binding on the real heir, but where there is no such possession, however bona fide the suit, the decree is not binding on the real heir. However honest or bona fide a person's belief may be in bringing such a suit, the danger of allowing it to bind the real heir lies in this consideration, namely, that however false or unjust the suit may be, where the defendant is neither in possession nor an heir, there is really nobody interested in defending the suit: 36 *M. L. J.* 106; 26 *Mad.* 230 and 11 *Mad.* 408, *Foll.* (*Case-law considered.*) [P. 489, C. 1, 2]

V. Govinda Rajachari—for Appellants.
C. S. Narasimachari—for Respondent.

Judgment.—These second appeals arise out of two suits which are connected and similar in nature. The plaintiffs are the same in both the suits and Defendants 2 to 13 are the same in both the suits, only the 1st defendant is different. The facts are:—One Linganna Gowd died about the end of 1915. The Defendants 2 to 13 of these suits, alleging themselves to be the creditors of Kare Gowd, the deceased in respect of certain promissory notes filed a suit, O. S. 176 of 1916, to recover the amount. In that suit there were six defendants. 1st and 2nd defendants were the sisters of Kare Gowd; the 3rd defendant was the sister's son and Defendants 4, 5 and 6 were impleaded as parties on the ground that they were in possession of some of the properties of the deceased. Defendants 1 to 5 never appeared. The 6th defendant alone filed a written statement, but he too did not appear at the time of the trial. A decree was given on the notes. Some time after, the present plaintiffs filed O. S. 697 of

1919 for a declaration that they were the heirs of Lingana Gowd. In that suit the creditors above mentioned and other persons in possession of the properties of the deceased were made parties and they obtained a decree. The decree-holders in that promissory note suit began to execute their decree, and in execution sales the 1st defendant in each of these suits purchased the properties. There was then a scramble for possession. An order was made sustaining the possession of the 1st defendant in each case and referring the plaintiffs to a regular suit. The present two suits are the consequence of those orders.

One technical objection in Second Appeal 199 of 1925 may be disposed of. The suit originally related only to two items. It was filed within one year of the order maintaining the defendant's possession. The plaintiffs then discovered that they omitted another one item. They then applied for amend ment of the plaint which was ordered with the result that the third item to the schedule was added. Even then they did not amend the body of the plaint by putting the number of the execution application relating to that item but otherwise the history of that item, is the same as that of Items 1 and 2. Above all, the application for amendment was not opposed by the defendants: it was ordered without any objection. The effect of that amendment is to date back the suit as no new party is added. In the result the suit is, I think, within time in respect of the three items, and this objection fails.

We now come to the main point in this case, which has been elaborately argued by Mr. Govinda Rajachar for the appellant. He contends that the decree in O. S. No. 176 of 1916 having been obtained by him bona fide against the two sets of defendants in that suit, the first set being believed by him to be the heirs, and the second set being persons in possession, the decree is binding on the present plaintiffs who no doubt have since been held to be the actual heirs of Lingana Gowd.

Incidentally I may mention there is a finding of the Subordinate Judge that the decree in O. S. No. 176 of 1916 has been obtained fraudulently and collusively. But on reading the judgment of the Subordinate Judge his reasons only show that there is collusion between the plaintiff and the 6th defendant. He has not adverted to the case of the 4th and 5th defendants and this has to be settled first before the main question is discussed. As the Subordinate Judge has not discussed this, I think it is open to me to give a finding in Second Appeal.

The 4th, 5th and 6th defendants are brothers. The plaint in O. S. No. 176 of 1916 alleged that all three were in possession of the properties of Linganna Gowd; that Linganna Gowd died in their house; that they usurped Linganna's properties and that they said they would discharge the debts of the deceased. In fact, wherever they are mentioned, they are mentioned together. The 4th and 5th defendants did not appear, but the 6th defendant only appeared saying that he was appointed guardian under Linganna Gowd's Will. Just before the written statement was filed, the plaintiff obtained an injunction against the 6th defendant on the ground that he was trying to alienate the properties. The District Munsiff in his finding also says that Defendants 4 to 6 were in possession of certain properties putting them together and without separating them. On these facts it seems to me to be plain that Defendants 4 to 6 were always acting together and never made a distinction between themselves. Even for appearing in Court they were content that only one of them should apppear, and even that one did not appear at the trial. If the inference of collusion is justified I think it applies to all. I would therefore find that the collusion was between the plaintiff and Defendants 4, 5 and 6. I do not mean to say that the promissory note was really fabricated as the Subordinate Judge seems to think, nor that the suit was filed as a result of collusion. What strikes me is that between framing of the issues and the trial, the plaintiff seems to have squared up the matter with Defendants 4, 5 and 6 and by some arrangement they were to be absent so that he may get a decree very easily, seeing that the other defendants did not appear. To that extent it may be said to be collusive. But beyond this point I am not prepared to go. There is nothing to show that there is any collusion between the plaintiff and Defendants 1 to 3 who were not said to

be in possession of Linganna Gowd's properties. They were sued only as heirs. The question, therefore, now reduces itself to this: whether the decree obtained against them on the ground that they were supposed to be the heirs will now be binding on the real heirs. I do not think it was open to the Courts below to go into the question of the genuineness of the promissory note until this question was decided and I do not think the Subordinate Judge was justified in finding the promissory note as not genuine without deciding the binding nature of the decree. If the decree is binding he cannot go into the question of the genuineness of the promissory note. If the decree is not binding it is unnecessary. Mr. Govinda Rajachar relied on *Gnanambal Ammal* v. *Veerasamy Chetti* (1) to show that the decree is binding on the present plaintiffs. In that case the illegitimate son of the deceased was in possession. Sadasivier, J., who was one of the Judges who decided it has explained it in *Bach Surayya* v. *Toomuloori Chinna Anjaneyal* (2).

As so explained it seems to me that the ratio decidendi of that decision is that where the decree is against the person in possession of the deceased's estate it is binding on the real heir, but where there is no such possession, however bona fide the suit, the decree is not binding on the real heir. The actual decision in 36 *M. L. J.* 106 is against the appellant. Another decision relied upon by the appellant is *Ramasamy Chettiar* v. *Oppilamani Chetti* (3). This was a case in which a wrong legal representative was brought on record in execution. On that ground I think this case does not help the appellant. I entirely agree with the observations of Sadasivier, J., where he says that all cases in which the defendant died pending the suit and a wrong representative was brought on record or cases of death pending execution are irrelevant for considering the point in that case, where the suit itself was filed against a wrong person. This is also the view of Bhashyam Aiyangar, J., in *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar* (4). In that case he observes that the decisions cited by the lower Courts were cases of suits being filed against a wrong person and therefore they had no bearing on the case before him, which was that of a defendant dying after a suit. The cases he so eliminated are those pertinent for our purpose now. One of these is *Subbanna* v. *Venkatakrishnan* (5). That is directly against the appellant and it has never been disapproved. It is referred to with approval in *Manccharam* v. *Kalidas* (6) and I see no reason to dissent from it. However honest or bona fide a person's belief may be in bringing such a suit, the danger of allowing it to bind the real heir lies in this consideration, namely, that however false or unjust the suit may be, where the defendant is neither in possession nor an heir, there is really nobody interested in defending the suit. The *argumentum ab inconvenienti* in the case of an honest plaintiff unable to find the real heir ought not to make us oblivious of this danger. I think the honest plaintiff should rather suffer rather than a judgment obtained by dishonest person bind the heirs who were never parties to the suit. This view was also held in *Shaik Abdulla Saiba* v. *Haji Abdulla* (7) where only one heir was sued. It was held there that it was open to the other heirs to redeem the mortgage.

In *Ambashunkar* v. *Sayad Ali* (8) a money decree was obtained only against one of the heirs and it was held that the decree binds only that heir and the property in possession of that heir. This view was also taken in *Jafru Begam* v. *Amir Muhamad Khan* (9) though it was also held that the heirs also who were not parties could not recover possession of the property without paying their share of the debts. The last three cases are cases of Muhammadan heirs and are not consistent with the decisions in *Muttijan* v. *Ahmed Ally* (10) and *Khurshetbai* v. *Keso Vinayak* (11) where it was held that a suit against one of several Muhammadan heirs must be regarded as an administrative suit and binds others. It is true it is difficult to reconcile all these cases as observed by

(1) [1915] 29 M. L. J. 698.
(2) [1919] 36 M. L. J. 106.
(3) [1910] 33 Mad. 6=19 M. L. J. 671.
(4) [1903] 26 Mad. 230=12 M. L. J. 368.
(5) [1888] 11 Mad. 408.
(6) [1895] 19 Bom. 821.
(7) [1880] 5 Bom. 8.
(8) [1895] 19 Bom. 273.
(9) [1885] 7 All. 822=(1885) A. W. N. 248 (F. B.).
(10) [1882] 8 Cal. 370=10 C. L. R. 346.
(11) [1888] 12 Bom. 101.

Kadir Mohideen Marakkayar v. *Muthukrishna Ayyar* (4). But I prefer the former class. The decision in *Kaliappan Servaikaran* v. *Varadarajulu* (12) is also against the appellant, but I do not want to rely upon it as it seems to go too far and is inconsistent with *Gnanambal Ammal* v. *Veerasami Chetti* (1) and would seem to decide that a decree obtained even against a person in possession would not bind the real heir, a position which I am not prepared to accept and which does not arise in the present case. The case in *Sotish Chunder Lahiri* v. *Nil Comul Lahiry* (13) and *Hari Saran Maitra* v. *Bhubaneshwar Debi* (14) are peculiar as in those cases there was an adoption after the suit divesting the widow and they do not help us. The decision of the Privy Council in the *General Manager of the Raj. Durbhanga* v. *Maharaj Coomar Ramaput Sing* (15) was very much referred to in many of these cases. The head-note shows that the original debtor was sued as defendant and he died after suit. Bhashyam Iyengar, J., observed in 26 *Mad.* 230 that the facts of the report did not support the head-note. The second sentence in the report "they had both taken out execution of their decrees after his death" shows that the head-note is right. Therefore on that ground it has been considered by Sadasivier, J., in 36 *M. L. J.* 106 as distinguishable. I think it is also distinguishable on the ground pointed out by Turner, C. J., in *Siva Bhagiam* v. *Palani Padaiachi* (16) namely, the son denied that he was the legal representative on the ground of his adoption and afterwards turned round and contended that the decree against the widow is not binding on him because his adoption turned out to be invalid. It was held that such a contention ought not to be allowed. The following cases cited by Mr. Narasimhachari I think are also against the appellant: *Premraj* v. *Javarmal* (17), *Baswantapa Shidapa* v. *Ramu and Malkhana* (18), *Ashi Bhusam Dasi* v. *Pelaram Mondel* (19); and *Tanguturi Jaghannadhan* v. *Seshagiri Rao*, Though *Madavarayudu* v. *Subbamma* (20) is a case of the death of the defendant after suit, it also helps the respondent as this would be an a fortiori case; for it was held there that even an honest belief does not allow the bringing in of the wrong representative after suit, a point which it is not necessary for me to decide. The decision in *Sreenivasa Iyengar* v. *Kanthamathi Ammal* (21) follows *Kaliappan Servaikaran* v. *Varadarajulu* (12) and is subject to the same observation I have made about the latter case.

For all these reasons, I think the contention of the appellant must be disallowed and the second appeals dismissed with costs.

Appeal dismissed.

(12) [1910] 33 Mad. 75=19 M. L. J. 651=6 M. L. T. 199.
(13) [1885] 11 Cal. 45.
(14) [1889] 16 Cal. 40=15 I. A. 195=5 Sar. 198 (P. C.).
(15) [1872] 14 M. I. A. 605=17 W R. 459=10 B. L. R. 294=2 Suther. 575=3 Sar. 117 (P. C.).
(16) [1882] 4 Mad. 401.
(17) [1913] 15 Bom. L.R. 41.
(18) [1885] 9 Bom. 86.
(19) [1913] 18 C. W. N. 173=18 C. L. J. 362.
(20) [1916] 31 M. L. J. 222=(1916) 2 M. W. N. 233.
(21) [1910] 33 Mad. 465=7 M. L. T. 157.

A. I. R. 1926 Madras 490

MADHAVAN NAIR, J.

M. Rudrappa—Appellant.

v.

K. Mariappa and *others*—Respondents.

Second Appeal No. 244 of 1922, Decided on 2nd October 1924, against the decree of the Dist. J., Bellary, in A. S. No. 70 of 1921.

Civil P. C., O. 23, R. 1—Although plaintiff's withdrawing without permission precludes him from bringing fresh suit, it does not prevent trial of subject-matter unless res judicata.

Under O. 23 when a plaintiff withdraws a suit without the permission of the Court, he shall be precluded from instituting fresh suit; but that does not prevent the trial of a subject-matter so long such trial is not affected by the principle of res judicata. [P. 492, C. 1]

Advocate-General and *C. S. Venkatachariar*—for Appellant.

V. S. Seshachariar—for Respondents.

Judgment.—The 3rd defendant is the appellant. The plaintiff's suit was substantially for a declaration of the rights of Plaintiffs Nos. 1 to 4 to the plaint lands and also for delivery of possession. During the pendency of the suit Plaintiffs Nos. 1 to 4 sold their rights to Plaintiffs Nos. 5 and 6. According to to the plaintiffs, the suit property origi-

nally belonged to the members of the Racheryla family and it was purchased by the father of Plaintiffs Nos. 1 to 4, one Hampayya of Idukal, on the 3rd of September 1912 under Ex. A. The case of the defendants is that the property belonged to the family of Pompayya and Mallayya, that they took a sale-deed of it from the Racherla family in the name of Mallayya's father-in-law, Harupayya of Idukal, that it was a mere benami transaction, that Pompayya and Mallayya were always in possession, that the lands now belong to Defendants Nos. 4 and 5 the children of Pompayya and Mallayya, and that the lands are now being held by the second defendant on a lease given to him by the first defendant as the guardian of the 4th defendant. The 3rd defendant supported the plea of Defendants Nos. 1 to 4 and also stated that the present suit is not maintainable on account of the order passed in O. S. No. 531 of 1918 on the file of the District Munsiff's Court of Bellary.

Three questions were argued before me; (1) that the purchase by Hampayya of Idukal, the father-in-law of Mallayya was a benami transaction; (2) that Defendants Nos. 4 and 5 are owners of the suit lands by adverse possession and (3) that the present suit is not maintainable. (His Lordship after confirming the finding of the Court below on the first two questions proceeded)

As regards the plea of the 3rd defendant that the present suit is not maintainable on account of the order passed in O. S. No. 531 of 1918, the facts are as follows: The 3rd defendant filed O. S. No. 2 of 1918 on the file of the District Court and attached the plaint lands before judgment; plaintiffs filed a claim petition which was dismissed, they, therefore, filed O. S. No. 531 of 1918 on the 9th of October 1918 for getting the summary order set aside and they filed the present suit on the 8th of July 1919. It will be seen that both these suits were filed within a year of the date of the other on the claim petition. In the present suit there is reference in the plaint to the claim petition and a prayer for a declaration of the rights of the plaintiffs to the plaint lands against all the defendants including the 3rd defendant. After the institution of this suit, the prosecution of O. S. No. 531 of 1918 was obviously unnecessary when the 3rd defendant took the objection that the present suit was not maintainable. O. S. No. 531 of 1918 had already been filed against him and the plaintiffs, therefore, withdrew that suit (O. S. No. 531 of 1918.) It is the order passed when it was withdrawn that is relied upon by the 3rd defendant as a bar to the present suit. The decree, Ex. 44, giving permission to the plaintiffs to withdraw the suit does not say whether it was with liberty or without liberty to bring a fresh suit. As it does not dismiss the suit, I do not think that the plaintiffs are precluded from agitating the question raised in O. S. No. 531 of 1918 in this suit. No doubt under O. 23 when a plaintiff withdraws a suit without the permission of the Court, he shall be precluded from instituting fresh suit; but this does not prevent the trial of a subject-matter so long as such trial is not affected by the principle of res judicata. As Ex. 44 shows that there was no final adjudication of the rights forming the subject-matter of that suit, I think that the plaintiffs may claim that the summary order passed on their claim petition should be set aside in the present suit. The declaration of title claimed by the plaintiffs in this suit amounts to a setting aside of the order on the claim petition. I have already stated that both this suit as well as O. S. No. 531 of 1918 were filed within a year of the date of the order on the claim petition. The plaintiffs elected to proceed with this suit involving the same relief after dropping the other. I may say in this connexion O. S. No. 2 of 1918, in connexion with which the plaint lands were attached by the 3rd defendant was dismissed after the filing of this suit. I agree with the learned District Judge that the present suit is not barred by the order in O. S. No. 531 of 1918.

I dismiss the second appeal with costs of Defendants Nos. 9 and 10. The memorandum of objections filed by Respondents Nos. 1 and 2 raises the same question dealt with in the second appeal. It is also dismissed with costs of Respondents Nos. 9 and 10.

Appeal dismissed.

A. I. R. 1926 Madras 492 (1)

WALLACE AND MADHAVAN NAIR, JJ.

Deputy Collector, Cocanada—Appellant.

v.

Maharaja of Pittapur—Respondent.

Appeal No. 391 of 1923, Decided on 10th December 1925.

Land Acquisition Act (1 *of* 1894), *S.* 31 (2), *Prov.* 3 — *Excess payment wrongfully made—Party entitled is not bound to recover it from the person to whom it has been paid.*

The 3rd proviso to S. 31 (2) only comes into operation when S. 31 (2) itself has been obeyed, and does not apply to a case of excess payment wrongfully made [7 *Cal.* 388 (*P. C.*), *Foll*]. It is not right that Government should throw on a party, whose property it has compulsorily acquired, the risk and burden of recovering the compensation from some one else to whom Government has wrongfully paid it.

C. V. Ananthakrishna Iyer—for Applt.

A. Krishnasami Iyer—for Respondent.

Judgment.—The award of the District Court directed that the amount awarded by it should be paid to each party. We think this is a clear direction that Government shall pay to each party the amount awarded to him. That is the essential motive and meaning of an award and Government is bound, prima facie, to supply the money required to pay each party the amount of compensation due to him.

In the present case unfortunately, the Deputy Collector had not obeyed S. 31 of the Land Acquisition Act, and instead of depositing in Court the amount to be apportioned, paid over to the tenants the amount awarded by him to them. Consequently for the Zamindar's share of the total compensation, the balance due to him was not available in Court for payment over to him. The Government view is that the Zamindar must recover it from the tenants to whom it was paid in excess. The Government pleader calls in aid the 3rd proviso to S. 31 (2). We do not think this proviso has any application. It only comes into operation when S. 31 (2) itself has been obeyed, and does not apply to a case of excess payment wrongfully made: (See *Raja Nilomini Singh Deo Bahadur* v. *Ram Bandhu Rai* (1).

We think that Government was bound, under the provisoins of the Land Acquisition Act, to have ready in the District Court the amount awarded by the referring officer, for distribution according to the decision of the District Court. If the District Court had in a proper reference increased the amount of compensation Government is bound to pay into Court the amount of increased compensation. The principle is not altered when an apportionment of the compensation amount is increased, and if the referring officer had obeyed S. 31, the necessary money would have been there. It is not right that Government should throw on a party, whose property it has compulsorily acquired the risk and burden of recovering the compensation from some one else to whom Governmens has wrongfully paid it. Whether Government can by appropriate proceedings recover the excess from those to whom it was paid is for Government to consider. We are not prepared at this stage to grant time to Government, as requested by the Government Pleader, to appeal against the award of the District Court. It seems to us a proper award and the appeal time has long ago expired. We see no reason to interfere with the order of the lower Court and dismiss the appeal with costs. *Appeal dismissed.*

(1) [1881] 7 Cal.388=8 I.A.90=10C.L.R.393 (P.C.).

A. I. R. 1926 Madras 492 (2)

DEVADOSS AND WALLER, JJ.

The Madura Hindu Permanent Fund Limited—Appellants.

v.

Kamakshi Ammal and *another* — Respondents.

Appeal No. 74 of 1924 Decided on 13th Nov. 1925, against judgment and decree of Phillips, J., in S. A. No. 1450 of 1921.

(a) *Succession Act, S. 75—Hindu Will made in mofussil—Principle of section does not apply.*

Even if the principle of S. 75 is to be applied to Hindu Wills, it cannot be applied to a Will executed in the mofussil to which the Hindu Wills Act does not apply. [P. 493, C. 1]

(b) *Hindu Law — Will — Devise to testator's father and his male heirs—Estate in tail male is created—Devise fails as such estate is unknown to Hindu Law.*

A devise to " My natural father and his male heirs " is one to the male heirs in succession. When a person bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession. The words, therefore, create an estate-in-tail in favour of male heirs and such an estate is unknown to Hindu Law and such bequests cannot, therefore, be valid. [P. 493, C. 2]

(c) *Hindu Law—Wills—Construction — Devise to testator's father and his male heirs — Court cannot give the property absolutely to the father.*

When a person devises property to a certain person and certain heirs and when he lower down, instead of repeating the expression, uses the expression ' aforesaid person and his heirs ' it cannot

be said that he intended to change the course of the devolution of the property already provided for in the preceding clause of the Will: *Doe* v. *Fyldes*, (2 *Confer* 833); *Foll.*

So, when a testator devises property to his father and his male heirs, the Court is not justified in creating a new Will for the testator by giving the property absolutely to the father and overlooking the intention of the testator to bequeath the property to father and his male heirs. [P 493 C 2; P 494 C 1]

K. V. Krishnaswami Iyer and *K. Raja Iyer*—for Appellants.

T. M. Krishnasami Iyer and *T. M. Ramaswami Iyer*—for Respondents.

Judgment.—This appeal is against the judgment of our learned brother Phillips, J., and relates to the construction of a Will. The clause of the Will to be construed reads as follows:

The undermentioned house. . . and all the rights accruing thereunder, shall after me, devolve absolutely on my natural father Pitchuvayyar and his male heirs. My aforesaid natural father and heirs shall maintain my adoptive mother Kamakshi Ammal during her life and shall perform the obsequies to be done to her and to me; and the aforesaid Pichuvayyar and his heirs shall get the undermentioned house belonging to me, absolutely with right to alienate the same by gift, exchange, sale, etc.

It was held by Mr. Justice Phillips that the will created an estate unknown to Hindu Law and, therefore, the disposition was invalid.

The first contention of Mr. K. V. Krishnaswami Iyer for the appellant is that there are two dispositions in the Will and as they are inconsistent dispositions they must be construed in such a way as not to give rise to an intestacy. The Will does not contain two distinct dispositions, but only one disposition in favour of the father and his male heirs in the first clause; and in the second clause a condition is attached as to what should be done for the maintenance of the adoptive mother and for the performance of the funerals. The second clause is only explanatory of the first and does not contain a disposition different from that contained in the first. In this view it is unnecessary to consider whether the principle of S 75 of the Indian Succession Act should be applied to the case of a Hindu Will. S. 75 has not been enacted in the Hindu Wills Act, and even if the principle of S. 75 is to be applied to Hindu Wills it cannot be applied to a Will executed in the moffusil to which the Hindu Wills Act does not apply. It is unnecessary to consider this question further.

The real question is whether the words "My natural father Pitchuvayyar and the male heirs" mean, Pichuvayyar and the male heirs in succession.

The contention of Mr. K. V. Krishnaswamy Iyer is, that the Tamil words *Yen janakapitha, Pichuvayyar Avergalum, Avarudaya Anvarsugalum* . . . should not be translated as: 'my father Pichuvayyar and his heirs male.' But the correct translation of *Anvarsugal* is only "male heirs" and when a person bequeaths property to some one and his male heirs, he means that the property should devolve upon the legatee and the male heirs in succession. The words therefore create an estate-in-tail in favour of male heirs, and according to the principle laid down in the well-known Tagore case, such an estate is unknown to Hindu Law, and such bequests cannot therefore be valid.

The next contention of Mr. K. V. Krishnaswamy Iyer is that the first clause of the Will should be interpreted in the light of the second clause. In the first clause the words are: "my natural father and his male heirs;" and in the second, the words are "my aforesaid natural father and heirs" and lower down "aforesaid Pichuvayyar and his heirs" Strong reliance is placed on the expression "Pichuvayyar and his heirs" and it is said that the testator meant to dispose of the property to "Pichuvayyar and his heirs." This argument overlooks the use of the expression "aforesaid." When a person devises property to a certain person and certain heirs and when he lower down, instead of repeating the expression uses the expression "aforesaid person and his heirs" it cannot be said that he intended to change the course of the devolution of the property already provided for in the proceding clause of the Will. The observations of Lord Mansfield in *Doe* v. *Fyldes* (1) apply to this case. The learned Lord observes:

If the word 'heirs' is so used in the first place it must be so used in the several other places that follow. Nothing is to be implied from the additional words 'for ever' because that expression is repeated by the testatrix in the devise of each of the estates tail. The nature of the provision affords a strong argument that she did not mean to change the sense of the word 'heirs' in this part of the Will and to give a fee simple.

In that case the testatrix bequeathed her property to her eldest daughter Alice Scolefield and the heirs of her body lawfully to be begotten for ever, and in the

(1) [1778] 98 E.R. 1387=2 Confer 833.

latter portion of the Will repeated the expression "the heirs of Alice Scolefield" three times in the Will. The question was whether the words "the heirs of Alice Scolefield" thrice repeated relative to the redemption of the term vested in the executors shall be construed to refer to the special designation of the heirs, to whom the estate is devised in the beginning of the Will or to introduce a new and more general denomination of heirs, and to amount to a revocation of the express estate tail given in the beginning of the Will. Lord Mansfield held: that the expression "heirs of Alice Scolefield", though thrice repeated, did not create a fresh bequest in favour of the heirs of Alice Scolefield but left the bequest in favour of 'Alice Scolefield and the heirs of her body to be lawfully begotten unaffected'. In this case the testator devises the property to his' father and his male heirs' and in a later clause uses the expression 'father and his heirs.'

It cannot be said that the later clause has in any way changed the nature of the disposition or the nature of the estate created in the previous clause.

Mr. K. V Krishnaswamy Iyer tried to get over the aforesaid decision of Lord Mansfield in *Doe* v. *Fyldes* (1) by contending that none of the text-books, except Jarman on Wills, gives any reference to this case. But we find that this case was referred to as an authority though on another point by Crompton, J., in *Good* v. *Good* (2).

It is next contended by Mr. K. V. Krishnaswamy Iyer that even if the bequest in favour of heirs be held to be bad the bequest in favour of the father should be held to be good. This contention is against the principle of the decision in the Tagore case. When a testator devises property to his father and his male heirs, the Court is not justified in creating a new Will for the testator by giving the property absolutely to the father and overlooking the intention of the testator to bequeath the property to father and his male heirs. This is not a case where Pichuvayyar is given a life estate and the remainder over to the male heirs. The bequest is to the father and the male heirs. The Court would not be justified in treating the bequest as one to the father alone. The judgment appealed against is right. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(2) [1857] 119 E.R. 1256=7 E. and B. 296.

* A. I. R. 1926 Madras 494

DEVADOSS AND WALLER, JJ.

Racharla Narayanappa—Petitioner—Appellant.

v.

Kondigi Bheemappa and *others*—Respondents.

Civil Miscellaneous Appeal No. 49 of 1923, Decided on 23rd September 1925, from an order of the Dist. J., Anantapur, in Insolvency Petition No. 4 of 1922.

* *Provincial Insolvency Act* (5 *of* 1920), *S.* 25 —*For adjudication enquiry into bona fides need not be made.*

When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the Insolvency Law. And when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his liabilities. No enquiry need be made as to whether some of the debts mentioned in his petition are real debts. An enquiry into the bona fides of the insolvent should be held when he comes up for discharge and not before.

[P. 494, C. 2; P. 495, C. 1]

B. Somayya—for Appellant.

C. V. Ananthakrishna Iyer—for Respondent.

Judgment.—This is an appeal against the order of the District Judge of Anantapur, dismissing the appellant's petition to be adjudicated an insolvent. The appellant stated in his petition that he had debts to the extent of Rs. 25,018-4-0 and that his properties were worth about Rs. 10,000; and he further stated that he was unable to meet his liabilities The learned Judge dismissed his application on the ground that he was not satisfied that the petitioner was unable to pay his debts. When a person presents a petition to be adjudicated an insolvent that petition itself is treated as an act of bankruptcy under the Insolvency Law. And when he says that his liabilities are more than his assets, that must be taken as some evidence that he is unable to meet his liabilities.

Under S. 24 of the Provincial Insolvency Act, where a debtor is the petitioner, he shall be required to furnish such proof as to satisfy the Court that there are prima facie grounds for believing the same. Under S. 25, the Court shall dismiss the petition if it is not satisfied of his right to present the petition. In this case, the learned Judge has taken evidence to consider whether

some of the debts mentioned in his petition are real debts. Such an enquiry should not be held for the purpose of considering whether the application of the appellant should be granted or not. An enquiry into the bona fides of the insolvent should be held when he comes up for discharge and not before. What the Court has to do is to see whether prima facie the person applying to be adjudicated insolvent is unable to pay his debts. It cannot be said in this case that the appellant was able to pay his debts at the time when he made his application to the lower Court. On the evidence on record, we do not think there are no prima facie grounds for believing that the appellant is unable to pay his debts.

We set aside the order of the District Judge and remand the petition for fresh disposal.

We make no order as to costs,

Appeal allowed.

A. I. R. 1926 Madras 495

PHILLIPS, J.

Muthusami Iyer—Appellant.

v.

Dharma Raja—Respondent.

Second Appeal No. 937 of 1923, Decided on 9th December 1925, from the decree of the Sub-J., Ramnad, in A. S. No. 124 of 1921.

(a) *Evidence Act, S. 92—Oral agreement entitling a vendee to retain portion of consideration cannot be proved.*

An oral agreement by which a certain sum due under a sale deed was not to be payable until the vendee got possession of the whole land cannot be proved under S. 92. [P. 495, C. 2]

(b) *T. P. Act, S. 55 (2)—No express provision for actual possssion in sale deed—Such covenant cannot be implied.*

In the absence of any express covenant for actual possession in a sale deed, there is nothing in S. 55 (2) to justify such a contract being implied, which refers to the interest professed to be transferred. [P. 496, C. 1]

K. V. Krishnaswami Iyer—for Appellant.

K. C. Champakesa Iyengar—for Respondent.

Judgment.—The adoptive father of plaintiff-appellant in this case sold certain property to the defendant in 1912. One item of property was apparently in the possession of one Veerappa Naidu and, as a matter of fact, the defendant did not get possession of that item until after filing a suit against him and the plaintiff, possession being obtained shortly after the present suit was filed. One item of consideration for the sale deed was a sum of Rs. 400 payable to plaintiff's creditor, Muthayya Chetti and this amount was admittedly not paid by the defendant. Muthayya Chetty eventually filed a suit against the plaintiff and obtained a decree for Rs. 340 in 1917. The plaintiff now seeks to recover from the defendant damages which he has suffered owing to the defendant's non-payment of this portion of the sale price. The District Munsiff gave a decree for the amount, but the Subordinate Judge in appeal held that inasmuch as the father of the plaintiff had contracted to give possession to the defendant of all the items sold and had failed to give possession of one item, plaintiff was only entitled to a refund of the purchase money with interest from the date on which the defendant actually got into possession. From that amount he allowed the defendant to deduct Rs. 150 said to have been incurred by him for the expenses of his suit against Veerappa Nayudu.

In coming to his conclusion he has relied partly on an oral agreement pleaded by the defendant namely, that Rupees 400, due under the sale deed, was not to be payable until the defendant got possession of the whole land. This oral agreement is inconsistent with the terms of the registered sale deed and consequently under S. 92 of the Evidence Act cannot be proved in this case. On this ground alone it might be held that the Subordinate Judge's finding is not justifiable, but he has also relied on the provisions af S. 55, Cl. 2 of the Transfer of Property Act. That runs as follows:

The seller shall be deemed to contract with the buyer that the interest which the seller professed to transfer to the buyer subsists.

The Subordinate Judge has held that under this clause the sale deed executed by the father of the plaintiff must be deemed to contain a contract to put the defendant in possession of the property. There is no such contract in terms in the document and the provision that the vendee shall be put into possession cannot be said to come under S. 55, Cl. 2, which refers to the interest professed to be transferred. In this case the interest which the plaintiff's father

professed to transfer was the absolute right to the property. It has been found that that right was subsisting on the date of sale and that the plaintiff's father had power to transfer it. The discussion, therefore, in the Subordinate Judge's judgment, with reference to this contract to put the defendant in possession is hardly relevant to the present suit.

It is probable that the defendant might have counter-claimed for damages sustained by him by alleging that the plaintiff's father has committed breach of contract by not putting the defendant in possession of the land. It appears that the parties were aware that a third person was in possession of one item although there is no reference to this fact in the sale deed. The defendant bought the properties without any covenant for actual possession and there is nothing in S. 55 to justify such a contract being implied. As a matter of fact the defendant has not pleaded a set-off in terms and has not proved breach of contract by the plaintiff. We have therefore only to consider the question whether the plaintiff is entitled to the damages claimed by him. The plaintiff has asked for the suit amount to be made a charge on the plaint property, and from that it might be inferred that he was seeking to recover his unpaid purchase money ; but on a perusal of the plaint it is clear that what he is asking for is damages sustained by him in consequence of the defendant's non-payment of the purchase money and it is only through an erronous view of his rights that he has asked for a charge.

A contention is raised as to the quantum of damages, and it is suggested for the defendant that the plaintiff colluded with the creditor, Muthayya Chetti, and allowed a decree for an excess amount to be passed. The Subordinate Judge has found that the agreement to pay compound interest alleged by the plaintiff is untrue but no such allegation was made by the defendant and the finding is certainly vitiated by the fact that it is based on a wrong principle of law. The plaintiff's father admittedly paid a certain sum towards Muthayya Chetti's debt and then the arrangement to pay compound interest is said to have been arrived at because the plaintiff's father wanted further time to pay the balance. The Subordinate Judge referring to this says :

An ordinary prudent man would not, after having paid Rs. 162, have agreed to pay compound interest when he had three years' time to pay the amount.

He seems to be under the impression that a debtor is not bound to pay his debts until the last day of limitation for filing a suit against him, which is, to say the least of it, a most extraordinary proposition. The agreement is spoken to by the witnesses and seems to be in accordance with probabilities, and it is not the subject of any specific issue. There seems to be no reason for holding that this amount decreed against the plaintiff was due to collusion, and consequently that is the amount of damages the plaintiff has sustained.

The appeal must, therefore, be allowed and the District Munsiff's decree restored except that the amount will not be made a charge on the suit property. The plaintiff wiil get his costs both here and in the lower appellate Court.

Appeal allowed.

A. I. R. 1926 Madras 496

RAMESAM, J.

(*Tadanki*) *Brahmayya* and *others*—Defendants 1 and 2—Appellants.

v.

Puvvula Madhuram and *another*—Plaintiff and 3rd Defendant—Respondents.

Second Appeal No. 104 of 1924, Decided on 18th November 1925, from the decree of the Dist. J. of Kistna at Masulipatam in A. S. No. 11 of 1922.

(*a*) *Inam—Service inam—Sarva dambala inam.*

The phrase "sarva dambala inam" shows only that no money payment is insisted on the holding of the inam, but it does not necessarily show that it was not a service inam. [P. 498, C. 1]

(*b*) *Religious Endowment—De facto dharmakartha of a temple cannot dismiss dancing-girls and appoint others in their place.*

A de facto dharmakartha of the temple is not entitled to call on the dancing girls to whom lands were granted as a sarva dambala inam land before the Permanent Settlement for rendering service,to perform service and on default to dismiss them and appoint others in their place. The position might be different if at the time of dismissal, the de facto trustee had completed his right as trustee by prescription. [P. 499, C. 2, P. 500, C. 1]

S. Varadachari and *V. Krishna Mohan*—for Appellants.

V. Ramadoss—for Respondents.

Judgment.—The facts out of which this second appeal arises may be stated as follows:

In the Zemindari of Telaprolu there is a village called Pamulapadu. In the village there is a temple dedicated to Sri Chidanandeswara Swami and it is said that the suit inam was granted to certain dancing-girls long before the permanent settlement for the purpose of rendering service in the temple. In the year 1904 the Tahsildar of Nuzwid started an enquiry on the question whether the services were being properly performed by the dancing-girls in the temple and whether therefore the Government ought not to resume the inam. The correspondence dealing with this matter consists of Exs. C to G during the years 1904 and 1905. Finally the Government placed the inam under attachment and began to collect assessment on the inam. Ex. G is the final order of the Collector. It appears from it that at that time, services were not being rendered for the preceding 15 years. The manager of the Telaprolu Estate says in Ex. F: "There is little or no probability of the kalyanothsavam in the Pamulapadu temple being performed in the near future." Ex. G. shows that the service was not rendered by the dancing-girls for some time because the utsavam at which such services had to be rendered was not performed. They were willing to render service if the utsavam is resumed. In 1911 the Zemindar of Telaprolu executed a deed of gift (Ex. Q) giving the suit village of Pamulapadu in favour of his brother-in-law Gangadara Ram Rao and his sons. The gift was followed by a sub division and now the donee is regarded as the proprietor of the village paying a separate peishkush. He then began to take steps to get the services in the temple properly rendered and to revive the kalyanothsavam. He issued two notices on 23rd August 1912 and 21st October 1912 to the representatives of the service holders, namely, the present Defendants 2 and 3. To these they replied by Exs. H and J denying that the land was a service inam and that they were liable to render service in kalyanothsavam, etc., festivals. After this denial the proprietor appointed the plaintiff for the purpose of rendering service in the temple. This was in June 1913. Meanwhile in 1913 by Ex. K the Government released the inam from attachment and informed the trustee that he could take such action as he thought fit to secure the revival of the services. In 1915 by Ex. P the proprietor called upon the Defendants 2 and 3 to render services in the temple. In this notice he says that as he entertained some doubt as to the legality of the prior notices, a fresh notice was issued. He also calls upon them to appear before the Tanadar of Pamulapadu on 8th May 1915 to show cause why they should not be dismissed from service. He entertained doubts as to the legality of the earlier notices apparently because they were issued at a time when the inam was under the attachment of Government and when the Government was collecting assessment on the inam. Soon after the notice, Ex. P, the proprietor seems to have filed a suit to recover possession of the suit inam. That suit was dismissed on the ground that the right of resumption was not in the zemindar but in the Government and that the proper person to recover the inam from the defendants would be the new appointee to the office. Thereupon the present plaintiff who was appointed in June 1913, filed this suit in August 1919. Both the lower Courts decreed the suit and the defendants have filed this second appeal.

Mr. Varadachari who appears for the appellants raises four points:

1. Whether the inam was a service inam held on condition of rendering service in the temple?
2. Whether the donee under Ex. Q was the lawful dharmakartha of the temple and was entitled to call upon the defendants to perform service and dismiss them on disobedience and appoint the plaintiff or other person to the office.
3. Whether the plaintiff is entitled to mesne profits.
4. Whether the inam consisted of melvaram only or both melvaram and kudivaram.

On the first question as to the nature of the inam I will refer to the documents not with a view to give my finding but merely to show that probably there was a genuine doubt in the minds of the defendants as to the nature of the inam. The earliest document, Ex. XIV, which is an extract from Oake's Register of Inams for Fasli 1797, shows that the suit inam was described as mokhasa. It was granted to one Balaguruvi in Fasli 1172 by Narasimha Appa Rao, the Zamindar of Nuzvid. The other documents, Ex. XIV series, also extracts from Oake's Register of Inams, show that in the case of other service inams they were not

shown as mokhasa but as inam expressly describing the service. For instance, in Exs. XIV, XIV (b), XIV (e) and XIV (h), the inam is described as inam to carpenters and blacksmiths for repairing the vahanams of Swamivaru. In Exs. XIV (c), XIV (d) and XIV (f) the services are described as Bajanthri, etc., for the performance of Utsavams iu Ayilur Swami Temple. Then another set of documents Exs. II, III and IV were also relied on. In Ex. II the suit inam appears under the head "Sarva Dambala Inams;" so also in Exs. III and IV. The phrase "Sarva Dambala Inam" was also relied on in the lower Courts and before me to show that it was an absolute inam and not subject to any service. I am merely expressing an opinion and not giving a finding on the issue. I rather think that the phrase "Sarva Dambala Inam" was only meant to show that no money payment was insisted on the holding of the inam and it does not necessarily show that it was not a service inam and this opinion is supported by the contents of Ex. XII. The inam came up before the Inam Commissioner in 1860 for consideration, and it was held that the land was inam held for Devadayam service and it was confirmed to the then holders nnder R. III, Cl. I to be held so long as the service was rendered. Of course no quit rent was imposed. In Cl. 8 it is stated that the inam is held for service as dancing-girls. Govindamma, the grandmother of the present defendants, was then mentioned as 'the present owner.' It is said she was aged 70 and the present 2nd and 3rd defendants' names do not appear as members of the family. Exs. V, VI, VII and VIII are cowls relating to inams in the suit village after the inam settlement, and here again the inam is described under the heading "Sarva Dambala." I need not make any further comment on this phrase "Sarva Dambala," as I have expressed my opinion in the matter.

In 1905 the Defendants 2 and 3 seem to have expressed their willingness to render service when the Kalyanotsavam was performed. (Vide Ex. G.). Somehow they did not then raise the question as to the nature of the tenure. But when they thought that they may well raise the question as to the nature of the tenure on which the inam was held they send Exs. H, J, in reply to the notices of the proprietor, denying that it was a service inam. In Ex. L, however, they seem to be more guarded in their tone than in Exs. H and J, their previous replies. In Ex. L they say:

> We shall act in whatever manner the Court may decide. As it is a dispute relating to liability to do service, we will not get any justice by an enquiry by your officials. I, therefore, pray that justice may be got rendered through Court. We have, therefore, submitted this."

It seems that they would not be satisfied with the result of an enqniry bp the Tanadar betore whom they were asked to appear by Ex. L. They wanted the decision of a Court. If the Court was of opinion that it was a service tenure, they were willing to render service. Though this intention was not expressed in so many words it is clear from their attitude in their written statement in the suit that such was their intention. In para. 4 they say:

> While the defendants are raising bona fide contentions to the effect that it is not service inam, he (the dharmakartha) should get it established, through Court, that the suit inam is a service inam and then he should give the defendants an opportunity to serve; and if they (defendants) fail to do so, he should get them (defendants) removed from service through Court and should appoint another. The appointment of plaintiff made without having recourse to the above procedure is not proper. If in this suit the Court is of opinion that it is a service inam, the defendants are ready to do service or get service done."

Therefore their willingness to render service after decision by the Court is expressly stated.

I now pass on to the second point raised by Mr. Varadachari, namely, whether the proprietor is the lawful dharmakartha of the suit temple. The deed of gift, Ex. Q, does not expressly purport to transfer the legal rights of trusteeship in respect of the suit temple in the village to the donee. It is unnecessary to observe that even if it purports so to transfer it is invalid: see *Rajah Vurmah Valia* v. *Ravi Vurmah Kunhi Kutty* (1). It may be that there was an impression in the minds of the donor and the donee that the trusteeship has passed to the donee along with the gift. The Courts below, in dealing with this point, find that the archakas in performing the Svasthivachakam are now mentioning the name of Gangadhara Rama Rao. This, of course, is a finding

(1) [1876] 1 Mad. 235=4 I. A. 76=3 Sutter. 382=3 Sar. 687 (P. C.).

of fact. But if there is no valid transfer of the trusteeship the fact that the archakas thought that the present proprietor of the village was the dharmakartha and mentioned his name at the time of Svasthivachakam does not make him a dharmakartha. It is said that the Government recognized the present properietor as the Dharmakartha, but this is not very clear. The District Munsif erred in saying that in Exs. C. to K the Government recognized the donee as the dharmakartha; for Exs. C to G were addressed to the Zamindar of Telaprolu. Exs. H and J had nothing to do with Government. Only Ex. K was addressed to the present proprietor by Government. But it can scarcely be relied on as the considered opinion of the Government on a question of this kind which was never raised before them and was neither discussed nor adverted to in the letter, the only object of which was to release the inam from attachment. It is also said that the defendants themselves recognized the present preprietor as Dharmakartha in Exs. H and J. But Exs. H and J are replies to notices in which the proprietor described himself as dharmakartha. The same remark applies to Ex. L. All these documents show that the defendants merely repeated the description which the proprietor applied to himself. But, even assuming that they intended anything more, their admission that he was dharmakartha, cannot make him dharmakartha, if otherwise he was not the dharmakartha. These transactions would not estop them from raising that point; for it cannot be said that these letters induced him to change his position for the worse. It follows that the proprietor is not the de jure dharmakartha of the temple. Mr. Ramadas says that even if he was not the de jure dharmakartha he was certainly the de facto dharmakartha, and therefore, he was entitled to appoint. He relies on the decision in *Banarsi* v. *Altaf Husain* (2), *Muiz-ud-din* v. *Mahomed Ikhlaq* (3), an unreported judgment in S. A. No. 107 of 1923 and the observations at page 82 in *Sheo Shankar Gir* v. *Ramshewak Chowdhri* (4).

In *Benarsi* v. *Altaf Husain* (2) it was held that the de facto muthavalli of a mosque can sue to remove a person who is infringing on the rights of the mosque and the defendant who is infringing on the rights of the mosque could not challenge the position of the de facto muthavalli. In *Muiz-ud-din* v. *Mahomed Ikhlaq* (3), it was held that the son of the prior de facto muthavalli could obtain refund of a payment made by the father provided he credits it to the trust and uses it for the purpose of the trust. In S. A. No. 107 of 1923 it appears that the point taken for the defendants was that the plaintiff was not the sole trustee. It was found that the plaintiff's father and grandfather were looking after the pallivasal from 1869 onwards and though it was not very clear it looked as if the plaintiff was one of the persons who might have acquired the trusteeship by prescription or by exercising the right for a long time, i. e., from 1867 onwards. But the suit was only against the tenant for possession of the site leased. The principle in all these three cases seems to be that a trust shall not fail for want of a lawful trustee and that where the defendant is doing something unlawful or something to the detriment of the trust even a de facto trustee should be allowed to maintain a suit for the benefit of the trust or institution. In the present case the suit is not on behalf of the trust or institution, nor is there any question of a de facto manager maintaining a suit on behalf of the trust. All that can be said is that the de facto dharmakartha called upon the defendants to perform the services, dismissed them and appointed the plaintiff in the interests of the institution. The question therefore is whether the de facto dharmakartha can put an end to the tenure which was being held by the defendants and give it to another. I therefore think that these decisions relied on do not apply here. In *Sheo Shankar Gir* v. *Ramshewak Chowdhri* (4) it was held that where there was an alienation on behalf of an institution for the purpose of the institution, the alienee dealing with the de facto manager bona fide ought to be protected, and reference was made to *Hanuman Persaud Pandey* v. *Babooee Munraj Kunweree* (5). It has only to be observed

(2) [1921] 63 I.C. 171.
(3) A.I.R. 1924 All. 59.
(4) [1896] 24 Cal. 77.
(5) [1856] 6 M.I.A. 393=18 W.R. 81 Foot-Note=2 Suther. 29=1 Sar. 552 (P. C.).

that no question of that kind arises in the present case.

I, therefore, think that the proprietor was not entitled to dismiss the defendants and appoint the plaintiff. I have no doubt that by 1923 or 1924, by adverse possession the present proprietor has completed his right as trustee by prescription and probably he would be entitled to call upon the defendants to render service hereafter. But it cannot be said that he was entitled to do this in 1912 when he issued notices to which Exs. H and J were replies or in 1915 when he issued Ex. P, and I may express the hope that the defendants would not take the risk of denying their liability to service hereafter if the present proprietor calls upon them to render services again. But, so far as the present suit is concerned, on this ground, I think the appeal has to be allowed.

Though no doubt their attitude in Exs. H and J may be said to be the cause of the whole trouble they assumed a much better attitude in Ex. L and also in the written statement and though it looks as if they have succeeded by a fluke which somewhat looks like a technical point, there has been no misconduct during the trial of the case. With regard to the nature of the tenure, as I have set forth in the beginning of this judgment, I think there is very good justification for their being anxious to have the decision of the Court on the nature of the inam, and it cannot be said that their conduct was contumacious whatever might be said as to the result of their denial that the suit land is service inam. I express no opinion on the point, i. e. how far their attitude while denying the service tenure would have helped them, if the suit is otherwise maintainable. Seeing that they have succeeded on the other point I do not see why they should be deprived of their costs. It is unnecessary to express any opinion on the third and fourth points raised by Mr. Varadachari.

The result is this appeal is allowed and the suit is dismissed with costs throughout.

Appeal allowed.

✻ A. I. R. 1926 Madras 500

ODGERS AND MADHAVAN NAIR, JJ.

A. Ramanathan Chettiar and *others*—Defendants—Appellants.

v.

Kanagasabapathy Chettiar and *others*—Plaintiffs—Respondents.

Appeals Nos. 54 and 80 of 1922, Decided on 31st July 1925, against the decree of the Dist. J., Madura, in Original Suit No. 2 of 1921.

✻ (a) *Trust — Insolvent ought not to be appointed to the position of trust — Absence of loss during his management does not make appointment proper.*

An insolvent ought not to be appointed to a position of trust. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy; and besides a man who has not shown prudence in managing his own affairs is not likely to be successful in managing those of other people. If an improper choice is made by a person in a fiduciary capacity it seems to be wholly wrong to say that after all the choice was not improper because as it turns out that no material damage has been done to the institution through the improper appointment. [P 503 C 2]

✻ (b) *Religious Endowments Act* (20 *of* 1863) *—Temple Committee—Appointment as manager of undischarged insolvent and one who was removed from Government service being improper, Committee ought to be removed.*

The members of a Temple Committee under the Religious Endowments Act appointed as Manager of an institution which was under their charge, and which yielded a yearly income of two lakhs of rupees, a person who was an undischarged insolvent and who had been removed from Government service for a flagrant breach of the rules regulating the conduct of Government servants and imposed certain conditions on the appointment, namely that the manager should hold office for five years, that he should furnish security for Rs. 10,000 and that he should as soon as possible file a scheme suit:

Held: that the appointment was improper and that by such appointment they had rendered themselves unfit to carry out the responsible duties with which they were entrusted and that consequently they were rightly removed from their office by the District Judge.

Held: further that the conditions did not make any difference as they were illusory. [P 503 C 2]

T. Rangachariar, T. Nallasivam Pillai, C. S. Venkatachariar, A. Krishnaswamy Aiyar and *C. A. Seshagiri Sastri* — for Appellants.

T. R. Venkatarama Sastriar, K. V. Krishnaswami Aiyar and *T. M. Ramaswamy Aiyar*—for Respondents.

Judgment.—In the former of these appeals Defendants 2 and 4 are the appellants, but Mr. T. Rangachariar informed us that he is only instructed

to appear for the 4th defendant and we have consequently heard no argument on behalf of the 2nd defendant. In A. S. No. 80, 5th defendant is the appellant and appears by Mr. C. S. Venkatachariar. The suits were brought by certain worshippers in the temple of Sri Minakshi Sundareswaral and other connected temples comprised in what is commonly known as the "Madura etc., D vasthanams." In the suit to which A. S. No. 54 relates the principal prayer was for removing the defendants from their respective offices. A. S. 80 is an appeal from the same decree by one of the defendants (Defendant No. 5) in that suit. It is of some importance to describe the defendants; 1st defendant is one Kuppusami Mudaliar, the Manager of the Sri Minakshi Sundareswaral temple. The other defendants are or were members of the Committee of the said Temple. The 2nd defendant, A. Ramanathan Chettiar, as has been stated, does not appear to argue before us. 3rd defendant, C. Sambasiva Mudaliar, gave evidence in the case as D. W. 1 to which evidence more particular reference will be made by and by, and at the end of a lengthy cross-examination tendered his resignation to the Judge so that he has now ceased to be a member of the Committee. 4th defendant is one Tirugnana Sambanda Pandara Sannadhi whose conduct will be in question in considering the subject-matter of this appeal. 5th defendant is one A. Rangasami Aiyar, who, I understand, is a leading vakil in Madura and has held the position of Public Prosecutor and Government Pleader. The 6th defendant is K. V. Subramania Aiyar who is, as a matter of fact, dead and has been exonerated by the learned District Judge who tried the suit. The District Judge has ordered the removal of Defendants 2, 4 and 5. As stated, 2nd defendant does not appear before us to urge his appeal. We are, therefore, concerned only with the cases of Defendants 4 and 5. The grounds on which the 4th defendant has been removed from his office are two: (1) that he took part in appointing one T. Minakshisundaram Pillai as trustee of the institution at the end of the year 1920; and (2) that he was responsible, directly or indirectly, for the non-performance or imperfect performance of the Chitharai festival in the plaint temple in April 1921. With regard to the 5th defendant: the only charge against him is No. 1 above, namely, that he voted for T. Minakshisundaram Pillai as trustee of the temple. It will, therefore, be convenient to proceed to investigate the appeal in the first instance by taking the first charge which is common to both the 4th and 5th defendants. 4th defendant was selected to the Temple Committee in 1919, and the 5th defendant in 1911, and the first point at which it is necessary to take up the matter is September 1920, when, in answer to the advertisement for a joint Manager, a telegram, Ex. CCCI was received by the Temple Committee from Minakshisundaram Pillai on the 20th of that month. The original idea seems to have been to associate a joint manager with Chockalingam Chettiar who was the manager at that time. There was apparently some inclination on the part of the Committee to get rid of Chockalingam Chetti because in Letter Ex. CVI, dated 25th September, Minakshisundaram Pillai applied for the post of manager which had not yet been notified as vacant; but Chockalingam Chetti resigned on the 27th September, and it was then incumbent upon the Committee to appoint a new Manager. They had two meetings on the 3rd and 5th October 1920, to consider this question, but apparently it was then resolved merely to call for further applications for the post, and we are told that as many as 37 applicants applied, and on the 17th October, the Committee again met to consider the applications. The proceedings are contained in Ex. XI in which we see the names of the applicants for this post. It is quite evident that this question of appointing a manager was made a communal question. D. W. 1 frankly says that he wanted to appoint a Non-Brahmin Manager. So did the 4th defendant and at the meeting of the 17th October he was not for appointing anybody but Minakshisundaram Pillai. Again the witness points out that in nearly all the resolutions passed by the Committee there has been this controversy and that he has joined Defendants 2 and 4 against Defendants 5 and 6 because they are non-Brahmins. The attitude of Defendants 5 and 6 throughout was that they did not want a non-Brahmin manager. It will be observed that three members of the Committee, Defendants 2 to 4, were non-Brahmins whereas Defendants 5 and 6

were Brahmins. The non-Brahmin majority defeated at least five candidates proposed by one or other of the Brahmin members. A good deal of discussion has arisen as to who exactly proposed the name of Minakshisundaram Pillai. 3rd defendant as D. W. 1, was the only witness for the Defendants 2 to 4 and his evidence has been characterized by the Judge as truthful, though in many cases what he said was to his own detriment. It appears to me, therefore, that we must accept the opinion of the Judge who saw and heard the witness give his evidence. He says that he thinks that the 4th defendant must have proposed Minakshisundaram Pillai and that the 5th defendant approved his nomination. The only members of the Committee to whom Minakshisundaram Pillai was known at the time were Defendants 5 and 6. 6th defendant may be immediately dismissed from consideration as he voted against the appointment. 3rd defendant (D. W. 1) says that though he first met him (Minakshisundaram) at the 5th defendant's house, the latter did not recommend him until the meeting of the 17th October. 5th defendant knew Minakshisundaram Pillai previously as they were both ardent theosophists. It does not seem to me to matter as to whether Minakshisundaram Pillay was actually proposed by the 4th defendant or 5th defendant. We know that he was elected by a majority of 4 to 1 of the Committee (i.e.,) that the 5th defendant, though a Brahmin, apparently convinced that none of the Brahmin candidates had any chance, eventually voted for his fellow theosophist. It may be somewhat reasonably asked what the objection is to the nomination and election of this man Minakshisundaram Pillai. The objection to him may be summed up. He had been for 23 years a Tahsildar in Government service and he left that service before the age limit without a pension, and he was further at the time of his election an undischarged insolvent. In these circumstances, we are asked to say whether those who voted for this man exercised their discretion as reasonable businessmen charged with the duty of protecting an institution whose yearly revenues, we are told, amount to about to two lacs of rupees. Much argument has been expended on the reasons or possible reasons why Minakshisundaram Pillai left Government service. In an affidavit filed by himself in O. S. No 63 of 1921 he says he was "removed" from Government service for "flagrant violation of the rules regula ing the conduct of Government servants." D. W. 1 states that Minakshisundaram Pillai never placed any credentials before the Committee; that when the 4th defendant met Minakshisundaram Pillai in the 5th defendant's house about the 23rd or 24th September 1920, he then learnt that he was an undischarged insolvent and that he had been a Government servant. The witness says;

"I thought from what was said that papers should be gone into so as to see how his Government service determined."

There seems to be no doubt that Minakshisundaram Pillai had told the Committee or, at any rate let it be known, that he had been adjudicated insolvent and had been a Government servant. D. W. 1 says that Minakshisundaram Pillai showed him (the witness) some printed papers. From these papers the witness says he found that his services were dispensed with and he was not dismissed. The papers shown to him did not appear to be final and he took M nakshisundaram Pillai on trust as to the truth of the printed papers without his producing any official communication. Minakshisundaram Pillai held office for about a month and a half. As early as 23rd October 1920, a petition by worshippers was addressed to the Temple Committee pointing out the disabilities under which Minakshisundaram Piilai laboured and protesting against his appointment. The petition further asked for a full and responsible statement on the points raised; and on the 9th December 1920, Ex. A, points out that the previous petition remained unanswered, that the petitioners understand that the resignation of Minakshisundaram Pillai was due to the fact that the Official Receiver attached the greater part of his salary and the petitioners, therefore, ask that in filling up the vacancy the proceedings of the Committee shall be in public.

With regard to the 5th defendant it is contended that though he voted for Minakshisundaram Pillai he insisted that certain conditions should be fulfilled which, it is said, would protect the

institution. Those conditions were that he should only hold the office for five years, that he should furnish security for Rs. 10,000, and that he should file a scheme suit as soon as possible. Although the 4th defendant had not the courage to go into the box, the 5th defendant did so as D. W. 2. He says that he agreed to support Defendants 2 to 4 over Minakshisundaran Pillai's appointment if they would agree to his (5th defendant's) conditions as he did not want to encourage any internal animosity such as was rife at about that time. Apparently the idea of the 5th defendant, as stated was that in the scheme there would be a provision against the manager's post being held by an insolvent, so that, if Minakshisundaram Pillai did not get his discharge within a short time he would ipso facto cease to be manager. 5th defendant admits that he had knwon Minakshisundaram Pillai as a theosophist for 5 to 10 years and that he received from Dr. Annie Besant a letter of recommendation to him which, however, neither he nor I imagine, anybody else could describe as strong. 5th defendant says that from subsequent events he is prepared to ascribe improper motives to Defendants 2 and 4 in appointing Minakshisundaram Pillai. His whole excuse is in a word that Minakshisundaram Pillai would have been appointed in any case by non-Brahmin majority on the Committee and that knowing this he (the witness) thought it was better that he should be appointed on the conditions laid down by him. The latter admits that with regard to his retirement from service he was shown one paper and he did not pay any real attention to it nor did he call for any more papers on this subject or on the matter of his insolvency. The witness adds :

"I did not want to make further enquiries as in my then view he was not a suitable candidate even for the joint manager's post. A fortiori I thought him unfit to be manager. I regarded him as not suitable until 17th October 1920. I thought his appointment against the interests of the Devasthanam under normal conditions. When I changed it was because the evil was one that could not be avoided and which I wished to minimise as far as possible.

It is difficult to see how if Minakshisundaram Pillai was not a suitable person to be appointed, the conditions have made any material difference. To begin with it is doubtful whether it is within the powers of a Committee under the Act of 1863 to appoint a trustee for a limited term. Secondly, it seems very doubtful if the security said to have been furnished by the sons of Minakshisundaram Pillai was of any real value. No Committee member seems to have considered it his duty to really investigate the matter. The only enquiry made by the 5th defendant as to the value of the properties was at the meeting of the 17th October by asking the members, which of course amounts to nothing at all. Again it is very difficult to see how the manager could have been forced to bring a scheme suit and it is surely improbable that he would have done so voluntarily considering that one of the terms was that no insolvent was to hold the post. In my opinion, the conditions sought to be imposed were entirely illusory and were put in because the Committee, as a body, were aware that the appointment of Minakshisundaram Pillai was entirely improper and in order that they might be able to meet objectors with some form of guarantee. It is, of course, prefectly clear in law that an insolvent ought not to be appointed to a position of trust of this sort. In *Raja of Kalahasti* v. *Ganapathi Iyer* (1) Abdur Rahim and Burn, J., observe as follows :

We think that the observation of Jessel, Master of Rolls, in *In re Barker's Trusts* (2), affords a proper guidance to the Court in cases of this character. A necessitous man is more likely to be tempted to misappropriate trust funds than one who is wealthy and besides a man who has not shown prudence in managing his ow affairs is not likely to be successful in managing those of other people.

I cannot hold that either of these Committee members Defendants 4 and 5, did their duty or acted reasonably in the interests of the institutition of which they were Committee members in giving their vote for this man Minakshisundaram Pillai. It is said that, as a matter of fact, no loss has occurred to the Devasthanam through this appointment. It seems to me that that is entirely a perverted way of regarding the matter. If an improper choice is made by a person in a fiduciary capacity it seems to be wholly wrong to say that after all the choice was not improper because as it turns out that no material damage has been done to the institution through the improper appointment. Even so

(1) [1918] M.W.N. 555.
(2) [1875] 1 Ch. D. 43.

this is apparently not certain. Minakshisundaram Pillai resigned on the 9th December 1920, asking it a condition of his resignation that his security bond should be cancelled. This was accepted by the Committee and the security bond was returned to him on that very day. D. W. 1 says:

> We had seen the accounts at that time which gave us no room to suspect defalcation or warrant us in keeping the security bond alive."

But later on he says:

> The devasthanam had a complicated system of accounts. They are hard to understand without the help of trained professional auditors. Without such assistance it will be hard to find out any irregularity. The Committee had no such assistance when it looked into the accounts.

The witness also states that the resolution to cancel the security bond was in his opinion premature. He further adds that by the cancelling of Minakshisundaram Pillai's security bond he considers that the interests of the Devasthanam have suffered because of his having expended or drawn sums which he should not have expended or drawn for which the Devasthanam may be held liable. 5th Defendant as D. W. 2 states that the accounts of Minakshisundaram Pillai's management have not so far been audited. Therefore, it appears to me, that these two persons, Defendants 4 and 5 by voting for the appointment of this undischarged insolvent Tahsildar who had, in his own words been removed from Government service for a flagrant breach of the rules regulating the conduct of Government servants of which we have no details had acted improperly and that men who can lend themselves to an appointment of this sort are entirely unfitted to carry out the responsible duties with which they were entrusted. This is possibly more so in the case of a man of the world like the 5th defendant than in the case of the former. But in neither case can I find any excuse or palliation for their conduct. In the case of the 4th defendant, there is, as I stated at the outset, a further charge which I propose to treat very shortly. I have stated that Minakshisundaram Pillai resigned on the 9th December 1920. The 1st defendant, Kuppusami Mudali, was then appointed manager. He apparently was a weak individual who was easily swayed by the Committee. A matter which was investigated at some length by the District Judge, and which has in fact been the subject of more than one proceeding in this Court is the undue interference with the trustees by the Committee of this Devasthanam. I do not proceed with this matter as the learned District Judge has decided that it is not sufficient to warrant the removal of any Committee member on this ground. But the events immediately preceding the suit and which no doubt gave rise to disputes in the institution are that soon after the appointment of Kuppusami Mudaliar, namely, on the 30th December 19 0, the 2nd defendant complained that the pipers were not carrying out their duties in the temple properly (Ex. DDD). The Bhattars had apparently for some time been in the habit of engaging the services of the pipers on private occasions in their own houses and this had increased to such an extent as to detract them from their proper piping services in the temple. The Committee then passed a resolution on the complaint of the 2nd defendant that a written permission should be taken by the pipers before they are engaged in these private festivals. The trouble seems further to have increased by an alleged insult to the 2nd defendant of which he complained in Ex. LXVI on the 20th January 1921, and he accuses the Bhattars with want of respect to himself. This came up on the 23rd January 1921, Ex.XIII in which the two Brahmin members thought that the matter might be recorded and the others thought that the matter should be referred to the manager for disposal. This state of things seems to have gone on—we are left without any details—till the approach of the Chithrai festival in April when owing to the strike of the Bhattars and the attempt to bring in substitutes to carry on the festival, resulted in something like on open riot within the temple so much so that an application had to be made to the Town Magistrate under S. 144, Criminal Procedure Code. A Nadar Magistrate arrived with a European Police Sergeant wearing boots and various incidents offensive to the scruples of the worshippers appear to have taken place. The learned Judge finds that Defendants 2 to 4 not only kept aloof in this crisis but threw obstacles in the way of things being properly done. In a word these three defendants never showed their face at all; 4th defendant is said to have been found in the 5th defendant's house and

and the excuse they have is that they were all in danger of their lives. The learned Judge has examined the evidence very carefully as to this charge in which only the 4th defendant is concerned, and I am not prepared to say that he is wrong. But I think we possibly have not the whole history of this quarrel between the Bhattars and the manager and the Committee before us. The Bhattars no doubt imagined themselves to be in an impregnable position from the fact that they hold a hereditary office and are in fact the one permanent element in the temple staff. It was undoubtedly the duty of the Committee and the Manager the latter having a primary duty, to see that the worship at the Chithrai festival was properly carried out and it is probably enough to say that if a Manager and the Committee permit a state of things to arise such as had arisen in this temple shortly before and during the Chithrai festival, it is proof positive that they are unfit to hold the management of the Institution. I prefer, however, to rest my judgment principally on the first ground which is common to both the defendants, though it must not be supposed that I am in any way differing from the finding of the learned District Judge on the second ground. Both the appellants appeal to us that we should refrain from delivering judgment and that they might both be allowed to resign. Speaking for myself, I must say that they have made such an application too late and it would have come from them with far better grace if, after they had seen how matters went before the District Judge when they heard the admissions made not only by the 3rd defendant but by one of themselves in the witness-box they had then applied to withdraw. It is difficult to appreciate the state of mind of men who after a long and patient enquiry are so determined to cling to this office in which they have been found, and rightly in my judgment found, to have failed in their duty. Both these appeals must be dismissed with costs.

Madhavan Nair, J.—I agree and have nothing to add.

Appeal dismissed.

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* A. I. R. 1926 Madras 505

DEVADOSS AND WALLACE, JJ.

Yandluri Yellamanda—Plaintiff—Appellant.

v.

Kunchala Chitambaram (died) and *others*—Defendants—Respondents.

Appeal No. 295 of 1923, Decided on 24th November 1925, against the order of the Sub-J., Bapatla, D/- 27th November 1922 in A. S. No. 106 of 1922.

* *Hereditary Village Offices Act* (3 *of* 1895) *S.* 21—*Suit by inamdar against his cosharer for possession of inam land is not barred—Suit not based on plaintiff's holding office and land being attached to it is not barred.*

Where a person sues for the possession of land which is his whether it be against a trespasser or against a cosharer he does not base his claim on his being the holder of the office but he bases his claim on his right to the land. The mere fact that it is inam land does not mean that the cause of action is based on his being the holder of the office. S. 21 has to be read along with S. 13. S. 21 does not take away the jurisdiction of a Court to entertain a suit for the recovery of possession of an inam land from a trespasser, or a tenant holding over or from a co-sharer who in order to defeat the plaintiff sets up a title in himself and denies the title of the plaintiff; [33 *Mad.* 208 and 33 *Mad.* 235 *Foll.*; 30 *Mad.* 126, *Dist.*] A suit for possession of land not based on the fact that the plaintiff is the holder of the office and that the land is attached to that office is cognizable by a civil Court. [P 506, C 1, 2, P 508, C 1]

V. Ramadoss and *V. Krishna Menon*—for Appellant.

V. S. Narasimhachari—for Respondents.

Devadoss, J.—The plaintiff's suit is for the recovery of his 1/6th share in the plaint property. The defendants contended that the lands in respect of which the relief was claimed were inam lands and the civil Court had no jurisdiction to try the suit. Both the lower Courts have held that the civil Court had no jurisdiction to try this suit. The plaintiff has preferred this miscellaneous appeal.

In order to determine whether the Court has jurisdiction or not we have to see what the averments in the plaint are and what is the cause of action of the plaintiff. The plaintiff sets out in his plaint that the plaint land was granted on cowl on 19th November 1897 and it expired with the close of the year, Parithavi, 1912-1913, and that Defendants 2 to 5 have been cultivating the land along with the 1st defendant. The plaintiff and his father

with some of the defendants took possession of the plaint property and the 2nd defendant instituted Original Suit No. 256 of 1915 on the file of the District Munsif's Court, Ongole, and obtained a decree, and took possession of the property on 12th June 1917. The cause of action is set out as having arisen on 19th November 1897 when the 1st defendant obtained a cowl in respect of the property, on 6th April 1913, when the cowl period expired, and on 12th June 1917 when the Defendants 2 to 5 obtained possession under the decree in O. S. No. 256 of 1916. Defendants 2 and 3 set up various pleas one of them being that the suit lands being service inam the Court had no jurisdiction to try the suit. The Subordinate Judge held that the suit was not cognizable by a civil Court on the bare finding that the suit land was inam land.

The question is whether this suit is cognizable by a civil Court or not. The contention of Mr. Narasimhachariar for the respondent is that no suit in respect of any service inam land is cognizable by the civil Court. S. 21 of the Hereditary Village Offices Act III of 1895 is:

> No civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified under S. 3 or any question as to the rate or amount of the emoluments of any such offices or except as provided for in proviso (ii) to sub-S. 1 of S. 13 any claim to recover the emoluments of any such office.

If a suit is based on the fact that the plaintiff is the holder of the office and therefore entitled to the land the possession of which he seeks, then that suit would come within S. 21. If a plaintiff brings a suit for the recovery of any land alleging that he is the holder of the office and that another person who is not the office-holder is in possession of the land that suit also would come within S. 21. But where a person sues for the possession of land which is his whether it be against a trespasser or against a cosharer he does not base his claim on his being the holder of the office but he bases his claim on his right to the land. The mere fact that it is inam land does not mean that the cause of action is based on his being the holder of the office. S. 21 has to be read along with S. 13. S. 13 provides for a suit before the Collector:

> for any of the village offices mentioned in S. 3 or the emoluments of such offices on the ground that he is entitled under sub-S. (2) or (3) of S. 10 of the Madras Proprietary Estates Village Service Act of 1894 or under sub-S. 2 or 3 of S. 10 or sub-S. 2 or 3 of S. 11 or S. 12 of this Act, as the case may be, to hold such offices and enjoy such emoluments.

In this case the plaintiff does not come into Court for recovery of land on the strength of his being an office-holder and that the lands being emoluments of the office. He seeks the Court's aid for recovering possession of the property which has been unlawfully taken from him. He alleges that a Cowl was granted in 1897 and that the period of the Cowl expired in 1912—1913 and that the defendants are holding over after the expiry of the lease that he and his father along with others took possession of the lands. The 2nd defendant filed a summary suit under S. 9 of the Specific Relief Act and got back possession from the plaintiff and his father. The main contesting defendants in this case are Defendants 2, 3 and 4. The 13th defendant, from whom they claim a portion of the land does not seem to contest the suit seriously, though the vakil for the Defendants 2 to 4 appears for him as well. The contention of Mr. Narasimhachariar is that the 13th defendant claimed the land as his and therefore the suit is one for the emoluments of the office. The 13th defendant does not say that all the suit land belongs to him. He is one of the persons entitled to a share of the land and the mere fact that he denies the plaintiff's right would not be sufficient to convert the suit into one for the emoluments of an office. If the contention of the respondent is to be upheld it would mean that even though a man recovers property by a suit under S. 13 of the Hereditary Village Offices Act, if somebody trespasses on the land and asserts a claim to it, the jurisdiction of the civil Court would be ousted. Section 21 does not take away the jurisdiction of a Court to entertain a suit for the recovery of possession of an inam land from a trespasser, or a tenant holding over or from a cosharer who, in order to defeat the plaintiff, sets up a title in himself and denies the title of the plaintiff.

In *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1) it was held

> that a suit for a Village Officer's inam land, on the expiry of a lease granted by such village officer to the defendant, is cognizable by the civil Courts as the plaintiff has only to prove the letting and expiry of the term, and he is not

(1) [1909] 33 Mad. 208=20 M. L. J. 91.

called upon to prove his title which the defendant will be estopped from disputing.

The learned Judges observe at page 210:

It is reasonable to hold, notwithstanding the apparent generality of the language of S. 21, that the jurisdiction of the civil Court is taken away in those cases in which it is conferred on the revenue Court by S. 13.

The respondent relied strongly upon the concluding sentence of the judgment: "the plaintiff will not be entitled to base his suit on the title to the inam." This sentence does not mean that if the defendant chooses to say that the plaintiff is not entitled to the land the jurisdiction of the civil Court is ousted. What is meant by the sentence, as we understand it, is that the plaintiff is not entitled to sue on his title to the inam, that is, on his being the office-holder and therefore entitled to the land. In another case in the same volume, *Gavara Ramanna* v. *Adabala Rattayya* (2), the Chief Justice and Mr. Justice Krishnaswami Aiyar held that:

"A suit in the civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in S. 13 of the Madras Act III of 1895, is not barred by S. 21 of the Act.

In that case the plaintiff sued for recovery of land on the ground that they were private property of the plaintiff. The Subordinate Judge held that the civil Court had no jurisdiction to entertain the suit on the ground that the land was inam land and that the suit was practically for the recovery of the emoluments of Naikwadi office. The learned Judges held that the suit was maintainable in a civil Court. They observe at page 237:

The present suit does not fall within that section (meaning S. 21). It is not a claim to succeed to any of the offices mentioned in S. 13. It does not raise the question as to the rate or amount of the emoluments of any such office.

The words:

"any claim to recover the emoluments of any such office under S. 21 do not apply to the present suit, since the suit is not a suit for land based on the ground that the land constitutes part of the emoluments of the office.

In the present case the plaintiff does not base his suit for the recovery of the land on his being the holder of the office and that the lands constitute the emoluments of the office. The observations of the learned Judges are applicable to the present case.

The case *Kasiram Narasimhulu* v. *Narasimhulu Palnaidu* (3) does not apply to the present case. There the plaintiff sued to recover possession of the land, alleging that it was the emoluments of his office of karnam and that the defendant resisted the plaintiff's claim on the ground that the land was not the emoluments of his office but the private property of the plaintiff which passed to the defendant in execution of a decree obtained by him against the plaintiff. The plaintiff's land was attached in execution of a decree for money, and in spite of the objection made by him on the ground that the attachment was prohibited by S. 5 of Act III of 1895 (the land being karnam's inam), it was brought to sale and purchased by the defendant. He then sued before the Collector for recovery of the land, alleging that he was a karnam and that the land was the inam attached to the office. The Board of Revenue, on second appeal, gave a declaratory decree in favour of the plaintiff as to his title to the assessment of the land leaving him to sue if so advised in a civil Court to recover possession of the land. The plaintiff sued in the civil Court. But on a difference of opinion between two learned Judges the matter came up before a Full Bench. The plaintiff did not deny the debt nor did he seek to set aside the sale on any ground other than the inalienability of the land. As observed by Miller, J., at page 131:

He can, therefore, only succeed by showing: (1) that he is the karnam of the village entitled as such to enjoy the emoluments; and (2) that the lands for which he sues is the emolument of his office. These must be the grounds of his suit, and these are the grounds which give him his right of action before the Collector under S. 13 (1).

The Full Bench held that the suit was for the emoluments of a village office based upon the title of the plaintiff as the holder of the office. As already observed the plaintiff herein does not base his claim as being the holder of the village office.

In *Kotiah* v. *Reddamma* (4) Seshagiri Aiyar, J., held that Act III of 1895 was not intended to take away the jurisdiction of the civil Court where trespass is alleged against the defendant. This decision was upset in L. P. A. Nos. 105 and 106 of 1916 on the facts, by a Bench

(2) [1909] 33 Mad. 235=20 M. L. J. 94.

(3) [1906] 30 Mad. 126=16 M. L. J. 514 (F. B.).

(4) [1916] 1 M. W. N. 278.

consisting of Spencer and Phillips, JJ. vide *Pattayya* v. *Kotiah* (5). The learned Judges held that the suit "was essentially one for the recovery of the emoluments of a carpenter's or blacksmith's service inam." They observe at page 8 :

In suits where the plaintiff seeks to recover on the ground of a bare trespass, and no question of title is involved as in *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1), or, on the ground that the land is private property as in *Gavara Ramanna* v. *Adabala Rattayya* (2) the suit is not based on any cause of action out of the plaintiff's right to recover the property as an emolument of an office, and in such cases the civil Court's jurisdiction may not be ousted. In such cases it is not necessary that the plaint should contain any mention of the fact that the land is an emolument of an office.

This observation is applicable to the present case.

Mr. Justice Spencer and Mr. Justice Ramesam observe in *Vanchinatha Aiyar* v. *Rajagopala Aiyar* (6) :

Of course a suit in which the plaintiff does not need to rely on his right to the office and its emoluments in order to succeed, such as would be the case in the instance cited in the words of Subramanis Aiyar, J. at page 210 of *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (1) stands on a different footing meaning that such a suit is not exempted from the cognizance of a civil Court by S. 21 of the Hereditary Village Offices Act.

The principle of these decisions is that a suit for possession of land not based on the fact that the plaintiff is the holder of the office and that the land is attached to that office, is cognizable by a civil Court. The mere fact that the defendant denies the title of the plaintiff would not be sufficient to oust the juisdiction of the civil Court.

In the result the judgments of the lower Courts are set aside and the suit is remanded for disposal on the merits. The plaintiff will have his costs of the Civil miscellaneous appeal and the costs of the suit in the lower Courts will abide its result.

Wallace, J.—I agree. I have nothing to add.

Suit remanded.

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(5) [1917] M. W. N. 7=5 L. W. 151.
(6) A. I. R. 1922 Mad. 361.

A. I. R. 1926 Madras 508

RAMESAM, J.

Gutha Viraraghavayya—2nd Defendant.

v.

Vemulapalli Ramakotayya — Plaintiff —Respondent.

Second Appeal No. 814 of 1923, Decided on 17th November 1925, from the decree of the Dist.-J., Guntur, in A. S. No. 92 of 1922.

(a) *Hindu Law—Suit to contest alienation by widow by one reversioner is on behalf of all.*

A suit by reversioner to contest an alienation by widow is really a suit on behalf of all the reversioners. [P 509 C 1]

(b) *Hindu Law—Consenting reversioner is estopped from questioning alienation by widow.*

A reversioner who consents to an alienation by a widow is himself estopped from questioning it. *A. I. R.* 1923 *All.* 387 (*F. B.*) and *A. I. R.* 1922 *Bom.* 102, *Foll.* [P 509 C 2]

Ch. Ragava Rao—for Appellant.

S. Swaminadhan—for Respondent.

Judgment.—The facts out of which this second appeal arises may be thus briefly stated. One Vemulapalli Subbiah died about 1909, leaving his widow, Sithamma, the first defendant, and his mother, Bapamma, the 3rd defendant. On 2nd October, 1918 the 1st defendant executed a deed of gift in respect of some of the properties she inherited from her husband in favour of the 2nd defendant, Viraraghavayya who is her brother. This deed of gift is Ex. I. The transaction was consented to by the plaintiff who was a cousin of the deceased Subbiah by a letter of consent, Ex. II. The present suit is brought by the plaintiff for a declaration that the deed of gift, Ex. I, is a forgery and does not bind the plaintiff and that the letter of consent executed by the plaintiff is also a forgery and does not bind him. Both the Courts below found that the allegations of the plaintiff as to the circumstances under which Exs. I and II were executed were not made out. But the lower appellate Court also finds that no consideration was received by the plaintiff for giving the consent under Ex. II. Before the present suit came on for trial the 1st defendant died, and the 3rd defendant in this suit became the reversioner. She filed a suit for possession against the 2nd defendant and that suit and this suit both came on for trial

together and in that other suit it was held that the deed of gift was not binding on Bapamma and Bapamma got a decree for possession. Having disposed of that suit the District Munsiff held that, though the plaintiff's allegations on the circumstance under which Ex. I was executed were not made out the plaintiff is entitled to the declarations he sought in this case because, so far as Bapamma is concerned, the deed of gift was found not valid and binding in the other suit. On appeal to the District Judge, he practically agreed with this view and dismissed the appeal. The 2nd defendant files this second appeal.

It has been contended before me by Mr. Raghava Rao who appears for the appellant that, however, much Ex. I may not be binding on Bapamma or on all the reversioners other than the plaintiff, Ramakotayya, it is certainly binding on the plaintiff himself on the other findings of the Courts below and an unqualified decree declaring that the deed of gift is not binding on all the reversioners cannot be sustained. I may here observe that the actual prayer in the plaint is for a declaration that Ex. I is not binding on the plaintiff and for a declaration that the letter of consent is not binding and valid on the plaintiff. But, as has been pointed out by Dr. Swaminadhan who appears for the respondents, a suit of this kind is really a suit on behalf of all the reversioners and though the plaint in this case is unhappily worded one may perhaps read it as a plaint filed on behalf of the whole body of reversioners. But even then as we do not now know who the reversioners will be at the time when Bapamma dies, the question has to be considered as to how far the plaintiff can get any decree if it happens that he will be the reversioner.

In *Ramasami Goundan* v. *Nachiappa Goundan* (1), Lord Dunedin observed at p. 539 :

> Of course something might be done even before that time which amounted to an actual election to hold the deed good.

We have not got any further indications in that judgment as to what such something might be.

In *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (2) it was held that a reversioner who consented to an alienation by a widow was himself estopped from questioning it ; for it was found in that case that he did not receive any consideration for giving his consent and there was a prior declaratory decree obtained by another reversioner that the alienation was not binding on the reversioner. That case follows a decision of the Bombay High Court in *Basappa* v. *Fakirappa* (3). These two decisions have been concurred by me and Reilly, J., in A. S. No. 368 of 1921 which was followed by me in another second appeal. The result will be that the decree given by the Courts below will be vacated and a fresh decree granted declaring that Ex. I will not be binding upon all the reversioners other than the plaintiff if they happen to be the reversioners at the time when Bapamma dies ; but so far as the present plaintiff is concerned, if he happens to be the reversioner when the succession opens, it will be binding upon him. I need hardly observe that I do not decide any question of limitation in this case, that is what the effect of long enjoyment on the part of Bapamma, adverse to the deed of gift, Ex. I, would be and how far a declaration of this kind will enable the 2nd defendant to recover the property after Bapamma's death. I leave all these questions open.

Each party will bear its own costs in the first Court. The respondent will pay the costs of the appellant here and in the lower appellate Court.

Appeal allowed.

(1) [1919] 42 Mad. 523=46 I. A. 72 (P. C.).
(2) A. I. R. 1923 All. 387 (F. B.).
(3) A. I. R. 1922 Bom. 102.

A. I. R. 1926 Madras 509

DEVADOSS, J.

(*Peria Nambi*) *Srinivasachariar*—Plaintiff No. 1—Petitioner.

v.

Kuna Ramasamy Naicker and *others*—Defendants and Plaintiffs Nos. 2 to 3—Respondents.

Civil Revision Petition No. 1148 of 1923, Decided on 30th September 1925, against the order of the Sub-J., Dindigul, D/- 12th March 1923, in O. S. No. 74 of 1920.

Civil P. C., S. 92—Scheme suit—Decree for damages for loss by trustee's misconduct cannot be passed.

Although in a scheme suit a decree for account may be passed against the trustee in office, a decree for damages for the loss caused to the devasthanam by the trustee's misconduct cannot be passed. [P. 510, C. 1]

K. Rajah Aiyer—for Petitioner,

M. Patanjali Sastri—for Respondents.

Judgment.—This is an application to revise the order of the Subordinate Judge of Dindigul directing payment of Court-fee on the amount mentioned in the plaint as damages on the ground that the proper Court-fee was not paid. The first plaintiff has preferred this petition.

The contention of Mr. Rajah Iyer, for the petitioner, is that the order of the Subordinate Judge was without jurisdiction inasmuch as his client was entitled to ask in a scheme suit for an account against the trustee. No doubt in a scheme suit a decree may be passed against the trustee in office to account for the income of the property which was under his management. But in this case what the plaintiff has done is to ask for a specific sum to be paid by the defendant as damages for the loss caused to the suit devasthanam by the defendants' misconduct. Claiming damages on account of misconduct is not one of the reliefs under S. 92, Civil P. C.

If the plaintiffs wanted the defendant to account for the income of the institution of which the said defendant was the manager, he should have been asked to submit an account relating to his management. Prayer (b) of para. II of the plaint does ask for an account of the management. But prayer (c) wants the defendant to pay Rs. 53,000 and odd as damages for the losses caused to the devasthanam during his management. As this is made on a different footing from the ground of accountability of a trustee for the income of the property which was under his management, I think the order of the learned Sudordinate Judge is right and I dismiss the civil revision petition with costs.

It is open to the plaintiffs to file another suit after obtaining the consent of the Advocate-General for such reliefs as they deem proper.

Petition dismissed.

A. I. R. 1926 Madras 510

WALLACE, J.

Solayappa Naicker—Plaintiff—Appellant.

v.

Shunmugasundaram Pillai—Defendant—Respondent.

Appeal No. 90 of 1924, Decided on 20th November 1925, from the order of the Dist. J., Ramnad, in C. M. A. No. 71 of 1923.

Provincial Insolvency Act (3 of 1907) and (Act 5 of 1920)—Insolvent's right to have execution proceedings stayed is substantive right and is not abrogated by new Act.

The right of an insolvent adjudicated as such under Act 3 of 1907 to have execution proceedings against him stayed, unless the insolvency Court gives leave to prosecute them, is a substantive right and is not abrogated by Act 5 of 1920, and so an order for his arrest without leave of the insolvency Court is without jurisdiction: *A. I. R.* 1923 *Mad.* 487; *A. I. R.* 1924 *Mad.* 368, *Foll.* [P. 510, C. 2]

Watrap S. Subramana Aiyar—for Appellant.

K. V. Venkatasubramayya Aiyyar—for Respondent.

Judgment.—I am prepared to follow the judgments of this Court reported in *Natesa Chettiar* v. *Annamalai Chettiar* (1) and *Rangiah Chettiar* v. *Annaswami Alwar Aiyangar* (2) which imply that the right of an insolvent adjudicated as such under Act III of 1907 to have execution proceedings against him stayed, unless the insolvency Court gives leave to prosecute them, is a substantive right. That being so, it has not been abrogated by the subsequent statute Act V of 1920. The order in E. P. No. 863 of 1923, dated 19th September 1923, to arrest respondent was not with leave of the insolvency Court and was, therefore, without jurisdiction.

It is contended that it has become final because no appeal was presented against it. But it was an order passed without notice. On 5th October 1923, he was arrested, brought to Court and released on terms, and on 16th October 1923, he put in his E. A. No. 692 of 1923. There was, therefore, no order for arrest in force at the time he put in his E. A. and no question of res judicata, therefore, arises. Appellant urges that

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(1) A. I. R. 1923 Mad. 487.
(2) A. I. R. 1924 Mad. 368.

the lower appellate Court should not have dismissed his E. P. in toto. I agree and direct that the E. P. be not dismissed, but be returned to the appellant with directions that it cannot be entertained by the executing Court unless and until the leave of the insolvency Court is obtained. The appeal is allowed to this extent only and is otherwise dismissed. The respondent will get his costs.

Appeal partly allowed.

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*A. I. R. 1926 Madras 511

VENKATASUBBA RAO, J.

(*Kandala*) *Thiruvenkatacharlu* and *others*—Plaintiffs—Appellants.

v.

Shaik Altoo Sahib—Defendant—Respondent.

Second Appeal No. 745 of 1923, Decided on 3rd November 1925, from the decree of the Sub-J., Chittoor, in A. S. No. 160 of 1921.

* (*a*) *Grant—Grant in lieu of wages is resumable but grant burdened with condition of service cannot be resumed except for default of grantee.*

To determine whether a certain grant is resumable or not, regard must be had to the nature of the tenure and to the fact whether the grant was made in lieu of wages for service or it was an absolute grant subject to the condition of the performance of the service. The relation between the grantor and the grantee is that of master and servant in the first case. In the second case, in absence of contract to the contrary, whether grantor requires the service or not is immaterial, the only question being whether there has been default on the part of the grantee. [P. 512, C. 1, 2]

(*b*) *Civil P. C., S. 100—Inferences from facts or circumstances can be set aside only if they are wrong.*

Where an inference is drawn from certain facts or circumstances, it must be shown that the lower appellate Court has made some mistake before its finding can be set aside in second appeal. [P. 512, C. 2]

(*c*) *Evidence Act, S. 114—For making presumptions some connexion between facts proving and to be proved must be shown.*

Presumptions are not made at random. Some connexion must be shown to exist between the fact proving and the fact to be proved, which warrants an inference from the one to the other when the two are brought into proximity. [P. 512, C. 1]

(*d*) *Grant—Zamindar can resume grant only if land is in his zamindari and is asseseed to revenue—Inclusion of revenue is presumed if services for the grant were personal.*

Whether a zamindar can resume a grant, will depend upon whether the revenue from the land was or was not included in the assets of the zamindari at the time of the settlement. If it was included, the right of resumption would be with the zamindar, if not, he would not have that right. If there is no direct evidence to show whether the revenue was or was not included, one may turn to the nature of the services as they may furnish a clue. If the services were personal to the zamindar, it may reasonably be assumed that the Government would not have exempted the land from the revenue, but would have treated it, for the purpose of the settlement, as revenue-paying land. [P. 513, C. 1, 2]

(*e*) *Grant—No presumption exists either of grant being service grant or that services were personal.*

In case of grants there is no presumption that it was made in lieu of wages for service, or when the grantor proves that the services were personal, that the grant was made in lieu of wages. The person claiming resumption must make out his title to resume: *Case-law reviewed.* (1911) 2 *M. W. N.* 406, *Dist.* [P. 513, C. 2, P. 514 C. 1]

C. S. Venkatachariar and *N. S. Rangaswami Aiyangar*—for Appellants.

B. C. Sankaranarayana—for Respondent.

Judgment.—The plaintiffs, who are the inamdars of Lupuchendrapet, seek to resume the plaint land which was granted for mudam service and to recover possession of it with mesne profits. The defendants contend that the land has been in the possession of their family for about 150 years and that they are entitled to enjoy it so long as they are able and willing to perform the duties of mudam, that there has been no default and that the land cannot, therefore, be resumed.

The District Munsif has found that the land is not resumable and the Subordinate Judge has confirmed this finding. The plaintiff has filed the present appeal. The lower appellate Court, on a review of the whole evidence, has come to the conclusion that the grant cannot be resumed. This is what the learned Judge says:

I am not satisfied on the evidence that the inam is resumable.

The appellant asks me to reverse this finding. The learned Judge has also found that there has been no default on the part of the defendants and the correctness of this part of his judgment has not been questioned.

In arriving at his conclusion that the grant is not resumable, the Subordinate Judge has relied to some extent upon the conduct of the plaintiffs as disclosed in various proceedings and upon the incongruous statements which they made

from time to time. He has also relied upon the fact that the defendants have expended money and dug a well. Further, the defendants and their ancestors have been long in possession and the second witness for the plaintiff, who is 70 years old, has admitted that the grant was made before his time.

Madam's duties are said to consist in looking after the harvest of the crops, watching the heaps of harvested produce, placing seals upon them, preventing removal of cowdung from waste lands and general supervision of harvest operations. The first witness for the plaintiff admits that the inamdars as well as the ryots are interested in the performance of these duties. I need not go more minutely into the evidence. Although the Sub-Judge refers to certain authorities which contain observations regarding onus of proof, he has not himself decided the case with reference to any presumptions. His finding is the result of his appreciation of the evidence independent of the rule of onus of proof. It has not been shown that his finding is wrong or vitiated by any mistake and I must therefore accept it in second appeal.

Regarding the nature and incidents of service tenure and the presumptions that may be drawn in dealing with such tenures, there has been a fairly long argument before me. I shall therefore proceed to discuss these points. The finding that the land is not resumable implies that the grant was burdened with service.

To determine whether the grant is resumable or not, regard must be had to the nature of the tenure. Was the grant made in lieu of wages for service or was it an absolute grant subject to the condition of the performance of the service? First, dealing with grants of the former description: the relation between the grantor and the grantee is that of master and servant. Instead of remunerating the servant by wages, the master grants land to him, and treating the rent payable as equivalent to wages the grantor makes remission of the rent. The contract, however, is, in essence, one of service, and as the master can, on terminating the employment, cease to pay wages, in like manner he may resume the grant on dispensing with services. The servant cannot compel his master to continue to employ him on the score that he is willing and able to serve.

Now let me turn to the second description of grants, those burdened with service. The position here is that there is no absolute grant but a condition is annexed to it. On the breach of the condition, the grant may be resumed. The condition being the rendering of the service, if the grantee commits default in its performance, the grantor becomes entitled to resume the grant. The mere fact that the grantor no longer requires service does not give him the right to resume the grant. Whether he requires the service or not is immaterial, the only question being whether there has been default on the part of the grantee.

It is also recognized that in the case of a grant burdened with service, it may be made a condition of the grant that it should cease when the services are no longer required. But in the absence of a provision to that effect, land held under that grant is not resumable unless the grantee commits default. This does not affect the main divison of the grants under two headings, namely, those burdened with service and those made in lieu of wages: See *Forbes* v. *Meer Mohomed Tuquee* (1), *Lakham Gavda* v. *Keshav Annaji*; (2) and *Yellava Sakreppa* v. *Bhimappa Gireppa* (3).

Where there is a grant in writing and it is produced, on a construction of it will depend the nature of the tenure, whether the grant was made in lieu of wages or was burdened with service. But, where, as in the present case, either the original grant was not in writing or in any event is not before the Court, the nature of the tenure can be determined only on the evidence given. The Subordinate Judge agreeing with the trial Court has found on the evidence that the grant is not resumable. Where an inference is drawn from certain facts or circumstances, it must be shown that the lower appellate Court has made some mistake before its finding can be set aside in second appeal. I am not satisfied that the appellant has succeeded in showing that the finding is liable to be reversed.

(1) [1870] 13 M. I. A. 438=5 B. L. R. 529=14 W. R. 28=2 Suther. 358=2 Sar. 588. (P. C.).
(2) [1901] 28 Bom. 305=6 Bom. L. R. 364.
(3) [1914] 39 Bom. 68=17 Bom. L. R. 128.

The appellant's learned vakil has contended that this appeal ought to be decided with reference to two presumptions: one of them broad, the other more limited. When the quession arises as to the class to which a specified grant belong, he contends that it should be presumed that the grant was one made in lieu of wages of services. Putting it in other words, the grantor has only to come to Court and show that it is a sevice grant. Nothing further need be done by him and the Court is bound to presume that the grant was in lieu of wages. The next presumption which he asks should be drawn is, that when the grantor proves that the services are personal the Court should infer that the grant was made in lieu of wages. The range of this presumption is somewhat more limited, for, this assumes that the grantor has at least to prove one fact, do nothing more and the Court will at once presume that the grant is resumable.

For making either of these presumtions, I do not believe there is the slightest ground. Presumptions are not made at random. Some connexion must be shown to exist between the fact proving and the fact to be proved which warrants an inference from the one to the other when the two are brought in to proximity. On many and varied circumstances may depend what kind of grant a man may choose to make. To presume at the very outset of a case that the grant is one in lieu of wages, does not seem to be in conformity with reason.

The second presumption referred to is, in my opinion, also opposed to reason. Having regard to the springs of human action, can it be said that a man is less likely to make an absolute grant burdened with personal service, or again, can it be said that when services are of a public nature there is any strong impelling motive for not making the grant in lieu of remuneration for those services? There exists thus on principle no ground for making either of the two presumptions. I am also satisfied that this is the position established by authority.

Before discussing the cases on the point, I should like, in order to remove a confusion that prevails, to refer to a presumption that is permissible and has often to be drawn. When a zamindar seeks to resume a grant, the question arises, is the and included in the zamindari? This will depend upon whether the revenue from the land was or was not included in the assets of the zamindari at the time of the settlement. If it was included, the right of resumption would be with the zamindar, if not, he would not have that right, If there is no direct evidence to show whether the revenue was or was not included, you may turn to the nature of the services as they may furnish a clue. If the services were personal to the zamindar, it may reasonably be assumed that the Government would not have exempted the land from the revenue but would have treated it for the purpose of the settlement as revenue-paying land. The reason is obvious. It was the Zemindar that had the benefit of the services and there would be no reason why the Government should not assess the land to revenue, for the services were after all an equivalent of the rent. A presumption is, therefore, made that when the services are proved to be personal, the right of resumption, if it exists, vests in the zamindar. This is the presumption that decided cases very often refer to and this presumption and its implications are misunderstood and some loose thinking has, I am afraid, given rise to some laxity of expression.

I shall now examine the cases on the point. *Forbes* v. *Meer Mahomed Tuquee* (1) is one of the earliest and most authoritative of the decisions. The zamindar sued for the resumption of a jaghir. Their Lordships of the Judicial Committee deal with two questions (1) regarding the nature of the tenure on which the lands were held, (2) whether the jaghir lands were made the subject of assessment at the settlement. Having held on the second point that the jaghir was included in the zamindari, their Lordships proceed to ask the question: "But is it a necessary consequence of this finding that the appellant is entitled to resume these jaghir lands?" They then observe that his right to do so must depend upon the nature of the tenure. They distinguish between the two categories of grant and conclude that the grant before them is one burdened with service. In the course of the discussion they observe that the grantees they were dealing with were not the private servants of the Zemindar. But they do not anywhere say that if the services were private or personal, there would arise a presumption that the grant

was made in lieu of wages. On the contrary, in the concluding paragraphs of their judgment, they remark that it lay emphatically upon the zamindar who is seeking to dispossess or to rackrent the grantees to make out a clear title to resumption. He, in their opinion. failed to discharge the onus and his suit was, therefore, dismissed. This case, therefore, far from recognising the rule of presumption contended for by the applelant, clearly lays down that the rule is the other way namely, that the onus of proof is upon the grantor claiming resumption.

Lakham Govda v. *Keshav Annaji* (2) is a suit by the inamdar to resume lands alleged to be held on-service tenure. Jenkins, C. J. and Chandavarkar, J., assume for the purpose of their judgment that the tenure was connected with services and proceed to examine if the plaintiff was entitled to resume. They refer to *Forbes* v. *Meer Mahomed Tuquee* (1) and the classification of grants adopted in that case, and in the end dismiss the plaintiff's suit observing that it lay upon him to make out that the combination of the grantee's interest and his obligation to serve was such, as to permit of resumption. This case follows the Privy Council decision and holds that the onus is upon the party claiming the right to resume.

A contention similar to the one advanced by the appellants was raised in *Yellava Sakreppa* v. *Bhimappa Gireppa* (3). The learned Judges rejected it saying that there is no presumption that where the services are personal the grantor has a right to resume the land. They say that that is the Bombay law, though they add very guardedly that the law is possibly different in Calcutta and Madras. This does not show that the law is in fact different in these provinces, but it clearly shows that in Bombay such a presumption is not drawn.

The question apain arose in *Chandrappa* v. *Bhima-bin-Dasappa* (4). Beaman, J., refused to recognize any such distinction between public and private services remarking that the distinction attempted is vicious.

In *Baslingappa* v. *Chandrappa* (5) it was again held that the onus is upon the plaintiff seeking to resume.

(4) [1918] 43 Bom. 37=20 Bom. L. R. 779.
(5) [1916] 18 Bom. L. R. 695.

With reference to the observation in *Yellava Sakreppa* v. *Bhimappa Gireppa* (3) that possibly the law in Madras is different, I must point out that *Lakham Gavda* v. *Keshav Annaji* (2) has been followed in this province in *Ramaswami Pattar* v. *Lakshmi Varassiar* (6), and that *Yellava Sakreppa* v. *Bhimappa Gireppa* (3) has been referred to and followed by Seshagiri Aiyar, J., in *Mrutyunjayudu* v. *Rajah of Pittapuram* (7). It cannot therefore be said that the Madras law is different from the Bombay law on this point.

Radha Pershad Singh v. *Budhu Dashad* (8), relied on by the appellant, proceeds, with all respect, on a misconception. In it, a twofold classification of grants is made. First, it is said there is a distinction between a grant for services of a public nature and a grant for services of a private nature. In the former the zamindar cannot resume, while in the latter he may. Secondly, it is said that there is distinction between grants of an estate burdened with service and grants in lieu of wages. This twofold classification is, in my opinion, unnecessary and loses sight of the real principle involved. The main division as pointed out by Beaman, J., in *Chandrappa* v. *Bhima-bin-Dasappa* (4) is that of grants burdened with service and that of grants by way of wages for service. Each of these two main categories may again be sub-divided according to the nature of the services, personal or public. The judgment in *Radha Pershad Singh* v. *Budhu Dashad* (8) loses its value by reason of this mistake and I am not prepared to agree with the view that when services to be rendered are personal the grantor has a prima facie right to resume the grant. It further seems to me that *Radha Pershad Singh* v. *Budhu Dashad* (8) is opposed to the authority of the Privy Council decision in *Forbes* v. *Meer Mahomed Tuquee* (1).

If the Madras cases are examined they do not support the appellant's contention. The sentence in *Saniyasi* v. *Salur Zamindar* (9) that is relied on reads thus :

(6) A. I. R. 1923 Mad. 572.
(7) [1915] 30 M. L. J. 132=(1916) 1 M. W. N. 279.
(8) [1895] 22 Cal. 938.
(9) [1883] 7 Mad. 268.

It is ordinarily competent to a zamindar to dispense with such services and to resume the tenure.

This may only mean that if the grant is in lieu of wages it may ordinarily be resumed. There is nothing to show that the learned Judges meant to say that if the services are personal they would presume that the grant was one made in lieu of wages. I cannot regard this as an authority for the proposition contended for.

In *Mahadevi* v. *Vikrama* (10) the following passage is relied on :

Now it is admitted on behalf of the appellants that if the land was held on service tenure it is resumable at the will of the zamindar for the time being in possession.

What is the tenure that is referred to in the above passage ? All lands held on service tenure are not resumable. There are two kinds of service tenures. The learned Judges were presumably referring to grants made in lieu of wages. The words literally taken mean that both kinds of grants are resumable which of course, is not the case. I am unable to see how this supports the appellant's contention.

In *Sri Rajah Sobhanadri Appa Rao* v. *Venkatanarasimha Appa Rao* (11) there is an observation at page 408 that it is for the grantee to make out that the land is not resumable. This case went up to the Privy Council and the decision of the Madras High Court was confirmed. But their Lordships of the Judicial Committee, while agreeing with the conclusion of the learned Judges, observe that their judgment does not imply that they adopt in entirety their reasoning. This is an important reservation and must not be lost sight of.

In *Vadisapu Appandra* v. *Vyrichendra Veerabhadraraja* (12), there is a passage at page 408 to the effect that in this Presidency there is a series of decisions and that where a land granted on service tenure was included in the assets of zamindari at the time of the settlement there is a presumption that the zamindar can resume. This only means that if the question is between the Zamindar and the Government as to who has the right to resume, the fact that the land is included in the zamindari indicates that the right vests in the zamindar. This passage does not help the appellant. There is another passage at p. 409 where the learned Judges say that in the case of a grant subsequent to permanent settlement to which personal services are attached, the burden of proving that it is not resumable is on the grantee. In the first place, with all respect, I cannot accede to this proposition. Secondly what difference does it make in regard to the present question, whether the grant was prior to or subsequent to the permanent settlement ?

There is one other case cited by the appellant to which I must refer. In *Gajapathi Maharaju* v. *Sondia Prahalada Binoy Ratna* (13), Ayling, J., observes at page 180 that the services are of a personal character and for the reason the inams are resumable by the zamindar. This observation, if I may say so with respect, is not quite accurate and I may point out that in a later case the same learned Judge expresses his view somewhat very differently. In *Mruitunjayudu* v. *Rajah of Pittapuram* (7), Ayling, J. differing from Sadasiva Aiyar, J., observes :

I can find no authority for holding that the nature of the services makes any difference in the case of such a grant, though in the case of a service grant, where lands are held and enjoyed in lieu of wages, the power of arbitrary resumption would largely turn on whether the services were private or public.

By reason of the difference of opinion there was a Letters Patent Appeal and Seshagiri Aiyer and Phillips, JJ., held, Sir John Wallis, C. J., dissenting, that the grant was a grant burdened with service and was not resumable. The judgment of Ayling, J., was upheld. Seshagiri Aiyer, J., at page 144 observes :

The next contention is that as the service was personal it was open to the Zamindar to dispense with it and to resume the land. Here again, it is not in every case of personal service that the grant can be resumed.

It is thus clear that both on principle and on authority, neither of the presumptions contended for by the appellant can be accepted. The plaintiff who seeks to resume must make out his title. As the appeal has been argued at some length, I have reviewed the law and shown what in my opinion the right principle is. But, as I have said, the lower appellate Court has not considered the case with reference to any rule of onus

(10) [1891] 14 Mad. 365.
(11) [1902] 26 Mad. 403.
(12) [1911] 2 M. W. N. 406=10 M. L. T. 391.
(13) [1914] M. W. N. 179=14 M. L. T. 562.

of proof, but has on the other hand arrived at a finding on a consideration of the entire evidence. Whether my view is correct or not it follows that the judgment of the Subordinate Judge must stand. The second appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 516

SPENCER, J.

Munuswami Pillai—Appellant.

v.

Mahdi Hussain Khan Sahib—Respondent.

City Civil Court Appeal No. 38 of 1924, Decided on 10th November 1925, from the decree of the City Civil Court, Madras in Original Suit No. 225 of 1920.

Civil P. C., S. 152—Correction involving a larger sum by one party to another long after satisfaction of decree cannot be made.

A Court would not be justified in making a correction which involves the payment of a larger sum of money by one party to another, long after satisfaction has been recorded, and when nothing remains to be done and the decree has become dead; 12 *M.L.J.* 96 *Applied.* [P. 517, C.1]

R. Sriramachariar—for Appellant.

M. S. Venkatarama Iyer and *R. N. Rajagopala Iyer*—for Respondents.

Judgment.—The respondent brought O. S. No. 225 of 1920 under the Madras City Tenants' Protection Act to eject the appellant. Under S. 9 of that Act the appellant applied for an order that the landlord should be directed to sell the land for a price to be fixed by the Court. The result of the suit was that the appellant got a decree on 12—5—1922 directing the respondent to convey the land to him upon his paying Rs. 615—6—10, being the value of the land at the rate of Rs. 1,100 per ground, and that the appellant should pay the respondent his costs and past and future mesne profits. On 10—7—1923, in E.P. 249 of 1923, the respondent applied for execution by attachment and sale of the superstructure. On 18—12—1923, the appellant applied in C. M P. 1814 of 1923 for a direction of the Court to the respondent to execute and register the conveyance, and got an order that respondent should execute a conveyance in three weeks. On 5—12—1923 the decree was entered as satisfied and the execution petition noted as disposed of. On 24—9—1924 the respondent applied under S. 152 of the Civil Procedure Code for an amendment of the decree by altering the amount to be paid as the price of conveyance from Rs. 615-6-10 into Rs 756—4—0. The appellant filed a counter-affidavit alleging that the respondent was vexatiously attempting to get more money out of him by this means and delaying to attend the Registrar's office for registration of the conveyance. The City Civil Court Judge observed that the amendment asked for was the rectification of a slip due to the mistake of a clerk and that the petitioner was not estopped from applying and accordingly he made the order from which this appeal has been preferred.

Now S. 152 of the Code of Civil Procedure permits clerical or arithmetical mistakes in judgments and decrees to be corrected at any time, but it is questionable whether a Court would be justified in making a correction which involved the payment of a larger sum of money by one party to another, long after satisfaction had been recorded, and when nothing remained to be done and the decree had become dead. Under the old Code of Civil Procedure, before errors in decrees were permitted by S. 152 to be corrected "at any time", and when the making of corrections was under S. 206 made obligatory and not discretionary, the High Court of Calcutta in *Fakkarudin Mahomed Ahsan* v. *The Official Trustee of Bengal* (1) held that matters which might have been discussed in the course of execution proceedings could not be re-opened after execution had been closed and the decree satisfied. The learned Judges observed that if a judgment-debtor desired to show that more money had been levied from him under the execution than was due from him under the decree, the only course open to him was to apply for a review of the order, which declared the decree to be satisfied and the execution proceedings struck off. Under the present Code the Allahabad High Court, in *Pitam Lal* v. *Balwant Singh* (2) revised an order of a Subordinate Court amending a money decree which had been completely satisfied. Daniels, J., observed :

(1) [1884] 10 Cal. 538.
(2) A. I. R. 1925 All. 556.

When a decree for money has been finally satisfied and discharged the Court is functus officio and can no longer entertain an application for amendment under S. 152 of the Code of Civil Procedure.

In Sheo Prasad Rai v. *Dharam Sen Rai* (3) it was stated that,

the dictum to the effect that where a decree had been completely executed the court executing the decree is functus Cfficio has not found complete favour in subsequeut decisions.

Nevertheless on the facts of that case. the Court dismissed the second appeal of the judgment-debtor against an order of an executing Court confirmed by the District Court refusing to cancel the execution proceedings on the ground that lands not covered by the decree had been delivered.

I am of opinion that the ground upon which *Pathan Bi* v. *Mytheen Biti* (4) was disposed of, namely, that an amendment of a decree after satisfaction has been entered up is a mere nullity unless steps are also taken at the same time to set aside the order recording satisfaction, is a sound objection to the procedure of the lower Court in this case in amending its decree at the stage when the respondent applied for amendment. I also think that this application should have been rejected on the ground that it involved a substantial alteration of the terms upon which the land was to be conveyed.

It is contended that, because the lands were found to measure 165, sq. feet the price necessarily had to be varied, after the rate had been fixed at Rs. 1,100 per ground. In answer to this contention the appellant stated in his counter-affidavit that the land measured only 1,386 sq. feet. The Judge has not decided in his order now appealed against which figure is correct. He only says: "If the land is 1650 sq. feet the plaintiff is entitled to Rs. 756-4-0". Moreover, the method by which the sum given in the decree was arrived at is not of consequence after the decree has been executed without objection. If the defendant had known, before he took a conveyance for the land, that he woul dhave to pay Rs. 150 moer than the sum ordered in the decree, it would have been open to him to have given up possession of this land and taken compensation under S. 3 of the Act instead of getting a conveyance executed by Court and registered. The plaintiff, having taken all that was due to him for costs and mesne profits, and having allowed this petition to be entered as disposed of and the decree as satisfied, cannot plead mistake and demand a larger sum as consideration for doing that which has been done already. S. 9, Cl. 3, declares that "upon a final order being passed directing the conveyance of the land by the landlord to the tenant, the suit shall stand dismissed". The respondent's application may thus be regarded as an attempt to re-open a closed suit and he is estopped from putting forward a plea that the decree is wrong by his conduct in not taking the objection earlier.

The appeal is, therefore, allowed with costs and the lower Court's order directing an amendment of the decree is quashed.

Appeal allowed.

(3) [1917] 49 I. C. 948.
(4) [1902] 12 M.L.J, 96.

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* A. I. R. 1926 Madras 517

DEVADOSS, J.

E. Rajagopalachariar—Plaintiff—Appellant.

v.

Sami Reddi and *others*—Defendants—Respondents.

Second Appeal No. 1548 of 1922, Decided on 1st May 1925, from the decree of the Dist. J., Chingleput, in A. S. Nos. 295 and 296 of 1920.

* (a) *Hindu Law—Limited owner inheriting considerable property cannot charge the reversion for debts which can be met with from the income.*

Where a woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met those debts from the income of the property. But where the income is not sufficient for her own maintenance, or for other purposes, such as pilgrimage to holy places, etc., a limited owner can alienate the property to the prejudice of the reversion. [P. 519, C. 1]

* (b) *Hindu Law—Reversioner—Debts contracted by mother for marriage of her son are not binding on reversioners.*

There is no obligation under the Hindu Law on the part of a mother to get any of her sons married, and so a debt contracted by her for the marriage of any of her sons is not binding on the reversioner. [P. 519, C. 2]

* (c) *Hindu Law—Reversioner—Mere consent by a reversioner to a transaction by widow is not estoppel in every case.*

If a reversioner by his act which amounts either to ratification or election, or some other

act which he has done after the reversion opened, in order to make the alienee believe that he was standing by the transaction and that he was prepared to allow it to be good, he cannot afterwards resile from that position; but by the mere consent to the transaction at the time when it takes place, it cannot be said that in all cases a reversioner is estopped from contesting the validity of the transaction after the death of the limited owner; *A. I. R.* 1922 *All.* 297; 46 *Cal.* 566 (*P. C.*) and *A. I. R.* 1922 *Bom.* 102, *not Foll.*

[P. 520, C. 2]

K. Bhashyam Aiyangar—for Appellant.

A. Viswanatha Aiyar—for Respondents.

Judgment.—The plaintiff's suit is for possession of one-fourth share of the family property and for a declaration that certain alienations are invalid. In this appeal the property in dispute is comprised in Sch. B to the plaint. The District Judge has dismissed the plaintiff's suit so far as the Sch. B property is concerned. The plaintiff has preferred this second appeal.

The first point raised by Mr. Bhashyam for the appellant is that what was sold to the 58th defendant under his mortgage decree was only the life-interest of the plaintiff's mother. In support of that contention he relies upon Ex. E-3 which is a statement put in by the 2nd defendant in O. S. No. 34 of 1901, who was the mortgagee decree-holder, and who brought the property to sale under his mortgage decree obtained against the plaintiff's mother, Alamelammal. One of her sons brought a suit for a declaration that the property was the property of his father and the alienation by the mother was not binding upon him and upon his brothers. After the written statements were put in, the 2nd defendant, the decree-holder, consented to having the properties sold without prejudice to the rights of the plaintiff. The argument advanced by Mr. Bhashyam is that the mortgagee decree-holder, by putting in this petition, consented to have only the life-interest of the mother sold in execution of his decree. His contention is not supported by the pleadings in the case. Unfortunately the plaint in O. S. No. 34 of 1901 has not been filed in this case, but there is the statement of the 1st defendant, the mother, Ex. E-1, from which it is clear that the plaintiff contended that the property was the property of the father and not that of the mother, and the plaintiff did not set up the contention that even if the property was the property of the mother, she only had a daughter's interest and, therefore, what could be sold was only her life-interest. In para. 1 of Ex. E-1, the 1st defendant, Alamelammal, says:

The suit property belongs to the 1st defendant. The plaintiff has no concern and enjoyment whatever therein. It is not even the plaintiff's ancestral property. The 1st defendant got it ancestrally and is enjoying it with patta from 1858.

Para. 2 makes the matter clear:

The plaintiff's father instituted a suit O. S. No. 452 of 1898. ia the District Munsif's Court, Chingleput, against this defendant for recovery of the suit property and some other property. It was decided that the property belonged to this defendant and the plaintiff's suit has been dismissed."

In the light of the pleadings in O. S. No. 34 of 1901 it cannot be said that the plaintiff and his brothers put forward the case that the mother was only entitled to a life-interest as a daughter and they were entitled to the reversion In the absence of such a contention in the pleadings, and in the absence of an issue to that effect, it cannot be said that the 2nd defendant consented to selling only the life-interest of the 1st defendant, Alamelammal. What he says in Ex. E-3 is:

If there be any right for the plaintiff in the aforesaid properties, I consent to have the auction sale effected without going against that right.

The meaning of that sentence is that if the plaintiffs have any claim to the property, that is, as being their ancestral property, such a right would not be affected by the auction sale. It cannot by any process of ingenious reasoning be contended that by Ex. E-3 the 2nd defendant consented or agreed to have only the life-interest of the mother sold in auction.

The property was purchased by the mortgagee who was the 58th defendant in the present suit. He was in possession from the date of the sale. Alamelammal, the mother of the plaintiff, died in 1918. The plaintiff, her third son has brought this suit for a share of his mother's property and for a declaration that the alienation made by her in favour of the 58th defendant is invalid and is not binding upon him. Ex. XX is the deed of mortgage which was executed on the 7th July 1896, by Alamelammal in favour of Vijiaraghavachari, 58th defendant. The consideration for the mortgage Rs. 250, was received for the marriage of her son Jagannathachari.

This sum, not having been paid, the mortgagee brought a suit and obtained a mortgage decree, and brought the property to sale. The contention of the appellant is that this mortgage is not binding upon the reversion. It is urged that the mother had considerable property and she could have paid off the mortgage amount out of the income of the property; and reliance is placed upon *Jiban Krishna Roy* v. *Brojo Lal Sen* (1) and *Rameswar Mandal* v. *Provabati Debi* (2). Where a woman inherits considerable property as a limited owner she is not entitled to charge the reversion with debts contracted by her when she could have met those debts from the income of the property. But where the income is not sufficient for her own maintenance or for other purposes, such as pilgrimage to holy places, gifts for the repose of the soul of the person from whom she inherits her property or for other purposes which would be considered 'necessity' under the Hindu Law, a limited owner could alienate the property to the prejudice of the reversion. But where ample funds are in her hands for meeting her own expenses and for all other expenses incidental to the ownership of property, such as payment of cist or rent, she is not entitled to charge the property with her debts to the prejudice of the reversion. In this case the debt was contracted for the marriage of one of her sons. The purpose for which the loan was contracted is clear from the document itself, and it is not suggested either by the plaintiff or by the defendant that the debt was borrowed for any other purpose. The question, therefore, arises whether a limited owner is entitled to charge the reversion with a debt contracted for the purpose of the marriage of her son. No authority is shown for the position that a mother could alienate the property inherited by her own father for the purpose of getting one of her sons married. Mr. Viswanatha Aiyar's contention is that there is a moral obligation to get her son married and therefore she is entitled to borrow for the purpose of getting her son married. There is no obligation under the Hindu Law on the part of a mother to get any of her sons married. The case of a daughter stands on a different footing altogether. It is one of the duties of the father to get his daughter married and settled in life, and in the case of the twice-born the girl has to be married before she attains puberty and therefore the Hindu Law lays the obligation upon the father of getting the girl married, and in order to do so the father is entitled to alienate ancestral property and the sons cannot question his act. But no such obligation is laid upon the father to get any of his sons married and I am not aware of any authority in which it was held that a father could alienate ancestral property for the purpose of getting any of his sons married. In the case of a mother there is no obligation at all to get any of her sons married by borrowing money on the security of the property inherited by her from her father. In *Rustom Singh* v. *Moti Singh* (3) the alienation by the mother was held to be good on the ground that the father was too poor to provide for the marriage of the daughter, and the mother was obliged to find the money for celebrating the marriage of the daughter. This is quite in consonance with the principle of Hindu Law that a daughter should be married before she comes of age and it is the duty of the father to see that she is married. If the father is too poor to do his duty, the mother could, under circumstances, alienate her property for the purpose of getting the girl married. This would not support the contention of the respondent that the mother could also do the same thing for the son. In *Narainbati Kumri* v. *Ramdhari Singh* (4) it was held that a grandmother could not alienate her property for the purpose of celebrating the marriage of her daughter's daughter for there is no duty at all on her to get her granddaughter married. No doubt natural affection might prompt her to do so; but if she wants to get the girl married she must do it out of the income of the property and she could not encumber the reversion with a debt for such a purpose. As observed by Sharfuddin, J., at p. 85:

"Merely because Adyabati remained with her grandmother Anupbati, it is no ground according

(1) [1903] 30 Cal. 550=30 I. A. 81=5 Bom. L. R. 428=7 C. W. N. 425=8 Sar. 444 (P. C.).

(2) [1914] 20 C. L. J. 23=19 C. W. N. 313.

(3) [1896] 18 All. 474=(1896) A. W. N. 155.

(4) [1916] 1 Pat. L. J. 81=20 C. W. N. 734=3 Pat. L. W. 377.

to Hindu Law to charge the estate of Kamla Prasad with the cost of her marriage. It may be a moral duty to see that this girl was properly married, but I am not convinced that this can at all be considered as legal necessity of a nature that would bind the estate."

In *Bai Mangal* v. *Bai Rukhmini* (5) it was held that a married daughter had no claim for maintenance upon the father. There is, therefore, no justification for Alamelammal to borrow money on the security of the property for celebrating the marriage of her son.

The next contention advanced by Mr. Viswanatha Aiyar for the respondent is that the plaintiff was a consenting party to the transaction evidenced by Ex. XX. The money was borrowed for the marriage of his brother and, therefore the plaintiff is estopped from contesting the validity of the transaction. In order to establish estoppel it is necessary to make out that a representation was made by a person, and the other party to the representation believed that representation to be true and acted upon it to his prejudice. If no representation was made or if the other party did not believe in the representation and did not alter his position to his prejudice by believing that representation, then there is no question of estoppel at all. In this case the mortgagee was aware for what purpose the money was borrowed. The document recites a purpose and he does not adduce evidence to show that the purpose recited in the mortgage deed is not the purpose for which the money was borrowed. But it is very strongly pressed upon my attention by Mr. Viswanatha Aiyar that the mere consent of the reversioner to a transaction is sufficient to make the transaction valid. Strong reliance is placed on *Mahadeo Prasad Singh* v. *Mata Prasad* (6). It was held in that case that, if the next presumptive reversioner at the time of a transfer made by a Hindu widow of property of her deceased husband assents to such transfer, neither he nor any of his successors-in-title can afterwards dispute its validity. With very great respect I am unable to follow the reasoning of the learned Judges in that case. The decisions of the Privy Council on which the learned Judges rely do not support such a wide proposition as that laid down in that case. At page 53 the learned Judges observe :

"If it was intended to lay down the general proposition that in no case a reversioner can by his act or conduct estop himself from challenging a transfer after he has succeeded to the estate, then we would not agree with the decision."

This statement of the law is correct. If a reversioner by his act which amounts either to ratification or election or some other act which he has done after the reversion opened, in order to make the alienee believe that he was standing by the transaction, and that he was prepared to allow it to be good, he cannot afterwards resile from that position, but by the mere consent to the transaction at the time when it takes place, it cannot be said that in all cases a reversioner is estopped from contesting the validity of the transaction after the death of the limited owner. The other cases, *Gur Narayan* v. *Sheolal Singh* (7) and *Basappa* v. *Fakirappa* (8), are also on the same lines as that in *Mahadeo Prasad Singh* v. *Mata Prasad* (6), and, as I have already observed, the broad principle which the learned Judges lay down in those cases is not in my opinion warranted by the decision of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* (9). Each case has to be considered in connexion with the facts of that case. Unless any broad principle has been laid down by the Privy Council it would not be right to extract from a few cases a broad principle as that which has been laid down by the learned Judges of the Allahabad High Court in *Mahadeo Prasad Singh* v. *Mata Prasad* (6) and *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (10). From the judgment of their Lordships of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* (9) it is clear that, if the reversioners consent to a transaction that would be, in the absence of other evidence, presumptive evidence of the necessity for the transaction. It is for the alienee to prove necessity or to prove that he made a bona fide inquiry and satisfied himself that there was necessity for the alienation. But where he is unable to give evidence of circumstances which would

(5) [1898] 23 Bom. 291.
(6) A. I. R, 1922 All. 297.
(7) [1918] 46 Cal. 566=23 C. W. N. 521=36 M. L. J. 68 (P. C.).
(8) A. I. R. 1922 Bom. 102.
(9) [1918] 42 Mad. 523=46 I. A. 72 (P. C.).
(10) A. I. R. 1923 All. 387 (F. B.).

amount to necessity in law, or where he is not able to prove that he made bona fide inquiries as to the circumstances which would constitute necessity, if he proves that the nearest reversioners consented to the alienation, that would be presumptive evidence of the existence of the circumstances which would amount to necessity, and, in the absence of any evidence to the contrary, that presumption could be acted upon and the onus laid upon the alienee would be shifted to the reversioner. That being the principle of the decision in *Rangaswami Goundan* v. *Nachiappa Goundan* (9), it is difficult to see how the mere consent of the reversioner estops him from disputing the validity of the transaction. If he is able to show that the transaction was for a purpose which ostensibly could not be binding on the reversioner, then the mere fact that he consents to the alienation cannot possibly estop him. Supposing a son negotiates for a loan for his father to meet a gambling debt or a debt incurred for liquor, and if the lender knowing the purpose of the loan, lends money and the document by which the amount is secured recites the purpose, namely, the payment of a gaming debt or a debt incurred for supply of liquor, the mere fact that the son has negotiated the loan or was a consenting party to the transaction, or even attested the document would not be sufficient to estop him from afterwards contending that the debt incurred by the father was not binding upon him. It is only in cases where the lender was misled by a representation made by a person that he can raise the plea of estoppel. Whereas in this case the purpose is mentioned in the document itself, I fail to see how any question of estoppel can arise. On the other hand the mortgagee with open eyes lent money for a purpose which he must have known or ought to have known and, if he took the trouble to inquire, would have known, could not be binding on the reversioner. It is not necessary to discuss this point any further and it is not necessary for me to notice all the cases quoted by Mr. Viswanatha Aiyar.

The B schedule property consists of three items. On Item 3 there was a house which was said to be worth Rs. 6,000 according to the plaintiff, and the District Munsif found that the house was worth Rs. 2,000. It was demolished by the 58th defendant who is now dead and he is represented by the 59th and 60th defendants. The District Judge has not given a finding as regards the value of the house. Inasmuch as the 58th defendant has demolished the house the plaintiff would be entitled to one-fourth the value of the house, his share being one-fourth and his brothers being entitled to three-fourths. I allow the second appeal with costs of the plaintiff and remand the appeal to the lower appellate Court for disposal after recording findings on Issues 7 and 8.

Appeal allowed.

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* A. I. R. 1926 Madras 521

COUTTS-TROTTER, C. J., AND VISWANATHA SASTRI, J.

(Pedda) Sanjivi Reddi and *another*—Plaintiffs—Appellants.

v.

Kondagari Koneri Reddi—Defendant—Respondent.

Appeal No. 356 of 1924, Decided on 6th October 1925, from the decree of the Dist. J., Bellary, in O. S. No. 53 of 1923.

* (a) *Tort—Defamation — Privilege — Statements of witness as preliminary to going to the box are equally privileged as those made in the box (per Coutts-Trotter, C. J.).*

All statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in the Court. *Watson* v. *McEwan*, (1905) *A. C.* 480, *Foll.* [P. 523, C. 2]

* (b) *Tort—Defamation—Statements.*

The statements made to the Police Officer which were made with a view to their being repeated on oath before a Magistrate are absolutely privileged. [P. 523, C. 2]

(c) *Criminal P. C., S.* 107—*It will be well if power to refer petitions under S.* 107 *for investigation is given to Magistrates (per Coutts-Trotter, C. J.).*

It will be well that the Code should be revised and that express provision should be made conferring power in terms upon Magistrates to refer petitions under S. 107 for investigation under S. 202. [P. 523, C. 2]

* (d) *Tort—Defamation—Absolute privilege.*

Statements made in the petition presented to the Magistrate, under S. 107 (1), Criminal P. C., are absolutely privileged. *Dr. Grivenwelt* v. *Dr. Burwell*, (1 *Ld. Raym.* 454), *Foll.* [P. 524, C. 1]

* (e) *Malicious prosecution—Dismissal of petition under S.* 107, *Criminal P. C., without notice to plaintiff—Plaintiff has no cause of action for malicious prosecution (per Viswanatha Sastri, J.).*

Where the petition was one praying for action under S. 107 of the Criminal P. C., and was dis-

missed without issuing any notice to plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie. [P 524, C 2]

(*f*) *Tort—Defamation—Statements in initial proceedings are equally privileged as those in subsequent stages.* (*Per Viswanatha Sastri, J.*).

A statement in a complaint which initiates a proceeding is as much entitled to privilege as other statements made by parties in the subsequent stages of the proceedings. 37 *Mad.* 110, *Foll.* [P 525, C 2]

* (*g*) *Criminal P. C., Ss.* 107 *and* 202—*Magistrate on petition under S.* 107 *may act under S.* 202—*Statements by petitioner made during such investigation by police are absolutely privileged* (*per Viswanatha Sastri, J.*)—*Criminal P. C., S.* 202.

It is perfectly open to a Magistrate who is asked to set in motion S. 107 to avail himself of the help which is available to him under S. 202, when complaint of an offence of which he is authorized to take cognizance is made to him. Apart from S. 202 it is competent to a Magistrate to refer the matter to the police, and the Police are entitled to hold the investigation, and it is the duty of the complainant to assist in the investigation, and so any statement made by the complainant during the investigation is absolutely privileged. [P 525, C 2]

K. V. Reddi and *P. S. Rangaram*—for Appellants.

S. Ranganatha Aiyar—for Respondent.

Coutts-Trotter, C. J.—The plaintiffs in this case brought a suit claiming damages for malicious prosecution and for defamation. The defendant presented a petition to the Deputy Magistrate of Adoni praying that the plaintiffs and some others should be bound over under S. 107 of the Criminal Procedure Code. The Magistrate on receipt of the petition sent it to the police for enquiry and report. The police reported after enquiry and after hearing what the petitioner had to say, that there was no foundation for the allegations in the petition. Therefore, the Magistrate dismissed it and refused to take any action under S. 107, Criminal Procedure Code. This civil suit is the outcome of those proceedings.

No difficulty arises with regard to the claim for malicious prosecution. The short and sufficient answer to such a claim is that the plaintiffs were not in fact prosecuted. But the claim for defamation raises a question of some little importance.

A Code like the Criminal Procedure Code which purports to provide for every conceivable situation labours under at least one disadvantage and, that is, that it is difficult, if not impossible, to argue by analogy and to extend the principle to be found in one class of cases with which it deals, to another. I make no question but that it is against the general principles of the Code that action should lie for statements made in circumstances such as the present. But unfortunately while the Code contains definite provisions as to certain statements the effect of which is to make them absolutely privileged, it can hardly be said to have provided for statements such as those. Indeed contention for the plaintiffs is that the present occasion cannot be brought within the words of the Code at all. The difficulty in the present case is created by the wording of S. 202, Criminal Procedure Code, the section which authorizes a Magistrate to refer a matter for investigation to a police officer taken in conjunction with the definition of "complaint" contained in S. 4 (1-h). In the latter section, "complaint" is defined as:

> the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code that some person whether known, or unknown, has committed an offence:

and S. 202 which gives the Magistrate the power to refer a matter for investigation by a police officer is in terms restricted by defining the occasion on which he may so act by the words:

> on receipt of a complaint of an offence of which he is authorized to take cognizance.

It is argued that as a petition under S. 107 does not allege the commission of an offence but merely the apprehension that an offence may be committed, the Magistrate has no jurisdiction to order a police investigation. From this it would follow that the investigation is one not authorised by the Code and it is said to follow that the statements made on such an occasion cannot be supposed to be absolutely privileged. It is further pointed out that, on the principle of *expressum facit cessare tacitum*, where the Code indicates that absolute privilege should attach to statements, it has done so by implication under S. 161. That section makes a person interrogated by a police officer making an investigation, bound to answer all questions relating to the case put to him by the police officer. Unfortunately the investigation dealt with by S. 161 is limited to an investigation made under Chap. XIV of the Code

which relates to information as to the commission of a cognizable offence. I have already stated that this was not a case of an offence at all but merely a threatened or contemplated offence. The argument is thus twofold : first, that the Magistrate had no jurisdiction to refer the case for investigation at all; and secondly, that even if he had, as the information did not relate to the commission of an offence, the witness was under no necessity to answer questions put to him and, therefore, absolute privilege cannot attach to such answers. It was not disputed at the Bar that if the witness were compellable to answer questions, absolute privilege would attach to his answers, nor was it disputed that qualified privilege might he held to attach to the statements made in this case. That, however, would not help the respondent here as there were allegations of malice which were not gone into by the learned Judge which would have invalidated any claim to qualified privilege. With regard to the statements alleged to have been made to the police officer, I do not feel any great difficulty. It is, I think, possible to argue that the words of S. 154 at the opening of Chap. XIV : "Every information relating to the commission of a cognizable offence" may be held to cover information relating to the threatened commission of a cognizable offence which, of course, would cover the present case, where the suggestion was that the petitioner's life was in danger. But I prefer to put it on another and a wider ground. In *Watson* v. *McEwan* (1) the House of Lords decided that the absolute privilege which attaches to a witness in the box also attaches to statements made by him for the purpose of his being examined in the box. In that case, one of the statements on which it was sought to found the action was made to the solicitor for the purpose of taking the witness' proof, and might have been held to be covered by the professional privilege of the solicitor. But another of the statements was made not to a professional lawyer but to a layman, the husband of the plaintiff, in reference to proceedings for a separation which were pending between them. But the House of Lords did not proceed on the ground of professional privilege at all but on the ground of the privilege of a witness. Lord Halsbury says at p. 487 :

> It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence, involve that which is a step towards and is part of the administration of justice, namely, the preliminary examination of witnesses to find out what they can prove.

I take that as clearly implying that all statements made by a potential witness as a preliminary to going into the witness-box are equally privileged with the statements made when actually in the box in Court. And the compiler of the head-note took the same view because he states :

> The privilege which protects a witness from an action of slander in respect of his evidence in the box also protects him against the consequence of statements made to the client and solicitor in preparing the proof for trial."

I am, therefore, of opinion that the statements made to the police officer which could only be made with a view to their being repeated on oath before the Magistrate, were absolutely privileged. It would, in my opinion, have been much better if the Code had contained a general power to Magistrate, to refer any matter brought to their notice for investigation to a police officer without confining it to Chapter XIV. Petitions under S. 107 are habitually referred for investigation by Magistrates which is a great safeguard to the subject, and no class of cases requires more scrutiny from the very nature of the allegations made. An allegation not that a man has committed an offence, but that he contemplates committing one can obviously be made much more recklessly than an allegation that he has in fact committed an offence which is a much more tangible subject of investigation. I think it will be well that the Code should be revised and that express provision should be made conferring power in terms upon Magistrates to refer petitions under S. 107 for investigation. It is quite true that there is a ruling recorded in Weir's Criminal Rulings, Vol. II, p, 51 (*Cr. R. C.* 132 of 1891) that there is no irregularity in a Magistrate calling for a report from a Magistrate and a police officer must be in the same position before taking action under S. 107. But I think it would be well if the matter were finally settled by an express statutory direction.

With regard to the statements in the petition presented to the Magistrate it is

(1) [1905] A. C. 480=74 L. J. P. C. 151=93 L. T. 489.

clear that such a document is contemplated by S. 107 (1) as part of the regular machinery of the section. Its wording is :

> Whenever a Magistrate of the class described in the section is informed that any person is likely to commit any breach of the peace

and it is clear that the petition would fall within the information contemplated by the section. If so, it would clearly be invested by the common law of England with absolute privilege which attaches not merely to the actual proceedings of any tribunal exercising judicial functions but to all preliminary steps which are in accordance with the recognized and reasonable procedure of such a tribunal. This was laid down by Lord Holt, C. J., in 1700 in the case of *Dr. Grivenvelt* v. *Dr. Burwell* (2). I am of opinion that that principle which is absolutely necessary for the administration of justice must be held to obtain in India also. The learned Judge was, therefore, right in non-suiting the plaintiffs. and this appeal must be dismissed with costs.

Viswanatha Sastri, J.— The suit was for the recovery of Rs. 5,000 being the damages sustained by plaintiffs by reason of certain "false and malicious' accusations and imputations made by defendant in a "criminal complaint filed" by him in the Court of the Deputy Magistrate, Adoni, on 28th June 1923. These accusations and imputations were repeated in a statement made by the defendant to the Sub-Inspector of Police, Aspari on 21st July 1923, to whom the Deputy Magistrate had referred the complaint for investigation. Defendant admitted the filing of the "petition" and contended that "it cannot be deemed to be a complaint" that the filing of it did not amount to a prosecution ; that consequently plaintiffs had no "cause of action to sue for damages for malicious prosecution"; that no such suit lay in respect of "statements made to the police officer in the course of the enquiry" and that the statements were not made "maliciously and without reasonable and probable cause," but "in good faith, bona fide for good reasons and for the protection of his (defendant's) own interest." On these pleadings the trial Judge joined the following issues :

1. Were the allegations absolutely privileged,

2. Was there any prosecution such as would entitle the plaintiff to damages, if it were proved to be malicious and based on false allegations.

No evidence was received, and the learned trial Judge, after considering the law , came to the conclusion that no action can be taken by the plaintiffs for damages for defamation in respect of allegations made by the defendant, in his complaint to the Magistrate or in his statement to the police." He also held that as "there was no prosecution" but only an attempt at prosecution no suit for damages for malicious prosecution can lie. These findings are impeached in appeal.

The petition of 28th July 1923, presented to the Deputy Magistrate, Adoni, is not printed, but the allegations said to have been made in it are detailed in paragraph 5 of the plaint. The petition was one praying for action under S. 107 of the Criminal P. C. and, as it was dismissed without issuing any notice to plaintiff, there was no prosecution of plaintiffs and consequently no action for damages for malicious prosecution would lie.

On the question whether an action for damages for defamation would lie on the basis of the petition, the contention of the defendant was one of absolute privilege. In *In Re Muthusami Naidu* (3) a Bench of this Court, following *Golap Jan* v. *Bholanath Khettry* (4) held that a defamatory statement in a compla int to a Magistrate was absolutelp privileged. But it was contended on behalf of the appellants that a petition to a Magistrate to take action under S. 107 of the Criminal P. C. was not a complaint within the meaning of the term as defined in S. 4, Cl. (h) of the said Code ; and that consequently no claim to absolute privilege can be made, with respect to accusations and imputations made therein. A "complaint" as defined in the Code is an

> allegation made orally or in writing to a Magistrate with a view to his taking action under the Code that some person.....has committed an offence.

It is argued that no offence was committed by the defendant,and that consequently the petition could not be deemed to be a "complaint." It is open to a person whose personal safety is threatened, to apply to a Magistrate for protection and one of the ways of

(2) 1 Ld. Raym. 454.

(3) [1914] 37 Mad. 110=11 M. L. T. 431.
(4) [1911] 38 Cal. 880=15 C. W. N. 917.

affording protection is by taking security under S. 107 of the Criminal P. C. The petition put in by defendant initiated a proceeding; and in *In re Muthusami Naidu* (3) the case above cited, the learned Judges observe:

> We do not think that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings.

I may here state that the words used in the plaint are:

> The defendant filed a criminal complaint in the Court of etc., etc.

In my opinion, therefore, the plea of absolute privilege will prevail, with respect to the petition presented to the Deputy Magistrate.

The question whether there is any such privilege in the case of the statement made to the Sub-Inspector of Police on 21st July 1923, is not free from difficulty in the face of the ruling of Seshagiri Aiyer, J., *in re Kakumara Anjaneyulu* (5) to the effect that:

> The rule of law that parties before the Court are absolutely privileged cannot be extended to the case of complaints to a police constable.

In that case the question of privilege arose in a prosecution under S. 499, I. P. C., and not as here in a civil action for defamation, and in *Chunni Lal* v. *Narasingh Das* (6) a Bench of five Judges held that:

> the civil and criminal law and procedure..... are independent of each other,

and that as:

> there was no statute in India dealing with civil liability for defamation, the rule of 'equity' justice and good conscience' had to be appplied.

The same view has been taken by a Special Bench of five Judges of the Calcutta High Court in *Satish Chandra Chakravarti* v. *Ram Dayal De* (7). At p. 426 it is stated that "the principles of justice, equity and good conscience" applicable in such circumstances should be identical with the corresponding relevant rules of the common law of England.

In the case before us, the petition presented to the Deputy Magistrate was by him to the police for investigation, and so far as my experience goes, this is usually done. Such a course is authorized under S. 202 of the Criminal P. C., when a Magistrate receives "a complaint of an offence of which he is authorised to take cognizance." But a contention is raised to the effect that as there was no complaint of an offence of which the Magistrate was authorized to take cognizance, he had no authority to order police investigation and that the statement to the Sub-Inspector of police was, therefore, made to an officer who had no authority to hold any investigation. S. 107 of the Criminal P. C. appears in Part IV which is headed "prevention of offences." The prevention of offences is a part of the administrative machinery for maintaining "Law and Order", and this task is laid on Magistrates. There Magistrates have control over the police, whose assistance they can seek in the discharge of their duties. Such being the case it appears to me that it is perfectly open to a Magistrate who is asked to set in motion S. 107 of the Criminal P. C., to avail himself of the help which is available to him under S. 202, Criminal Procedure Code, when complaint of an offence of which he is authorised to take cognizance is made to him. In this view, I am fortified by the ruling reported in Weir's Criminal rulings, Vol. II, p. 51. In that case, the report was no doubt called for from a Subordinate Magistrate, but this can make no difference. In Halsbury's Laws of England (Edition of 1911, Vol. 18, S. 1254) it is stated that

> The privilege attaches not merely to proceedings at the trial, but to proceedings which are essentially steps in judicial proceedings.

In the foot-note reference is made to *Watson* v. *Jones or Mc Ewan* (1) where it was held:

> That the public policy which renders the protection of witnesses necessary for the administration of justice necessarily involves that which is a step towards, and is part of the administration of justice namely, the preliminary examination of witnesses to find out what they can prove, and that consequently statements made by a witness to a litigant or his solicitor in preparing proof are absolutely privileged.

I am, therefore, of opinion that apart from S. 202 of the Criminal Procedure Code, it was competent to the Deputy Magistrate, Adoni, to have referred the matter to the Police for investigation, and that the Sub Inspector of Police, Aspari, was entitled to hold the investigation and having presented the petition, it was the duty of the defendant to assist in the investigation. It was said that such wide privileges would have disastrous consequences on innocent citizens, who would be left without redress. But it will

(5) [1916] 35 I. C. 813.
(6) [1918] 40 All. 341=16 A. L. J. 360 (F. B.).
(7) [1921] 48 Cal. 388.

always be open to such person to put Ss. 182 and 211, Indian Penal Code, in motion by an application under S. 195, Criminal Procedure Code.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 526

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

(*Chintalapati Butchi*) *Seetayya Garu* and *another*—Plaintiffs—Appellants.

v.

Gollavilli Appadu and *others*—Defendants—Respondents.

Appeal No. 193 of 1922, Decided on 26th March 1925, from an order of the Sub-J., Vizagapatam, D/- 11th April 1922 in A. S. No. 106 of 1922.

(*a*) *Madras Estates Land Act* (1 *of* 1908), *S.* 3 (5)—*Grant of inam comprising both varams—Grantee is landholder.*

Although the grant of a post-settlement inam comprises both the varams, the grantee is a landholder and his ryot can claim occupancy rights, but where the grant is of kudivaram alone, he would be merely a ryot with the result that any under-tenant cannot claim rights of occupancy; *A. I. R.* 1922 *Mad.* 373 (*F. B.*), *Appl.* [P 527 C 2]

(*b*) *Grant—Inam—Waste land.*

Per Venkatasubba Rao, J.—It cannot be said that an inam grant of waste land is in law impossible. [P 528 C 1]

(*c*) *Grant—Inam—Perpetual lease.*

The distinction between a grant in inam and a perpetual lease on a favourable rent is indeed very fine although in law it is quite sound. [P 528 C 1]

D. Appa Rao and *B. Somayya*—for Appellants.

T. Suryanarayana—for Respondents.

Venkatasubba Rao, J.—The question to be decided in this appeal is whether the defendants gave permanent occupancy rights in the land in question.

The facts may be briefly stated. The Rajah of Vizanagaram granted in the year 1810 to Chintalapati Rayappa Razu a portion of the village of Lakkavaram on what was described as "Harasala Cowle" or permanent lease. The assessment and other dues payable to the zamindar were fixed at Rs. 1,421-6-0 and the grant contains the words that "the profits are to be enjoyed hereditarily from son to grandson." It may be useful to give the rendering of the grant itself (Ex. 1).

Harasala Cowle granted by Sri Pusapati Narayanagajapathi Raju Maharajulungaru to Chintalapati Rayaparaju on Saturday, the 5th day of the bright-fortnight of Margasira of the Promodutha year. Yearly money rent for the village of Lakkavaram in the Purganah of Veddadi excluding the existing temple, Brahmin, mirasi inams from the year Pramothudha:

Rs. 1,400 jamabandi or assessment

* * * * *

Rupees one thousand four hundred and twenty-one and annas six is settled, and kadapa having been filed, Harasala Cowle is granted. Therefore, for this the instalments every year are;

* * * * *

In default of payment on due dates the amounts should be paid along with interest. Cultivating this village extensively, the profits left after payment of the sircar jamabandi or assessment from its produce, are to be enjoyed hereditarily from your son to grandson. The laws enacted by the company should be observed towards ryots and other people.

In 1823 there was what purported to be a relinquishment in favour of the zamindar and an endorsement was made on the Cowle to the effect that the land was relinquished. Taking his stand on this relinquishment, the zamindar sued for possession in 1825. His suit was dismissed in 1827 by the Provincial Court, Northern Division, on the ground that the parties who made the relinquishment had no right to the land and that Simhadri Razu, the adopted son of Rayappa Razu, was the person entitled.

We have no information as to the subsequent history of this inam excepting that the family became split into three branches and a third share was held by a widow belonging to one of them, by name Sundaranarasayya. She granted to Sripati Purushottam about 6 acres of land out of her share. The grant is not before us and we have to decide what was the nature of the grant that was then made. Nor is it known when the grant was made excepting that it should have been previous to 1874 as Sundaranarasayya died in that year. On her death the zamindar of Vizianagaram, claiming that certain sums were due from her, resumed her share of the inam. The only information that we have in regard to the plot granted to Sripati Purushottam is that on the 8th of February 1893 he executed Ex. B in favour of the zamindar. It recites that the suit plot which had been granted to Purushottam and had been for long in his enjoyment, is at his request allowed to continue to remain

with him and he agrees to pay an annual kattubadi of Rs. 6 and obtain receipts from time to time. We have to decide what is the nature of this grant and what light does it throw on the previous grant by Sundaranarasayya to Purushottam.

We have evidence in the case as to how Purushottam was enjoying these lands subsequent to 1893. Exhibit D is a kadapa exeeuted by one Jarripotula Bhimanna in favour of Purushottam wherein he agrees to pay a kist of Rs. 43-8-0 for the land in question and to give up possession at the end of the year for which the lease was granted. This recites that one Dummi Appadu was cultivating the land during the previous year. Again in 1899 the same Bhimanna executed another kadapa, apparently for one year, agreeing to pay a half share of the produce and a further sum of Rs. 3-8-0, half of Rs. 7, the kattubadi payable on the land. In 1903, the 4th defendant who contests the suit executed Ex. C-1 agreeing to take the land on lease for three years at a yearly kist of Rs. 22-8-0 and to surrender the land at the end of the period. In 1909, again, the 4th defendant executed to Purushottam another kadapa (Ex. C.) for a period of three years on a yearly kist of Rs. 30 agreeing, as before, to give up the land at the end of the term. This recites that this very tenant was in the possession of the land during the year previous to the kadapa. These documents show that the land was being actually cultivated by tenants and that Purushottam leased to such lessees from time to time as he pleased. The evidence also makes it clear that the 4th defendant was originally admitted as tenant about the year 1900. On the death of Purushottam, his sons executed a sale-deed for the suit land in favour of the plaintiff. The suit is for recovering possession and the 4th defendant resists it on the ground that he has permanent occupancy rights.

The plea, namely, that occupancy rights were expressly conferred on the defendant by Purushottam may be easily disposed of. The terms of the kadapas C and C-1 are inconsistent with any such hypothesis and it is impossible to hold, in the face of his undertaking to surrender the land at the end of the term, that by contract such rights were granted to him.

The next question then is, Can the 4th defendant claim occupancy rights in virtue of the Estates Land Act? The defendant can succeed by showing either that the land in question is an estate within the meaning of S. 3, Cl. (2), of the Act or that the plaintiff is a landholder as defined in Cl. (5) of the same section. What was granted to Rayappa Razu was itself less than a village and S. 3 (2) (e) does not apply even to the original grant. Rayappa Razu was himself a minor inamdar and the portion granted to Purushottam cannot possibly be an estate within the Act. This proposition is not disputed. The defendant, therefore strongly seeks to make out that the plaintiff is a landholder. Mr. Varadachari, the learned vakil for the plaintiff, contends that according to the true construction of Ex. E (1) it constitutes a grant only of the kudivaram interest. But for the purpose of the present appeal he does not propose to take his stand upon this. I have, therefore, to deal with the case on the footing that Rayappa Razu and Sundaranarasayya are minor inamdars.

That they will in that event be landholders must now be taken as settled: *Brahmayya* v. *Acthiraju* (1). That case is an authority for the proposition that although the grant of a post-settlement inam comprises both the varams, the grantee is a landholder and the ryot can claim occupancy rights. Now, the short question is: Did the grant in favour of Purushottam comprise both the varams; in other words, was there a grant in inam to him, or as the plaintiff contends, was he merely inducted to the land as a ryot? To put it in another way: What was the subject of the grant in favour of Purushottam? (1) Was it of melvaram alone: in which case he would be a landholder? (2) Was it of melvaram and kudivaram: in which case again he would be a landholder? (3) Was it of kudivaram alone: in which event he would be merely a ryot with the result that any under-tenant cannot claim rights of occupancy?

At the time of the grant the land was waste and there were no cultivating tenants on it, and what was granted, therefore, could not be melvaram alone. This hypothesis is, therefore, out of the question. The question, therefore, narrows itself into: was the grant of both the varams or was it only of kudivaram; in other words, was it the land that was

(1) A. I. R. 1922 Mad. 373 (F. B.).

granted, or was the grantee introduced on the land merely as a ryot ?

The contention of Mr. Varadachariar. the learned vakil for the plaintiff, is twofold. On the date of the grant by Sundaranarasayya the land was clearly waste. Where melvaram and kudivaram interests do not exist as two independent entities but only notionally (as in the case of waste land) it is not correct to describe the grant as being in the nature of inam. Such a conception is erroneous in law. The transaction can amount only to admission of a tenant to waste land as in the case of a darkhast grant in ryotwari tracts. Dealing with this contention, I must say I am unable to accept the theory that an inam grant of waste land is in law impossible.

Mr. Varadachari's second contention cannot, however, be so easily disposed of. He contends, assuming that there is nothing to prevent the transaction from being a grant in inam, this transaction must be construed as a disposition in favour of a tenant. He argues that the land being waste, a favourable rent would be a normal feature and points to S. 26 of the Estates Land Act and urges that it contemplates the co-existence of low rent with mere kudivaram grant. In effect he maintains that the transaction is not an out and out grant, but it should be viewed in the nature of a perpetual lease, there being a remission of a part of the rent. The distinction between a grant in inam and a perpetual lease on a favourable rent is indeed very fine, although in law it is quite sound and this distinction is very material in the consideration of the present question. To understand, therefore, what the true nature of the transaction is, a very careful scrutiny of the evidence becomes necessary.

In this connexion I must point out that there is no suggestion that at the time of the grant by Sundaranarasayya the grantee was in possession of the land or that any person had any kudivaram interest in it. In para. 5 of the plaint it is stated that the land was waste at that time, and the 4th defendant in his evidence admits that the land was then waste. *Marina Veeraswamy* v. *Bayinappalli Venkatarayudu* (2) and *Manaikyamba* v. *Mallayya* (3) are, therefore, inapplicable. The only other positions that remain to be dealt with are, first, that there was a simultaneous grant of both varams and, secondly, that there was a grant of kudivaram alone. In the former case *Brahmayya* v. *Achiraju* (1) directly applies and the grantee would be a landholder.

To clear the ground, I should like before discussing the evidence to make another observation. Exhibit B very clearly shows that there was no fresh grant by the zemindar but that he merely confirmed the original grant, whatever, it was, imposing probably a kattubadi for the first time or enhancing a previously existing kattubadi. With these remarks I shall examine the evidence. (1) Exhibit B is more consistent with the theory of an inam grant than a lease on favourable terms : especially the use of the word "kattubudi" favours this view. (2) K-4 is a receipt by the zamindar in favour of Purushottam. He is described in it as inamdar and the sum of Rs. 6 payable by him as "darimila kattubadi."

There are other receipts where the word "pattadar" appears but I attach importance to the word "inamdar" which was specially written in ink, whereas the word "pattadar" appears in print in a common form of receipt. (3) Exhibits 1-A, 1-B, and 1-E, dated 23rd December 1904, 10th December 1905 and 2nd May 1907, respectively are receipts granted by Purushottam to the 4th defendant. In the first and second of them, the rent is described as inam kist, in the third it is described as "kist in respect of manyam lands." (4) Exhibit D, one of the kadapas executed in favour of Purushottam, describes the lands as "inam wet lands." (5) The landlord's share alone is fixed at Rs. 43-8-0 in Ex. D, at Rs. 22-8-0 in Ex. C-1 and at Rs. 30 in Ex. C, whereas the kattubadi is only Rs. 6. (6) A holding in perpetuity is in the circumstances more consistent with the grant being in the nature of an inam. (7) Exhibit A refers to the sums payable in respect of land as taxes and what is described as post-settlement inam.

Beyond this, there is no evidence worth mentioning and as we must reach a decision only upon this material, I am of the opinion that the grant was in the nature of an inam. The plaintiff, therefore, is a landholder and I must in this

(2) [1920] 39 M. L. J. 225 = 12 L. W. 51 (F. B.).
(3) A. I. R. 1924 Mad. 782.

view uphold the judgment of the Subordinate Judge.

The appeal, therefore, fails and is dismissed with costs.

Madhavan Nair, J.—I agree. The main question for consideration in this appeal is: What was the nature of the grant of the suit land by Sundaranarasayya to Sripati Purshottam? Was it the grant of a land in inam, or, as is contended for by Mr. Varadachariar, the learned vakil for the appellant, did the grant only amount to an admission of Sripati Purushottam to the land as a tenant, in which case the 4th defendant would not be an under-tenant under him? The decision of the question must depend entirely upon a scrutiny of the evidence in the case.

The original grant is not before us, but we have to proceed on the assumption that the land when it was given was merely a waste land. It is so described in the plaint and it is admitted by the 4th defendant in his evidence. From the nature of that land itself nothing definite as regards the character of the grant can be inferred. It is quite possible that only a kudivaram interest was granted to Sripati Purushottam. Section 26 of the Madras Estate Lands Act shows that it is quite possible to make a grant of such a limited character, and the decisions quoted to us also suggest that the idea of such a grant is not an unfamiliar one. But the other evidence in the case, which I shall presently examine, makes me think that the grant in this case was in the nature of the grant in inam. This evidence consists of three classes of documents: (1) kadapas executed in favour of Sripati Purushottam, namely, Exs. D, D-1 and C, C-1; (2) receipts granted by the Vizianagaram Estate to Sripati Purushottam, namely, Exs. K series; (3) receipts granted to Sripati Purushottam by the 4th defendant; and (4) Exs. A and B.

(1) The kadapas do not afford much valuable evidence in the case, but Ex. D, executed by one Bhimanna in favour of Sripati Purushottam describes the land "inam wet land." Exhibits C and C-1 show that Sripati Purushottam was letting out the land for cultivation to tenants on lease. Taken along with the other evidence in the case, an inference, though a faint one, that Sripati Purushottam was an inamdar may be drawn from these documents.

(2) As regards the receipts granted by the estate we have to note that in Ex. K-4, Sripati Purushottam is described as "inamdar." The word is written in ink through the printed word "pattadar," the usual word appearing in the printed receipts has not been scored out. In Ex. K-8 the land is described as "inam of No. 107 individual" and Sripati Purushottam is described as "inamdar," and the word is written in ink. No doubt in some of the receipts he is described as "pattadar," but it seems to me that importance is to be attached more to the description "inamdar" than to the word "pattadar" as the former word has, as already mentioned, been specially written in iuk, whereas the printed word "pattadar" is the common word appearing in the receipts. It may also be noted that the kattubadi payable is variously described as "dharmilla kattubadi" and "dharmilla inam kattubadi." The words "inam kattubadi" appearing in Ex. K-4 are again written in ink.

(3) Dealing with the 3rd class of documents, Ex. 1-a is a receipt given by an agent on behalf of Sripati Purushottam to the 4th defendant. It mentions that the rent is paid as "inam cist for the land in Lakkavaram village." In Ex. 1-b also the same description appears. In Ex. 1-0 the rent is referred to as "kist for manyam land". These receipts go to show how Sripati Purushottam himself thought about his right to the land.

(4) Exhibit A is the sale-deed to the plaintiff. There the suit land is described as "dharmilla inam land." Exhibit B is the agreement executed by Sripati Purushottam in favour of the Maharaja of Vizianagaram, dated the 8th of Feburary 1893. This does not help us very much in finding out the nature of the grant in this case; but the use of the word "kattubadi" suggests that the land may have been granted in inam. The oral evidence in the case is not of much importance. On a careful consideration of the above evidence, I have come to the conclusion that the grant by Sundaranarasayya to Sripati Purushottam was the grant of the land in inam. The plaintiff is, therefore, "a landholder" within the meaning of the Full Bench decision in *Bramayya v. Acthiraju* (1).

The decisions in *Marine Veeraswamy* v. *Boyinapplli Venkatarayudu* (2) and *Ganjain Manikyamba* v. *Pasala Mallayya* (3), are inapplicable to this case as at the time when the land was granted to Sripati Purushottam it is not suggested that there was anybody in possession of it.

As the plaintiff is a "landholder" the judgment of the learned Subordinate Judge is right and this appeal should be dismissed with costs.

Appeal dismissed.

** A. I. R. 1926 Madras 530

COUTTS-TROTTER, C. J., AND REILLY, J.

(*Komirisetti*) *Satyanarayana* — Appellant.

v.

Yeeranki China Venkatarao and *others* —Respondents.

Appeal No. 68 of 1922, Decided on 16th September 1925, against a decree of the Addl. Sub-J., Cocanada, D/- 18th April 1921, in Original Suit No. 10 of 1920.

(a) *Practice— Precedents— Conflict of view among High Courts—Each High Court should follow its own decisions unless clearly wrong.*

In a matter which is open to divergence of view among various High Courts the Court should follow its own cursus curiae unless it is of opinion that the former decisions of the Court are clearly wrong. [P. 531, C. 1]

** (b) *Registration Act, S. 77—Sale deed refused to be registered on executant's objection— Vendee's remedy is by suit under S. 77 and not by suit for specific performance against executant.*

Where the executant of a document at the time of registration thereof objects to the registration which is, therefore, refused, the remedy of the vendee is only by suit under S. 77 and not by a suit for specific performance against the vendor: 7 *A. L. J.* 887; 12 *C. L. J.* 464; 44 *I. C.* 361, *Dissented from*; 20 *Mad.* 19 and 5 *M. H. C. R.* 123, *Dist.*; 17 *Mad.* 341; 42 *Mad.* 822; and (1922) *M. W. N.* 10, *Foll.* [P. 532, C. 2]

C. Sydney Smith, *A. Krishnaswami Aiyar* and *P. C. Venkataramanayya*—for Appellant.

G. Lakshmanna, *A. Satyanarayana* and *C. Rama Rao*—for Respondents.

Coutts-Trotter, C. J.—This is an appeal from a decree of the Subordinate Judge of Cocanada wherein he gave certain remedies by way of specific relief to the plaintiffs' The plaintiffs' case was that certain sums of money were due to them as debts from various people. It is not material for the purposes of our decision to know how those debts were alleged to have come into existence, what was their nature or what were the relations to the plaintiffs of the various parties to the transactions in question. The transaction was that an agreement was entered into for the sale of certain property in extinguishment of the plaintiffs' claims. The agreement that was entered into by the contracting parties was this:

> "We shall execute the sale deed for this as per your draft and give it to you registered within three months from this date"

so that undoubtedly under that document it was part of the obligation of the defendants to get the deed that was in contemplation by this agreement drawn up, executed and registered. A deed was drawn up and in due course, it came on to the stage of registration. One of the persons who executed the agreement, the 3rd defendant in this case, when the time came for registration objected to the registration of the document and the registration authorities, after an enquiry into the matter refused to order registration of the document as against the recalcitrant 3rd defendant, plaintiff's case, of course, being throughout that she was a person against whom the deed ought to have been registered and that is their case here today and that the registration authorities were in error in giving effect to her refusal. In these circumstances they brought this suit for specific performance of the agreement against all the parties to it. We are not really called upon to decide in this case whether this is a matter in which the contemplation of the parties was that all should sign or that the signatures of what I may call the operative persons should be regarded as sufficient, it apparently being the fact that the signatures of others including the recalcitrant 3rd defendant were added ex majori cautela in case they should raise objections and claims thereafter. Speaking for myself, I think, that even in such a case it must most probably be held that it was the intention that they should execute for the very purpose that I have mentioned. However, in the view that we take it is unnecessary to decide the matter. And if the other view were to

prevail that the signature of this person was otiose and unnecessary then of course the plaintiffs' case would fail equally because the whole agreement would be completed sufficiently to satisfy the contract and there would be nothing for the suit to operate upon. But taking it that the signature of the 3rd defendant was necessary, what is the position in law ?

By S. 77 (1) of the Registration Act it is enacted as follows :

" Where the Registrar refuses to order the document to be registered, any person claiming under such document may within 30 days after the making of the order of refusal, institute in the civil Court, within the local limits of whose original jurisdiction is situate the office in which the document is sought to be registered, a suit for a decree directing the document to be registered in such office."

That is a statutory remedy given to a person who stands in the position that he is entitled to have a document registered by somebody else, that that somebody else has refused and the Registrar has upheld the refusal and he wants to have that compulsorily registered as against the other person. It should be observed, and I think, this is a most important thing to notice about the section, that it provides a limitation of a short period of 30 days, the object no doubt being to ensure that matters of this kind should be gone into when the evidence is fresh in everybody's mind and in all human probability all of it available, whereas if left to an ordinary suit some people might be dead who could throw light on the matter and others might have let it fade from their recollection. I should have thought that looking at the statute alone, it is clear that the object of the Legislature was to provide a remedy of a very short period of limitation for putting right a wrongful refusal to register, and that must be held to be the remedy and the only remedy given by law. But unfortunately the matter is covered with conflicting authority. The authorities in Madras appear to differ from the authorities in other parts of India. In a matter which is open to divergence of view my opinion is that this Court should follow its own cursus curiae unless it is of opinion that the former decisions of the Court are clearly wrong. I do not think, if it agrees with those decisions, that it ought to harass the parties with any argument before a Full Bench merely because of different views in other Courts.

An authority which is directly in favour of the respondents is *Amer Chand* v. *Nathu* (1), a decision to which that very distinguished Judge, Stanley C. J., was a party. A sale deed was executed, a lady refused to register it, but no suit was brought for compulsory registration ; nevertheless it was held that the plaintiff was entitled to a remedy by way of specific performance ; and the learned Jndge says this :

" His (plaintiff's) grounds of appeal are that the substantial relief sought by him was the specific performance of the contract for sale and for possession of the property. We see no answer to this appeal. No defence to the action was disclosed by the defendants and in view of all the facts the Court of first instance as well as the lower appellate Court ought, in our opinion, to have granted a decree for specific performance. The Court of first instance was wrong in passing an order (that is no doubt true) for registration of the sale deed which was executed by the guardian of the defendants in view of the provisions of the Registratiou Act. But it appears to us that the Court has jurisdiction to direct performance of the contract and to require that the defendants should do all necessary acts for the purpose of fulfilling the obligation into which through their guardian they had entered, and that the plaintiff is entitled to have a fresh sale deed executed by all the necessary parties and to have the document so executed registered."

And then they quote *Chinna Krishna Reddi.* v. *Dorasami Reddi* (2) a case which I shall show presently is really no authority for the proposition laid down by the Allahabad High Court at all. The next direct authority in Mr. Lakshmanna's favour is a case in *Surendra Nath Nag Chowdhury* v. *Gopal Chunder Chosh* (3) a decision of Mukerjee and Carnduff, JJ. There the decision was that

"although a document, which has been executed, is inoperative in law and wholly ineffectual to create title in the intended lessee, it is nevertheless evidence of a valid agreement to execute a lease and may consequently form the foundation of an action for specific performance."

That really entails another doctrine as well as the one we are directly concerned with here, namely that though a lease has for some reason or other become, or was from the first, legally inoperative, yet for the purpose of bringing a suit for specific performance it is open to the Court to treat it as a mere agreement of lease. I should have thought it a very vicious method or construction to say

(1) [1910] 7 A. L. J. 887.
(2) [1897] 20 Mad. 19.
(3) [1910] 12 C. L. J. 464.

that a document, which purports to be one thing, is to be allowed to be treated when it is found imperfectly to contain what it purports to be as a valid document of a different order altogether. The reasoning of the learned judges of the Calcutta High Court appears to be this. The undertaking of a person who enters into a contract for the sale of real property is to do everything whereby an operative agreement in law can be effected. He has not done everything if he failed in an instrument where the obligation is cast upon him to obtain its registration and, therefore, a step in the creation of the legal relation of purchaser and vendor being wanting, you can compel the person who has not taken that step to take it. The answer appears to me to be very simple. Sect. 77 of the Registration Act not only tells you how you are to do that, but says that if you want to effect that purpose of having registration forcibly carried out by a decree of the Court, you must do it within 30 days. It seems to me that these decisions in Calcutta and Allahabad in effect take upon themselves by a side wind to get rid of the period of limitation strictly imposed by the express words of the statute. To my mind no judicial decision has any right to tamper with a thing directly enforced and enjoined by a statute whose construction is free from possible doubt. The most that can be said is that the remedy given by the statute is not intended to be the only one. It is almost impossible to believe that the legislatnre can have intended that there should be a direct and an indirect way of effecting the same thing and that the period of limitation applicable to them should be entirely different. That is the view that has been taken in more than one case in this Court. But before I deal with them I want to refer to one other case of the Calcutta High Court, *Nasiruddin Mia* v. *Sidhoo Mia* (4), because that is an instructive case. What appears to me to be the policy underlying the Calcutta trend of decisions is I think well illustrated by that case decided by Mookerjee and Beachcroft, JJ., in 1917. In that case the plaintiff claimed two things in the alternative. He first put in a claim asking in termes to have the registration of a document enforced and an alternative claim along with it for specific performance. The document was in the same stage as the document here. It had been executed but one of the parties had refused to acknowledge the right to have it registered. The learned Judges say this:

"As regards the claim to enforce registration of the document executed in his favour by his vendors he was, no doubt, bound to follow strictly the procedure prescribed by the Indian Registation Act before he could institute a suit under S. 77 to compel registration. But as regards the alternative claim to enforce specific performance of the agreement to sell there was really no answer to the suit. Although the vendors had executed the document, as they could not be deemed to have completely performed their part as the agreement in essence was not merely to execute a conveyance which until registered would be inoperative in law but to transfer the full title from themselves to the plaintiff as purchaser. Such title could be transferred only by means of a registered instrument; consequently the execution of the conveyance not followed by registration could not be regarded as fulfilment of contract".

so that what is taken away by the right hand is immediately replaced by the left and where the statute has forbidden a special means, another means is promptly devised in order to get round the words of the Act.

In Madras the decisions have been different and having considered them all, I am of opinion that they are quite consistent. The leading case and the most direct authority is *Venkatasami* v. *Kristayya* (5). There the plaintiff sued for specific performance and a decree had been passed in the lower Court directing the defendant to execute and register a deed of transfer. That judgment was upset by Muthuswami Aiyar and Handley, JJ., and the reasoning that is directly in point is to be found on the second page of the judgment. It is an interesting case because the judgment contemplates the case not merely of failure by the defendant to procure registration but the case where the plaintiff does not assume the remedy given him under S. 72 or 76. The learned judges say this:

"If defendant had appeared and admitted execution, the document would have been refused and plaintiff would have been entitled to an enquiry before the Registrar under S. 72 to 76. If defendant did not appear, plaintiff might have proved execution of the document, and on such proof would have been entitled to registration. It the registering officer was not satisfied with the evidence of execution and refused to register, an appeal would have lain to the Registrar under

(4) [1918] 27 C. L. J. 528

(5) [1893] 16 Mad. 341=3 M. L. J. 169.

S. 72. If the decision under S. 72 or 76 had been adverse to plaintiff, he would have a remedy by suit under S. 77 of the Act. Plaintiff had, therefore, a complete remedy under the Act, and not having chosen to follow it has only himself to blame that the efficacy of the document has not been completed by registration."

Then they go on to dispose of the other doctrine that you can treat an incomplete conveyance as a complete agreement for a conveyance and negative that. The learned vakil who appeared for the respondents in this case said:

"There is a distinction. The plaintiff was disentitled there because it was through his own negligence that he failed to get the document registered."

I may point out in passing that in terms part of that negligence was considered by the learned Judges to be his failure to adopt the remedy given him under the Registration Act including the remedy by suit under S. 77. But says

"If you look at some of the later cases you will find that a distinction is drawn and you find that in cases where it has been proved that the defendant was the person to blame, the remedy by the Specific Relief Act has been allowed."

When examined, those cases appear to me not in the least to support his contention. In *Chinna Krishna Reddi* v. *Dorasami Redi* (2), there had been a document of conveyance executed but before registration the defendant in the suit got hold of the document fraudulently, stole it from the plaintiff and concealed it for the purpose of preventing registration from taking place because obviously the Registrar cannot register a document which for his purpose is non-existent and, therefore, the learned Judges say that the plaintiff was clearly entitled to have a fresh document executed and registered just as he would be so entitled if after execution the document had been accidentally lost or destroyed. That, no doubt, is quite true. And it follows a much older decision of this High Court in *Nynakka Rowthen* v. *Vavana Mohamed Naina Rowthen* (6). In that case soon after execution, the document in question was destroyed by fire before it had been registered. It was held that the plaintiff was entitled to ask the Court to compel the defendant to execute a fresh document. The principle of the decisions in the last two cases is perfectly intelligible but it does not appear to me to touch the present case. Mr. Lakshmanna says:

All those were cases where it had been shown that the defendant was at fault. No doubt on his own showing the Court ought to give specific performance of a remedy for the plaintiff.

It is not, in my opinion, the true line of reasoning at all. The plaintiff there was entitled to have a decree which no doubt included a direction that he should be given an executed and registered instrument because as things stood at the time of the suit, he had nothing whatever to register. In the one case the document had been destroyed and in the other case, it had been abstracted and he could not go to the Registrar and say

Compel my conveyor to register a document in my favour.

because the document to be registered was non-existing. The cases appear to have no bearing on this case. And it must be remembered that although in this country the remedy of specific performance is a statutory remedy, it neverthless is simply a crystallisation into statutory form of an equitable remedy to which laches was, as it is to all equitable claims, an answer. How it can be said that a man who is given an express statutory remedy by an Act of Legislature under S. 77 of the Registration Act and has failed to take advantage of it has not been guilty of laches and is entirely free from blame passes my comprehension. It appears to me that a man who has failed to adopt the remedy expressly provided by the statute cannot come to this court and ask for an exercise in his favour of a discretionary and equitable remedy. I ought to add that the decision in *Venkatasami* v. *Kristayya* (5) has been followed in several later decisions of this Court of which I need only instance two: *Thayar Ammal* v. *Lakshmi Ammal* (7) and *Subbaraya Pillai* v. *Devashayam Pillai* (8). This is sufficient to dispose of this appeal, because it is not pretended that unless the respondent can get over this stile there is anything arguable in the appeal. That being so, the appeal must be allowed with costs of the 2nd defendant throughout and the suit dismissed.

The memorandum of objections is dismissed. No costs.

Reilly, J.—I entirely agree.

Appeal allowed.

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(6) 5 M. H. C. R. 123.

(7) [1920] 43 Mad. 822=39 M. L. J. 181=12 L. W. 161=(1920) M. W. N. 457.

(8) [1922] M. W. N. 70.

A. I. R. 1926 Madras 534

SPENCER, J.

(*Kaki*) *Narasamma*—Plaintiff—Appellant.

v.

Kaki Venkataraju and *others*—Defendants—Respondents.

Second Appeal No. 93 of 1923, Decided on 5th October 1925, from the decree of the Addl. Sub-J., Rajahmundry, in A. S. No. 111 of 1921.

(*a*) *Hindu Law—Widow—Suit by, for maintenance—Right to maintenance and rate there of only should be considered.*

In a suit for maintenance by a widow the only questions for consideration are whether the widow is entitled to maintenance and at what rate maintenance should be awarded. [P. 534, C. 2]

(*b*) *Hindu Law—Maintenance is liable to be increased or decreased.*

A maintenance allowance is liable to be increased or decreased by change of circumstances; 27 *M. L. J.* 656, *Foll.* [P. 535, C. 1]

(*c*) *Hindu Law—Widow—Direction in husband's will allotting a fixed sum as maintenance without bequeathing specific property in her favour is merely indicative of husband's estimate.*

Where a husband in his Will made a provision that his wife should get a certain rate of maintenance without actually making a bequest of any item of property in her favour, the rate is merely an indication of what the husband thought to be a reasonable amount at the time of the Will, and it is not obligatory upon Courts to award exactly that amount in a suit for maintenance by the widow. [P 534, C2, P 535, C1]

P. Bapiraju—for Appellant.

T. Ramachandra Rao—for Respondents.

Judgment.—This is a suit for the recovery of past and future maintenance from the plaintiff's stepson. The District Munsif awarded maintenance to the plaintiff at the rate of Rs. 2 per mensem if she surrendered possession of the lands at Devarapalli; or if those lands remained in her possession he decreed that she should get no other maintenance at all. She was also given a right of residence in a portion of the defendant's house.

On appeal the Subordinate Judge fixed the amount of maintenance at Rs. 6 a month or Rs. 72 a year with the proviso that the defendants should pay only Rs. 32 a year so long as the plaintiff continued in possession of the Devarapalli lands. The plaintiff appeals against this decision and there is a memorandum of objections on the other side.

The plaintiff's husband, before he died, executed a Will, which is Ex. A, allowing his wife a sum of Rs. 15 a month for her life besides the lands at Devarapalli and providing that the sum should be Rs. 10 a month so long as she lived in her son's house with the rest of the family.

In a suit of this nature the only questions for consideration are: (1) whether the plaintiff is entitled to maintenance; and (2) at what rate maintenance should be awarded.

The Courts below, however, allowed an issue to be raised as to whether the Will (Ex. A) was obtained by the plaintiff from her husband by undue influence. The Subordinate Judge considered that the plaintiff was in a position to dominate the will of her husband and obtained an unfair advantage over him. He gives no reason for his finding on this point beyond the fact that the testator was in a very weak condition, that his body was swollen and the plaintiff was his second wife and threatened to make a disturbance if he did not accede to her wishes. The present suit has not been brought to enforce the provisions of the Will apart from the plaintiff's natural right to be maintained by her stepson. It is obvious that the plaintiff's husband had no power to bind his heirs by Will to pay maintenance at a definite fixed sum per annum or per mensem for the rest of the life of his surviving widow. The Will, therefore, is only useful as an indication of what in the view of the testator would be a reasonable rate of maintenance for his wife to have after his death. Seeing that the 1st defendant himself wrote the Will and got it registered, he cannot plausibly put forward a plea that the plaintiff exercised undue influence over his father. Nor do I consider the circumstances found by the lower Courts to exist as amounting to undue influence within the law. In this view of the case the provisions made in the Will, seeing that the provision in favour of the plaintiff was not an outright bequest of a definite item of property, become of secondary importance, and it is thus unnecessary to canvass the finding of the Subordinate Judge on the subsidiary points whether the Will was obtained by the exercise of undue influence and whether it is valid as a family arrangement. The Courts below have not found what income the defendant gets beyond

the income from the house and lands. But P. W. 2 admitted that the 1st defendant had had no trade since 4 or 5 years ago. It is also not disputed that he has nine members of his family to maintain. It has not been found that the defendant has any immovable properties besides the house at Rajahmundry and a site on the road to Dowleshwaram. On the merits of the case I am unable to find that the rate of maintenance fixed by the Subordinate Judge is unreasonable. The fact that in 1912, when the Will was made, the plaintiff's husband would have given at least Rs. 15 a month is not proof that in 1919 when the suit was brought the 1st defendant's circumstances were such that Rs. 15 a month would be a reasonable allowance. In *Raja Venkatappa Nayanim Varu* v. *Rajah Thimma Nayanim Varu* (1) it is pointed out that a maintenance allowance is liable to be increased or decreased by change of circumstances. The plaintiff has been awarded Rs. 32 a year so long as she continues in possession of Devarapalli lands. It is not stated that she is no longer in possession of those lands. The question whether she should get Rs. 32 a year and the income of the Devarapalli lands, or 72 without them, is one which will come up when the decree is executed.

Upon the objection memorandum it is contended that the District Munsif's decree should be restored on the ground that the plaintiff is not entitled to get more than one-third of the total income of the family when the 1st defendant has nine members to maintain. I am not inclined te reduce the amount below Rs. 6 a month seeing that the 1st defendant was one earning and may again earn something to supplement the income from the lands and house. No satisfactory reasons have been shown for altering the decree of the lower appellate Court, which, on the face of it, appears to be a fair provision to make for the plaintiff's needs after fully considering the 1st defendant's present income and his obligations. The second appeal and the memorandum of objections are therefore both dismissed. The parties will bear their own costs throughout.

Appeal dismissed.

(1) [1914] 27 M. L. J., 656=(1914) M. W. N. 900.

A. I. R. 1926 Madras 535

DEVADOSS AND WALLACE, JJ.

Nori Venkatakrishnayya—Appellant.

v.

Kundurthi Byragi and *others* — Respondents.

Appeal No. 365 of 1923, Decided on on 30th November 1925, from the order of the Sub-J., Bapatla, in E. A. No. 1546 of 1921.

Hindu Law—Debts—Sons' liability to pay father's debts is not discharged even if the father misappropriates money for which he was accountable as trustee.

Where certain sums of money for which a Hindu father, in the capacity of a trustee, was accountable, were not accounted for by him, and in a scheme suit he was ordered to pay the amount which came into his hands.

Held: that that will not amount to misappropriation or breach of trust and the sons' liability to pay father's debts is not discharged, and that even if it is found that he misappropriated the amount which came into his hands, the sons cannot escape the liability to pay their father's debt: 32 *Bom.* 348 and 35 *M. L. J.* 661, *Appl.* [P 536 C 2]

V. Ramadoss—for Appellant.

K. Kameswara Rao—for Respondent.

Judgment. — The contention of Mr. Ramadoss in this appeal is that the debt incurred by the father was in the capacity of a trustee and, therefore, he must have been considered to have criminally misappropriated the trust funds and that the sons' share cannot be made liable for such a debt.

There is nothing to show that the 1st defendant misappropriated any amount so as to bring him within the clutches of the criminal law and all that was found against him was that certain sums of money for which he was accountable were not accounted for by him and in a scheme suit he was ordered to pay the amount which came into his hands. We do not think that will amount to misappropriation or breach of trust, within the meaning of S. 403 or S. 406 of the Indian Penal Code. If he had been found guilty of breach of trust he would have been removed from his office of trusteeship. But he has been allowed to continue. Therefore, we cannot hold that he was guilty of breach of trust.

Even if it is found that he misappropriated the amount which came into his hands, we do not think the sons can escape the liability to pay their father's debt. Mr. Ramadoss relied strongly upon

Durbar Khaghar v. *Khachar Harsur* (1). That case was considered by the learned Chief Justice and Mr. Justice Seshagiri Iyer in *Garudu Sanyasayya* v. *Nerella Muthenna* (2). There they held that.

Under the Hindu law a person was liable to account for amount collected by his father and grandfather in their capacity as trustees, but subsequently misappropriated by them. The fact that the misappropriation amounts to a criminal offence did not affect his liability.

We are entirely in accord with the principle of this decision. Therefore we consider that there is nothing in this objection.

The next point raised is that the son, the appellant, was specifically exonerated by the decree. The decree has not been produced before us. There is nothing to show that his share of the family property was exonerated. If there was anything in this point it would have been pressed before the learned Judges who remanded the suit for disposal on the merits.

No doubt this point was raised in the grounds of appeal, but it evidently was not pressed. There are no materials before us for holding that the appellant's share was exonerated by the decree passed in the scheme suit.

The next question is one of fact. The contention of the appellant that he was divided from his father was disbelieved by the lower Court. We have been taken through the evidence on his side and we find that the evidence is not only unsatisfactory, but even if believed does not go to show that the property attached fell to the share of the appellant on partition. The evidence as to partition is very unsatifactory, and we have no reason to differ from the finding of the learned Judge which we consider to be correct.

The appeal is dismissed with costs.

Appeal dismissed.

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(1) [1908] 32 Bom. 348=10 Bom. L. R. 297.
(2) [1918] 35 M. L. J. 661=9 L. W. 1.

A. I. R. 1926 Madras 536

PHILLIPS, J.

(*Sekkhu*) *Musthabu alias Appu Ravuthan*—Plaintiff—Appellant.

v.

Nani and *others*—Defendants—Respondents.

Second Appeal No. 1676 of 1922, Decided on 29th April 1925, against the decree of the Dist.-J., South Malabar, in A. S. No. 726 of 1921.

Civil P. C., S. 47 (3)—*Order allowing legal representative to execute decree is appealable—Subsequent suit to challenge the order is barred—Civil P. C., S.* 11.

An order passed in execution proceedings that a person is a legal representative is within the jurisdiction of the execution Court and if not appealed against bars a subsequent suit challenging that order ; 2 *Cal.* 131 (*P. C.*), *Rel. on.* [P. 537, C. 1]

N. R. Lakshmana Iyer—for Appellant.

C. V. Ananta Krishna Iyer—for Respondents.

Judgment.—The first objection taken by the appellant is that the application to execute the decree on behalf of the legal representatives of the decree-holder ought not to have been made to the Court which was executing the decree, but to the Court which passed the decree. This question is concluded by a decision of the Full Bench in this Court in *Swaminatha Ayyar* v. *Vaidyanatha Sastri* (1) ; and also in *Amar Chandra Banerjee* v. *Guru Prosunno Mukerjee* (2) ; and *Tameshar Prasad* v. *Thakur Prasad* (3) ; *Sham Lal Pali* v. *Modhu Sudan Sircar* (4). All these cases were decided under Civil P. C. of 1882, and there has since been an alteration in Ss. 88, 244, 232 and 234 of that Code. It is questionable whether these decisions are correct under the new Civil P. C., and I may observe that in the Full Bench decision in Madras, the learned Chief Justice did not come to a determination without considerable hesitation, and one of the Judges was of opinion that Ss. 234 and 244, of the Code of 1882 are irreconcilable. As these sections have now been amended, it is possible that they may be reconciled by a different interpretation of them. I, however, refrain from dis-

(1) [1905] 28 Mad. 466=15 M. L. J. 116 (F. B.).
(2) [1900] 27 Cal. 488.
(3) [1903] 25 All. 443=(1903) A. W. N. 99.
(4) [1895] 22 Cal. 558.

cussing this question further in view of the fact that the appeal must fail on another ground.

The appellant was a party to the order in execution proceedings in which the legal representatives were added and although he preferred an appeal against the order, he did not take this particular ground of appeal and the order was confirmed. Under S. 11 Expl. 4, the ground ought to have been decided. It is, therefore, not open to him now to raise the same objection in a suit. It is contended that he can do so, because the executing Court had no jurisdiction to decide the case. It has been held that the Court had no jurisdiction but it is not a question of absolute jurisdiction, but a question of exercising jurisdiction wrongly, and it has been held that a similar order passed in these circumstances is subject to appeal and is not necessarily null and void from its inception. I may refer in this connexion to *In the matter of the petition of Hadjee Abdoollah Reasut Hossein* v. *Hadjee Abdoollah* (5). The order not being null and void from its inception, this plea, that it was absolutely without jurisdiction, cannot avail the appellant. This suit was rightly dismissed and the second appeal must also be dismissed with costs.

Appeal dismissed.

(5) [1876] 2 Cal. 131=3 I. A. 221=26 W. R. 50. (P. C.).

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* A. I. R. 1926 Madras 537

WALLACE AND MADHAVAN NAIR, JJ.

S. N. S. Satheppa Chettiar—Plaintiff—Appellant.

v.

K. Muthusami Pillai—Defendant—Respondent.

Appeal No. 53 of 1924, Decided on 28th November 1924, against an order of the Addl. Sub-J., Madura, D/- 4th October 1923, in A. S. No. 74 of 1923.

* *Evidence Act, S. 92—Promissory note—Agreement showing the method of discharge agreed to is admissible.*

Where in a suit on a pro-note in answer to the demand the defendant pleads that he has already discharged the note according to the method agreed upon between the plaintiff and himself, there can be no bar under S. 92 to prevent proof of that agreement as it is a method of payment or discharge. [P 538, C 2]

B. Sitarama Rao and *S. R. Muthuswamy Iyer*—for Appellant.

R. Satherama Sastri—for Respondent.

Judgment.—This is an appeal against an order of remand by the lower appellate Court in a promissory note suit. The plaintiff sued the defendant in the District Munsif's Court on an on-demand promissory note for Rs. 700. The defendant admitted execution and the receipt of the money, but pleaded that the promissory note was taken by the plaintiff as a sort of guarantee that the plaintiff would not resile from his bargain to empower the defendant to manage his lands and get possession of them for him by criminal proceedings, that the plaintiff promised to pay him Rs. 200 a month for his services and a bonus of Rs. 500 if the criminal proceedings turned out successful, that he thus got the Rs. 700 as a sort of advance of his pay and bonus which were going to fall due to him, and that this advance was to be discharged as and when that pay and bonus became due and that the plaintiff agreed to this course being adopted; the defendant further pleaded that pay to the extent of Rs. 200 and more and the bonus of Rs. 500 had actually fallen due to him before the date of suit and that, therefore, the promissory note had been fully discharged.

The District Munsif held that the defendant could not put forward the above agreement in defence in a promissory-note suit as such an agreement contravened the provisions of S. 92 of the Indian Evidence Act. The lower appellate Court held that the agreement could be proved and remanded the suit for evidence, and against this order the present appeal is filed.

Neither of the lower Courts has, we think, quite clearly understood the nature of the case. The defendant's written statement is not as clear as it might be, but we think that his plea really amounts to a contention that the promissory-note sum was paid to him as an advance of pay and bonus, that advance to be paid off as and when that pay and bonus fell due Now, if this is a plea that the promissory-note was not payable on demand and was not enforceable until the pay and bonus became due i.e., was not enforceable until it was scharged and was, there-

fore, never really enforceable at all, that would be a plea of a condition in defeasance of the on-demand contract and the District Munsif's view would be perfectly correct. But it is not that, and the defendant himself admits so much. His plea is rather an admission that if the plaintiff chooses to sue before the pay and bonus were due then he cannot resist the demand, but if the plaintiff chooses to delay his suit until the pay and bonus had fallen due, then the promissory-note is in fact discharged because the plaintiff agreed to allow that pay and bonus to be credited towards the promissory-note debt. That that was the case between the parties from the first is clear from the fact that the first issue in the case was whether the discharge pleaded is true, the defence being treated not as plea of non-enforceability of the note, but as a plea of discharge, and it was until another District Munsif took up the case that the third issue was framed, namely, whether the written statement discloses any valid defence Now, as the plaintiff has on the defendant's case deferred his suit until the pay and bonus were due from him to the defendant, we can see no bar under S. 92 of the Indian Evidence Act against the proof of this agreement. It is not in any sense an alteration of the original terms of the contract. It is for the purposes of the present defence a mere agreement as to the method of payment proveable and enforceable when a state of affairs is reached where it does not conflict with the on-demand condition in the promissory-note. The note is still, and has always been payable on demand; but when in answer to the demand the defendant is in a position to say that he has already discharged the note according to the method agreed upon between the plaintiff and himself, there can be no bar under S. 92 to prevent proof of that agreement.

In this view, no question of legal or equitable set off will arise. If it is proved that there was an agreement that the note should be discharged in that way, then the note is either discharged or it is not, and the coreect issue for decision in the case is Issue-I—Whether the discharge pleaded is true ?

The defendant has also put forward a plea of general set off against the plaintiff that the plaintiff owed him various sums of money amounting to much more than the promissory-note amount and that, therefore, the promissory-note amounted is not owing. But he did not in the first Court pay any fee on the amount claimed by him as a set off and the District Munsif, therefore, refused to entertain that plea. The defendant did not appeal on that ground and he never urged that ground before the lower appellate Court. We are not prepared, therefore, to allow him to take the point here in appeal, nor need we deal also with the further ground put forward by him that this promissory note was merely an item in a series of running accounts that being a point which he also never put forward before the lower appellate Court. We are here concerned only with the question whether the lower appellate Court's order of remand is a proper one. We are of opinion for the reasons given above that it was and that the suit after remand should be dealt with by the first Court on the lines that we have indicated above. We, therefore, dismis this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 538

WALLACE AND MADHAVAN NAIR, JJ.

Chinnatha Rowther—Appellant.

v.

Karunji Andi and *another*—Respondents.

Letters Patent Appeal No. 103 of 1924, Decided on 18th December 1925, from the judgment and deree of Devadoss, J., D/- 21st July 1924.

Hindu Law—Religious endowment—Member of joint family alienating temple properties—Any other member can recover them on behalf of the trust.

Where an alienation of temple properties is made by a member of an undivided Hindu family who are *pujaris* of the temple, and beneficially interested in the trust, any member is entitled to maintain a suit to recover the properties on behalf of the temple trust: 32 *Mad.* 167, *Dist.*; 33 *Cal.* 507, *Ref.* [P 539, C 1, 2]

K. S. Jaganadha Iyer and *T. S. Venkatesa Iyer*—for Appellant.

G. Lakshmana Iyer—for Respondents.

Judgment.—Plaintiff is 1st defendant's son. Second defendant is 1st defendant's brother's son. They are members of an undivided Hindu family. Defendants 1 and 2 usufructuarily mortgaged the suit pro-

perties to 3rd defendant who hypothecated his rights to 4th defendant. 5th defendant purchased the properties in execution of the decree obtained by the 4th defendant on his mortgage. The properties have been found to belong to a temple of which the plaintiff and Defendants 1 and 2 are the dharmakarthas and pujaris. As pujaris they are entitled to appropriate for their own purposes what remains of the income of the suit properties after meeting the puja and other expenses of the temple. The only question for decision in the case is whether the plaintiff can alone maintain the suit. The District Munsif decided in favour of the plaintiff. The Subordinate Judge, relying on a decision in *Thandavaraya Pillai* v. *Shanmugam Pillai* (1) reversed the judgment of the District Munsif and dismissed the plaintiff's suit. Devadoss, J., setting aside the decision of the Subordinate Judge has restored the District Munsif's decree.

We think the decision of the learned Judge is right. It was argued on behalf of the 4th defendant, appellant that the learned Judge has not recorded a finding as to whether the suit properties form the private property of the family or belong to the temple of which the plaintiff and Defendants 1 and 2 are the pujaris. No doubt the language of the learned Judge is a little indefinite, but we are satisfied that he is of the opinion that the suit properties belong to the temple.

The decision in 32 *Mad.* 167 is inapplicable to the present case. In that case it was held that, when the right to manage charity properties is vested in a joint Hindu family, its senior male member is entitled to exercise that right vested in the family on its behalf and that, until a partition is effected, no junior member is entitled to management by rotation in the absence of an agreement recognising such right. The learned Judges take care to point out that in the case before them the family had no beneficial interest in the trust properties. This fact distinguishes the present case from the decision in 32 *Mad.* 167. In the case before us we are not concerned with any question relating to the management of the family properties. The plaintiff having a beneficial interest in the suit properties is entitled to recover them on behalf of the trust. if the alienation is not binding on it, see *Rama Chandra Panda* v. *Ram Krishna Mahapatra* (2). In this view, the plaintiff is alone entitled to institute the suit and recover possession of the properties in question. But the decree should be on behalf of the plaint-mentioned Kaliamman Devasthanam. The decree of the District Munsif restored by Devadoss, J., does not mention that possession is to be recovered on behalf of the devasthanam. We modify the decree of the District Munsif to this extent. In other respects we dismiss the Letters Patent Appeal with costs.

Decree modified.

(1) [1909] 32 Mad. 167=19 M. L. J. 59.

(2) [1906] 33 Cal. 507.

A. I. R. 1926 Madras 539

PHILLIPS, J.

Dharman and *others* — Defendants—Appellants.

v.

Jagaveerarama Venkateswara Ettappa Nayakkar Ayyan — Plaintiff — Respondent.

Second Appeals Nos. 344 to 389 of 1923, Decided on 5th February 1925.

Landlord and Tenant—Land admittedly held on varam originally—Tenant must prove contract to adopt fixed money rent.

Where it is admitted that the lands were originally held on varam tenure, it is for the tenants to prove a contract to adopt a fixed money rent. [P 540 C 1]

F. S. Vaz—for Appellants.

S. Ramaswami Aiyar, *R. Ganapathy Aiyar* and *Hamid Ali*—for Respondent.

Judgment.—The question for determination is whether the respondent is entitled to charge varam rates as rent for the land occupied by the appellants. The estate was under the management of the Court of Wards from 1872 to 1878 and from 1893 to 1899. During the first period of management, from 1872 to 1878, the Court of Wards levied a fixed rent of Rs. 14 per kottah of land in lieu of varam but when the management came to an end, the tenants asked the proprietor to revert to the varam rate, and he consented to it, making it a condition that they should admit that they had not got occupancy rights. When the Court of Wards again came into management they reverted to the money rent, and, when

that management terminated, the proprietors again reverted to varam. It is admitted by the defendants that prior to 1872 there was varam tenure on the lands; for they asked for a return to varam tenure in 1878 or 1879. The proprietor has a right to varam tenure unless it is proved that there is a valid contract that money rent should be paid in its place. It is argued that because the proprietor agreed to revert to varam tenure with a condition that the ryots should admit that they had not occupancy rights, the arrangement is not binding on the ryots, now that the Courts have held that they have occupancy right in these lands, and the lands are what are called ryoti lands in the Estates Land Act. This decision of the Court has not in any way altered the nature of the lands, but it has determined what their nature was and, therefore, when they were paying varam from 1872 onwards they were ryoti lands in the same sense that they are now ryoti lands. It being admitted that the lands were originally held on varam tenure, it is for defendants to prove a contract to adopt a fixed money rent. It is suggested that as the Court of Wards levied a money rent it must be deemed that there was a contract to do so for ever. In so far as the period from 1872 to 1878 is concerned it is obvious that there was no such contract, or even if there was, it was put an end to by the parties themselves when they expressed a desire to revert to varam, a desire which was acquiesced in. To suggest that the payment of money rent from 1893 to 1899 constitutes a contract to pay for ever thereafter at that rate cannot be supported. The period of payment at this rate is very short and there are no grounds for assuming that there was any valid contract. It is quite probable that the Court of Wards levied this money rent, because it found it to be a more convenient way in which to collect rent. As there is no contract to alter the varam into money rent in perpetuity the proprietor is entitled to charge rent according to varam rates.

The appeals are accordingly dismissed with costs. Vakil's fee in all the appeals together Rs. 100.

Appeals dismissed.

A. I. R. 1926 Madras 540

PHILLIPS, J.

Thirumalai Pillai and *others*—Plaintiffs—Appellants.

v.

Arunachella Padayachi and *others*—Defendants—Respondents.

Second Appeal No. 1145 of 1922, and Civil Misc. Petition No. 1565 of 1925, Decided on 15th April 1925, against the decree of the Dist. J., East Tanjore, in A. S. No. 57 of 1921.

(*a*) *Civil P. C., S. 2 (11)—Trustees are not legal representatives.*

Within S. 2 (11), trustees are not legal representatives of their predecessors-in-office.

(*b*) *Civil P. C., O. 22, R. 10—Trustees dying or retiring during pendency of a suit—Persons elected to fill their places can be added as party apart from limitation.*

Where some of the trustees die or retire during the pendency of a suit and new persons are elected to fill their place : it is a case of devolution of interest during the pendency of a suit and the elected persons can be added as parties under O. 22, R. 10, notwithstanding the question of limitation: *A. I. R.* 1922 *Mad.* 402 and *A. I. R.* 1924 *Mad.* 615, *Foll.* [P. 541, C. 1]

S. T. Srinivasagopalachari—for Appellants.

S. Muthiah Mudaliar—for Respondents.

Judgment.—This is an appeal by the trustees of the Pachayappa's Charities to recover rent from the respondents. The appeal was filed by all the nine trustees, but, since the appeal was filed, two of the appellant-trustees have died and one has retired. Of the two trustees who died, one died only on 21st March 1915, and, therefore, there is plenty of time to bring in his legal representative or the person on whom his interest has devolved; but objection is taken by the respondents that No. 6, Mr. Ethiraja Mudaliar, having died in 1923, and No. 5, Sir P. T. Thiagaraja Chettiar, having retired on 29th April 1924, the application to bring in the three trustees who have since been elected on the Board is out of time and that, therefore, the appeal should be dismissed in limine. The contention for the respondents is that the new trustees who have been appointed by election to fill the places of those who have died or retired are their legal representatives within the meaning of S. 2, Cl. (11), of the Civil P. C., but in that section we

find that "legal representative" included "where a party sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued." When Mr. Ethiraja Mudaliar died, his estate as trustee devolved on no one, unless it can be deemed to have devolved on the surviving trustees, who are parties to this appeal. Certainly it cannot be said that his estate devolved on his death on a person who was subsequently elected to fill his place. The act of the electors can certainly confer no retrospective power on the person elected so as to vest the estate of the deceased in him. So far as No. 5 is concerned his office became vacant by retirement and not by death. On the date of his retirement, the person subsequently elected to succeed him was certainly not his legal representative within the meaning of S. 2, Cl. (11), Civil P. C. Consequently these persons, now sought to be added as appellants, do not come within the meaning of "legal representative." For the appellants it is contended that O. 22, R. 10 is applicable and I see no reason why it should not be so. The estate of the deceased trustees has devolved on these persons by the act of the electors done in pursuance of the scheme framed by this Court, and it appears to me that it is a case of devolution of the interest during the pendency of a suit. A similar view was held by a Bench of this Court in *Sundaresam Chettiar* v. *Viswanatha Pandara Sannadhi* (1) and by another Judge in *Ratnam Pillai* v. *Nataraja Desikar* (2). I see no reason to differ from the view and hold that these persons can be added as parties under O. 22, R. 10. In these circumstances, it is unnecessary to discuss the further question whether the trustees who have all along been on record can be allowed to continue the appeal on behalf of the whole body of trustees without adding the trustees subsequently elected.

Coming to the merits of the appeal, two points are argued. The appellants claim firstly the loss which they have suffered owing to the depreciation of Government promissory-notes deposited by the defendants in respect of the lease which they obtained from the appellants. The second question relates to the amount of water-rates payable by the defendants. As regards the second point I may say that, on a construction of the lease, defendants are liable to pay water-rate for water taken to punja lands; for water taken for second crop on nanja lands; and for water taken to poramboke. The learned Judge has only considered one of the provisions of the lease which relates to poramboke, but does not appear to have considered the earlier clauses at all, and the learned Judge's judgment is not supported by the respondent's vakil who admits that the construction put upon the document by him is incorrect. In this respect, the Munsif's decree must be restored.

The more important point is the question of depreciation of Government promissory-notes. When the respondents obtained the lease, they deposited a sum of Rs. 5,300 with the appellants. This amount was equivalent to one year's rent of the lands, the lease being for five years. Soon after the deposit was made the appellants wrote to the 1st defendant and suggested that the money should be converted into Government promissory-notes. Defendant agreed to this course in his letter of 30th April 1913 saying: "Accordingly I am willing to purchase and keep Government bonds bearing 3-1/2 per cent. per annum:" Subsequently, the actual lease deed was executed on 26th May 1914 and that deed contains the following recital, "As the understanding is that Government promissory-notes should be purchased and kept for the said cash deposit, etc." So far, the documents show clearly that the defendant agreed to the purchase of Government promissory notes on his behalf as the equivalent of the cash deposit made by him, and the method in which that deposit was to be applied is mentioned in the lease deed, Ex. B. The question really at issue is whether these promissory-notes which have depreciated very considerably by the end of the lease when the deposit had to be applied in payment of the last year's rent, belonged to the appellants or respondents. It is not disputed that the cash deposit belonged to the respondent, and it is on record that the respondent agreed to that cash deposit being converted into Government promissory-notes. It is difficult, therefore, to understand the contention that this conversion of cash

(1) A. I. R. 1922 Mad. 402.
(2) A. I. R. 1924 Mad. 615.

into notes had also the effect of transferring the property in them from the respondent to the appellant unless there was some contemporaneous agreement to that effect. The learned Judge does not appear to have considered at all the question of the property in these promissory-notes and has based his decision on certain findings as to what the defendants understood. I may say at once that in several cases, apart from the condition as to payment of water-rate, the learned Judge has obviously misconstrued the documents. In one case, namely, Ex. 9, he apparently has only read the document perfunctorily, for he gives its contents accurately as mentioned on the docket : but when the document itself is read it appears that the docket is not accurate and it would appear that the learned Judge has relied solely upon the docket without reading the actual document. That by itself would be sufficient to vitiate his judgment, but it is also clear that he has not applied his mind in the right direction. The learned Judge starts by thinking it a most extraordinary thing, that, when Government promissory-notes stood at about 98, the appellants should have purchased notes of the face value of Rs. 5,500 instead of notes of the face value of Rs. 5,300 considering the cash already in their hands was sufficient to purchase notes to the extent of nearly Rs. 5,500 (plus interest accrued to date) in view, as they said, to secure against loss by depreciation. If there were depreciation below the price at which they purchased, and notes only of Rs. 5,300 were purchased, the appellants might be put to great loss as the security would be inadequate. As it is, even after taking this precaution, the value of the notes has fallen far below the amount due by the defendants. There was, therefore, nothing surprising in the appellants purchasing notes of the value of Rs. 5,500.

The main ground for finding that defendants were not liable for the depreciation is that there was no understanding on their part that they would be liable for any depreciation in value ; but when a man owes promissory-notes, he must know that, if they depreciate in value, he will he liable for such depreciation and not a third party, unless there is an agreement to the contrary. His misunderstanding on this point, if there was any, would be merely due to ignorance of ordinary business principles of which any man should be deemed to have knowledge. Every man knows that he is responsible for the condition of his own property and when that changes, the responsibility is his and not that of a third party. Whether the defendants really understood their position or not is immaterial in this case. The property in the notes was theirs and, therefore, when the notes depreciated they must bear the loss.

An attempt has been made to show that the property in the notes was not defendants' and reliance is placed on a letter by the Bank to the trustees. How that could effect a transfer of property I do not understand. The contention is quite worthless. The defendants accepted the change in the nature of their property and had never repudiated it any time. They are, therefore, liable for this depreciation. The appellants would have been entitled to realize the security in their hands, at the end of the lease, but, as a matter of fact, they merely credited the market value of the notes at that date and asked the defendants to pay the balance ; in fact, they even offered to return the notes if the defendants would pay the proper amount in cash. The Judge was, therefore, quite wrong in saying that the defendants were never consulted before the Government promissory-notes were sold. This is yet another question of fact in which the Judge is completely wrong. Considering all these circumstances, the judgment appears to be most unsatisfactory.

The decree of the lower appellate Court must be set aside and the decree of the District Munsif restored with costs both here and in the lower appellate Court.

Decree set aside.

A. I. R. 1926 Madras 542

JACKSON, J.

N. K. Govindan Nair—Petitioner.

v.

Kanhirathotikayil Ithalutty — Respondent.

Civil Revision Petition No. 30 of 1925, and Civil Misc. Petition No. 3199 of 1925, Decided on 8th September 1925, from the order of the Addl. Dist. Munsif, Calicut, in I. A. No. 1123 of 1924.

(a) *Malabar Compensation for Tenants Improvements Act* (1 *of* 1900), *S.* 6 (2)—*Damages, unlike improvements, affect Court-fee.*

The principle that improvements would not affect the Court-fee cannot be extended to damages. Such extension cannot be said to be intended by the phrase "or otherwise" in S. 6 (2), Madras Act (1 of 1900). [P. 543, C. 1]

(b) *Court-Fees Act, S.* 7 (1)—*Redemption suit—Deduction from redemption money of amount claimed as damages — Court-fee on account of damages as well as redemption amount must be paid.*

When damages are sued for, S. 7 (1) of the Court-Fees Act must apply, and redemption and damages are two distinct subjects as contemplated by S. 17.

Where plaintiff sued for redemption of kanom and also prayed for a deduction of certain amount claimed as damages.

Held: that he must pay Court-fee on the amount of the kanom as well as ad valorem fee on the amount of the damages. *Case-law discussed.* [P. 543, C. 2]

K. P. Ramakrishna Aiyar—for Petitioner.

A. Parameshwara Aiyar—for Respondent.

Judgment.—Petitioner is plaintiff in O. S. No. 286 of 1923, on the file of the Court of the Additional District Munsif of Calicut. He sues to redeem certain land granted on kanom, and seeks to deduct from the kanom amount certain damages to which he claims to be entitled. The question is whether he need pay Court-fee only on the kanom amount, or whether, as held by the lower Court, he must also pay an ad valorem fee on the amount claimed as damages.

The petitioner relies upon *Eacharan Pattar* v. *Appu Pattar* (1), but there it was simply a question of taking an account of rents due on the original contract. Here, there is the additional cause of action that defendant committed a tort. *Reference under Court-Fees Act*, S. 5 (2), is also a question of rents. I do not think that petitioner can draw any useful analogy between improvements and damages. Improvements are specially provided for in Madras Act (1 of 1900); and it was early held that they could not affect the Court-fee. *Zamorin of Calicut* v. *Narayana* (3). I find no authority for extending this principle to damages; and it cannot be said to be intended by the phrase "or otherwise" in S. 6 (2), Madras Act (I of 1900).

The petitioner also contends that this is a mortgage suit in which any question of damages must necessarily be only one of account. The only authority he can cite is the observation in *Ragavaji Sait* v. *Annamalai Mudali* (4), (which was not a mortgage suit but a suit between principal and agent): "Even if this suit be regarded as a suit for damages based on fraud and not as a suit for account," I agree with the lower Court that when damages are sued for, S. 7 (1) of the Court-Fees Act must apply, and redemption and damages are two distinct subjects as contemplated by S. 17.

The petition is dismissed with costs.

Note: The petitioner says that he relied upon *Parasurama Pattar* v. *Venkatachalam Pattar* (5), *Thekkemannengath Raman* v. *Kakkesseri Pazhiyot Manakkal Karnavan* (6), and not upon *Ragavaji Sait* v. *Annamalai Mudali* (4). These two cases deal with the point whether: (1) a claim for rent, (2) a claim for damages for breach of contract are barred at the time of redemption. I did not and do not consider that these rulings affect the question.

Petition dismissed.

(1) [1895] 19 Mad. 16.
(2) [1891] 14 Mad. 480.
(3) [1882] 5 Mad. 284 (F. B.).

(4) [1907] 17 M. L. J. 625.
(5) [1913] 25 M. L. J. 561=(1914) M.W.N.198.
(6) [1915] 28 M. L. J. 184=2 L. W. 433.

A. I. R. 1926 Madras 543

JACKSON, J.

(*Addepalli*) *Kondayya*—Plaintiff—Appellant.

v.

Yandru Veeranna — Defendant—Respondent.

Second Appeal No. 532 of 1922, Decided on 7th October 1924, against a decree of the Sub-J., Cocanada, in A. S. No. 45 of 1921.

T. P. Act, S. 118—*Grant of easement.*

The grant of an easement is not a transfer of ownership in immovable property: 31 *All.* 612, *Foll.* [P. 544, C. 2]

C. Rama Rao—for Appellant.

P. Somasundaram—for Respondent.

Judgment.—Appeal from the decree of the Subordinate Judge of Cocanada in A. S. No. 45 of 1921. The plaintiff and defendant entered into an oral agreement whereby the defendant was permitted to rest the beams of a structure upon plaintiff's wall, and to open certain cupboards

in the said wall, in exchange for land which plaintiff added to his property. Plaintiff alleges that the full amount of land has not been made over to him, and sues to have the cupboards and beams removed. The lower appellate Court has found that less land than what is alleged by plaintiff was agreed to be exchanged, and that defendant has fulfilled his part of the agreement. Accordingly it has dismissed plaintiff's suit and plaintiff appeals.

Two points have been argued: (1) The lower appellate Court's finding on the facts is not based upon any evidence (10th ground of appeal); (2) the exchange pleaded by defendant is not valid since there was no registered document and no delivery (2nd ground).

I do not find that the lower appellate Court proceeded without regard to the evidence. Appalaswami (D. W. No. 3) says that the land given in exchange extended to the west as far as the line in continuation of the western boundary of the western verandah of plaintiff's house and to the north of the red line in Ex. B. That is the triangular section south of the new wall and north of the red boundary line which the Subordinate Judge finds to have been the portion surrendered by defendant and this finding on the evidence cannot be traversed in second appeal.

It is a very small strip of land admittedly below Rs. 100 in value (District Munsif's judgment, para. 7). Therefore, there is no question of the necessity of a registered document. Each party has delivered possession to the other, the defendant by allowing plaintiff to wall off the triangle of land, and the plaintiff by constructing the cupboards in defendant's side of the wall and having them available for his use. Therefore, the exchange is valid, and plaintiff has no right to oust the defendant. As regards the other grounds of appeal (Grounds Nos. 2 and 3), if an exchange for defendant's land plaintiff has only obtained an easement (and the transfer of the portion of his wall occupied by the cupboards is not a transfer of tangible property.) then there is no question of plaintiff's transferring (apart from creating) any immovable property either tangible or intangible. The only transfer would be the transfer of defendants' triangle, and the transaction is on the same footing as it would be if plaintiff had given cash instead of an easement in exchange for this land. This point, that the grant of an easement is not a transfer of ownership, is laid down in *Bhagwan Sahai* v. *Narasingh Sahai* (1), the ruling quoted by the lower appellate Court. The Subordinate Judge may have overlooked that the other side of the bargain, the transfer of the defendant's land, is a transfer of ownership; but to establish that transaction proof of delivery is sufficient because, as I showed above, its value is well below Rs. 100.

Ground No. 4.—And if plaintiff has transferred tangible property by the transfer of the cupboard space, then again its value is so small that proof of delivery is sufficient. Ground No. 5.—There is no such finding. The site "all along the northern side" which the Subordinate Judge finds was intended to be given is just that triangle which I have explained above and that has been given. Grounds Nos. 7 and 8 do not arise and there is no question of onus.

The appeal fails on all grounds and is dismissed with costs.

Appeal dismissed.

(1) [1909] 31 All. 612=6 A. L. J. 871.

A. I. R. 1926 Madras 544

KUMARASWAMI SASTRI AND KRISHNAN, JJ.

K. V. Periyamianna Marakkayar and Sons—Defendants—Appellants.

v.

Banians and Co.—Plaintiffs—Respondents.

Original Side Appeal No. 42 of 1923, Decided on 21st April 1925, from the judgment and the decree of Coutts-Trotter, J., D/- 26th January 1923.

(a) *Contract Act, Ss.* 140 *and* 141—*Surety's rights against debtor arise only if surety takes responsibility at request of debtor—Indemnifier cannot sue in his own name unless he gets assignment from promisee while surety can—Contract Act, S.* 124.

Per Kumaraswami Sastri, J.—A person cannot make himself the creditor of another by volunteering to discharge the obligations of the other, and the rights of the surety against the principal debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor. So far as the contract of indemnity is concerned, by which a person agrees to indemnify another against loss caused by the conduct of a third person, and which does not require the consent of or the privity with

the third person, the person who indemnifies can, on payment or discharge of the obligation, sue but the suit in the absence of any assignment can only be in the name of the promisee. There is no subrogation in law as in the case of a surety who undertakes the obligation at the request of the promisor. There is nothing either in the Contract Act or the Civil Procedure Code which can give any higher rights to a person under a contract of indemnity as distinguished from a contract of guarantee: 39 *Mad.* 96, *Dissented.* Ss. 140, 141 and 145 refer not to contracts of indemnity but to contracts of suretyship which has been defined in S. 126.

[P 549 C 2; P 550 C 1, 2; P 551 C 1]

Per Krishnan, J.—S. 140 lays down the rights of a surety in a contract of guarantee as defined in the Act. Such contract is a tripartite contract to which the surety, the principal debtor, and the creditor are all parties. Such a contract results only when at the instance of the debtor the surety guarantees payment to the creditor. S. 126 of the Act, which defines a contract of guarantee though it does not say expressly that the debtor should be a party to the contract, clearly implies that there should be three parties to it, namely, the surety, the principal-debtor and the creditor; otherwise it will only be a contract of indemnity. S. 145 which enacts that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety clearly shows that the debtor and the surety are both parties to such a contract; for it will be strange to imply in a contract a promise between persons who are not parties to it. [P 553 C2]

(b) *Principal and Agent—Del credere agent is one who guarantees performance and must be party to contract—Dubash is not one—Contract Act, S.* 182.

A del credere agent is defined as one, who, in consideration of extra remuneration, called a del credere commission undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties. It is necessary that before a person can claim to be a del credere agent he must have brought about the contract in question. A dubash who gets a commission does not thereby become a del credere agent in respect of contracts entered into without his intervention: 27 *M. L. J.* 501, *Exp.* and *Dist.*

[P 551 C 2; P 552 C 1]

Nugent Grant instructed by *M. P. Sundararaja Aiyar*—for Appellants.

T. R. Venkatarama Sastriar, G. Krishnaswami Aiyar and *K. Subramaniyam*—for Respondents.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the respondents who were the dubashes of the 1st defendant Company for the recovery of Rs. 73,117-5-7 from the 1st defendant or in the alternative to direct the 2nd defendant to pay either the plaintiffs or the 1st defendant the amount due by them.

The case for the plaintiffs is that by a dubash agreement dated the 21st of November 1912 entered into between them and the 1st defendant they were appointed banians or dubashes of the 1st defendant to push certain branches of the business of the 1st defendant; that the said agreement inter alia provided that the plaintiffs were to guarantee the due completion of all contracts entered into by merchants with the 1st defendant and covered by the agreement in consideration of the plaintiffs receiving certain rates of commission; that the plaintiffs deposited a sum of Rs. 3,00,000 for the due performance by them of the terms of their agreement with the 1st defendant; that a sum of Rs. 1,25,000 is now in the hands of the 1st defendant, that during the subsistence of the said agreement the 2nd defendant entered into a contract in writing with the 1st defendant on the 13th of February 1920, by which the 2nd defendant agreed to purchase from the 1st defendant 25 tons of yellow metal sheets at the rate mentioned in the contract; that the plaintiffs as the dubashes of the 1st defendant guaranteed the due performance of the said contract by the 2nd defendant according to its terms; that under the contract between the 1st and 2nd defendants it was provided that cash must be paid against documents within 60 days of the arrival of the steamer and the 2nd defendant was to be entitled to a rebate of interest at 6 per cent. for moneys paid before maturity; that the rate of exchange for payment at Madras was to be fixed on the 2nd defendant's account on or before the date when payment by the 1st defendant Company to the shippers fell due subject to the Banks in Madras operating for the period; that on the 14th of February 1920, the 2nd defendant asked the 1st defendant in writing to fix the exchange at once and the 1st defendant agreed to do so; that the 1st defendant failed to fix the exchange and the 2nd defendant again asked the 1st defendant, on the 3rd of May 1920, to fix the exchange immediately without any reference to him which also the 1st defendant agreed to do; that the 1st defendant Company, however, failed to fix the exchange; that the 2nd defendant by his letter of the 20th of October 1920, cancelled the contract owing to the 1st defendant's breach, but agreed to accept the goods by paying at the rate of exchange current during the 1st week of May 1920, if delivery was offered on those terms; and that on the 29th of March 1921, the 1st defen-

dant told the 2nd defendant that they had fixed the exchange at 1sh. 3-3/4d., which was alleged to be the current rate on that date and required the 2nd defendant to pay a sum of Rs. 73,117-5-7. The plaintiffs state that under the circumstances mentioned above, the 1st defendant was bound to fix the rate of exchange at least in May 1920, as required by the 2nd defendant and that the 1st defendant not having done so, the 2nd defendant was not bound to pay at a higher rate of exchange than what was current on the 4th of May 1920, or accept the goods. They state that the 1st defendant was under an obligation to communicate to them the 2nd defendant's application and fix the rate of exchange and that if the 1st defendant had done so and told the plaintiffs of their inability, the plaintiffs would have taken steps to settle the exchange and that the 1st defendant wrongly debited to the deposit account of the plaintiffs with the 1st defendants and deducted therefrom a sum of Rs. 73,117-5-7 alleged to be due by the 2nd defendant to the 1st defendant in respect of the contract made by the 2nd defendant and that the 1st defendant is bound to pay the plaintiffs that sum with interest at 12 per cent. till the date of payment. The alternative case of the plaintiffs is that, if for any reason the Court should hold that there was no breach or default on the part of the 1st defendant and that they were entitled to debit the said sum, the 2nd defendant should be directed to pay the plaintiff or the 1st defendant a sum of Rs. 73,117-5-7 which was the amount which, according to the 1st defendant, the 2nd defendant was liable to pay in respect of the contract for the purchase of yellow metal sheets.

The 1st defendant admitted the dubash agreement and its terms and also the contract by the 2nd defendant with them for the purchase of yellow metal sheets, but they stated that they were under no absolute obligation to fix the rate of exchange in advance as it involved a contract with the Banks, that between the date of the contract and the 20th of October 1920, the Banks were not willing to enter into forward contracts fixing the rate of exchange for remittances to London, that the failure to fix the rate of exchange would not entitle the 2nd defendant to cancel the contract, but that he can only claim damages and that, in any event, such failure would not relieve the plaintiffs from their obligations as surety under the dubash agreement. They admit that they called upon the 2nd defendant to pay Rs. 73,117-5-7 according to the rate of exchange on the 29th of March 1921, and that they were within their rights in doing so. They also admit having debited the plaintiffs' deposit account with the sum of Rs. 73,117-5-7 and deny their liability to pay to the plaintiffs the said sum or to restore the item to the plaintiffs' account. So far as the 2nd defendant is concerned, the 1st defendant firm state that they have no objection to any decree being passed against him.

The 2nd defendant filed a written statement admitting the contract, but denying that the plaintiffs guaranteed the due performance of the contract by him. He states that the plaintiffs did not undertake any liability at his instance or for his benefit, that he is not concerned with any agreement between the plaintiffs and the 1st defendant firm, that there was no privity of contract between himself and the plaintiffs and that any transaction between the plaintiffs and the 1st defendant firm would not affect him. As regards the fixing of the rate of exchange, he says that the 1st defendant firm wrongfully failed to fix the rate of exchange, that by reason thereof he was relieved from liability under the contract, that in any event the 1st defendant's remedy against him is not to claim the price of the goods, but the difference between the market rate and the contract rate and that, if the Court should be of opinion that the failure to fix the rate of exchange does not relieve him of his obligation under the contract and that his only right is to claim damages from the 1st defendant firm for breach of covenant, he claims Rs. 30,500 as damages, being the difference in the rate of exchange between May 1920, and the 29th of March 1921. He states that, if the plaintiffs have acquired the rights of the 1st defendant firm under the contract, he is entitled to set off the above sum of Rs. 30,500 against the plaintiff's demand, that the 1st defendant firm refused to accept payment for the price of the goods at the rate of exchange prevailing in May 1920, and thereby committed a breach of contract and that the plaintiffs have no cause of action against him.

The case was tried before Coutts-Trotter, J., who held that the plaintiffs had a cause of action against the 2nd defendant on the ground that they affixed their signature to the offer made by the 2nd defendant on the 13th of February 1920, and that, therefore, they must be taken to have guaranteed the contract which was subsequently made. As regards the fixing of the rate of exchange the learned Judge was of opinion that, though it was possible to fix the exchange between February and May and difficult thereafter, the 1st defendant having employed a competent agent, they were absolved from liability as the agent failed to get exchange fixed between February and May. After the trial judge gave these findings, the parties said that if the 5th of March was to be taken as the date when the exchange was to be fixed, Rs. 30,000 would be the sum payable after giving credit to the price realized by the goods on re-sale under order of Court and he passed a decree for that amount in favour of the plaintiffs.

The 2nd defendant appeals, and the main grounds taken by Mr. Grant are that there was no privity of contract between the plaintiffs and the 2nd defendant entitling the plaintiffs to sue the 2nd defendant on the contract ; that the evidence shows that there was no agreement between the plaintiffs, the 1st defendant firm and the 2nd defendant whereby the plaintiffs entered into a contract of guarantee so as to give them any right of action under the provisions of the Contract Act, that at best the transaction was merely a transaction of indemnity between the plaintiffs and the 1st defendant firm without any consultation with the 2nd defendant, that the frame of the suit which is primarily against the 1st defendant firm shows that the suit was not instituted by the plaintiffs as the agents of the 1st defendant firm, nor was there an assignment of any cause of action by the 1st defendant firm even if such an assignment were permitted in law, that the 1st defendant firm was bound to fix the rate of exchange at the request of the 2nd defendant, that the onus is on them to show that they could not fix the rate of exchange and that they have not proved it. An objection is taken by the Advocate-General for respondent that the appeal is bad for nonjoinder of Messrs. Shaw Wallace & Co. No application was made either by the respondent or Shaw Wallace & Co., to be added as parties to the appeal. The appellant who was directed to pay the plaintiffs the amount claimed is not concerned with the 1st defendant Company as he has to pay 1st defendant nothing. As Mr. Menzies says that there has been an agreement between plaintiffs and 1st defendant firm that the plaintiffs, if unsuccessful against 2nd defendant, the 1st defendant would pay plaintiffs Rs. 6,000, there is no necessity to join the 1st defendant firm without any application made by the 1st defendant. I am of opinion that on the evidence and the documents filed there was no privity of contract between the plaintiffs and the 2nd defendant and that the plaintiffs were not guarantors within the meaning of the Contract Act.

The dubash agreement between the plaintiffs and the 1st defendant has been filed as Ex. A in the case. It is dated the 21st November 1912. Paragraph 3 of the agreement states the nature of the business which is covered by it and it refers to three kinds of business : (a) business undertaken by the firm either on their own account or as agents for any constituent on guarantee of the Banians ; (b) business undertaken by the firm on joint account of themselves and the Banians ; and (c) business undertaken by the firm on their own account. Clause (e) of paragraph 5, which refers to the duties of the Banians, states that their duty shall be to guarantee due completion by contracting parties of all the terms of their contracts. Clause (g) states that in the event of the failure of any contracting party or parties or pay for or take delivery of his or their goods at the date stipulated it shall be the duty of the Banians to pay the firm in cash all sums so payable in the manner provided in the agreement. Clause (h) runs as follows :

> Generally in respect of any business covered by this agreement to guarantee the due fulfilment by all dealers and traders of their several contracts, liabilities and obligations and to indemnify the firm against any loss in respect thereof and the liability of the Banians shall in no way be affected by the firm giving time or otherwise affording facilities to any dealer or constituent.

Paragraph 6 of the agreement runs as follows :

> The liability of the Banians shall commence (1) in the case of transactions coming under clauses (a) and (b) of paragraph 3 hereof ;

As soon as the business is entertained. (2) In all other cases as soon as contracts are made between the firm and any dealer and shall continue until the contracts have all been duly completed or all claims, losses, costs and damages in respect thereof shall have been fully discharged.

Paragraph 11 refers to the right of the Company to deduct out of the security deposited by the Banians any amounts that may be due by the Banians. Paragraph 13 refers to the duty of the firm to institute suits at the cost of the Banians for the realisation of any moneys due in respect of contracts on the firm being sufficiently indemnified. Paragraph 14 refers to the commission payable. It states that as remuneration for their services under the agreement the Banians should be entitled to a commission of half per cent. in respect of yarns, metals, other than iron, paint, cement, sugar, timber and produce imported from other Indian ports.

The agreement gives the plaintiffs the option of refusing to be liable for any particular contract.

The contract between the 1st and 2nd defendants for the purchase of yellow metal sheets has been filed as Ex. B and it is dated the 13th of Feburuary 1920, It is for 25 tons of yellow metal sheets, English quality, to be shipped in November 1920, at £ 182—10—0 per ton C.I.F. and C. I. Madras. The clause relating to exchange runs as follows :

Exchange to be fixed on dealers' account on or before the date when payment by the merchants to shippers falls due subject to the Banks in Madras operating for this period.

Should no instructions in writing be received from dealers prior to the above-mentioned date the merchants have the option of' their fixing exchange at rates then current.'

At the foot of the contract is a note signed by the Banians which runs as follows :

Responsibility acknowledged by Banians and Co."

The offer for these goods made by the 2nd defendant is Ex. I, dated the 9th of January 1920, and at the foot of it the Banians and Company have signed. There is nothing more than

" For Banians and Co.
(Signed)
Manager,

None of the members connected with the firms of Banians and Company have given evidence. Mr. Browning, an assistant in 1st defendant firm, was called as the plaintiffs' first witness. When asked about the contract, Ex. B, which I have already referred to, he states that in the course of business, documents are signed by the dealers, that those documents are sent down to Banians and Company for countersignature and that so far as the 2nd defendant was concerned, he had no other document given to him evidencing the contract, but that he could always have access to the contract in the firm's office. This is all the evidence as regards what took place when the contract was entered into and there is no evidence that the plaintiffs introduced the 2nd defendant to the 1st defendant's firm or that there was any agreement between the plaintiffs, the 1st and 2nd defendants, that the Banians should guarantee the performance of this particular contract. All that appears from the evidence is that after the contract was signed it was sent down to the Banians and they accepted liability under the terms of the Dubash agreement between the plaintiffs and 1st defendant and without any request by or reference to the 2nd defendant. There is nothing to show when the Banians affixed their signature to the proposal, Ex. B, nor is there any evidence to show that the Banians introduced the 2nd defendant to the 1st defendant and that the contract was brought about on their intervention and guarantee. On the contrary the evidence of Mr. Menzies, one of the principals of the 1st defendant firm, shows that the 2nd defendant was doing business with Gibson & Co., the 1st defendants' agents at Tuticorin and that Mr. Menzies asked the 2nd defendant to do business with his firm. He states that he could not say whether the Banians were present when the contract was fixed up nor could he say when the Banians put their signature to the contract. He says it was customary in their firm after the contract was entered into to send that particular form of contract and get the Banians' signature. This was, I think, to show that the Banians did not exclude this contract from the scope of the Dubash agreement, Ex. A. I think that on the evidence on record there is no privity shown between the plaintiffs and the 2nd defendant. So far as the plaintiffs and the 1st defendant are concerned, the Dubash agreement creates an obligation on the part of the plaintiffs

to indemnify the 1st defendant against any loss they may sustain by the non-performance, and the question is whether such an indemnity would give a right of action against the 2nd defendant on the contract between the 1st and 2nd defendants.

Chapter VIII of the Contract Act deals both with contracts of indemnity and guarantee. A contract of indemnity is defined by S. 124 as a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. A contract of guarantee is defined by S. 126 as a contract to perform the promise, or discharge the liability of a third person in case of his default. The person who gives the guarantee is called the surety; the person in respect of whose default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. S. 140 states that where a guarantee's debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. S. 141 states that a surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security. S. 145 states that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

I think that the Contract Act draws a distinction between contracts of indemnity and contracts of suretyship, and that contracts of suretyship, unlike contracts of indemnity, require the concurrence of three persons, namely, the principal debtor, the creditor, and the surety. The surety undertakes his obligation at the request express or implied of the principal debtor. Reading Ss. 126 and 145 together, it seems to me that there can be no contract of guarantee as distinguished from a contract of indemnity unless there is privity between the principal debtor and the surety as it is difficult to speak of an implied promise between persons between whom there is no privity of contract. S. 126 refers to contract of guarantee and speaks of three persons with reference to that contract, namely, the person who gives the guarantee, the person in respect of whose default the guarantee is given and the person to whom the guarantee is given. S. 127 refers to consideration for the guarantee which is sufficient to support the guarantee. *Nanak Ram* v. *Mehin Lal* (1) is authority for the view that privity is necessary in all cases of suretyship between the three parties. Ss. 140 and 141 only prescribe the methods by which the rights of the surety can be worked out and I find it difficult to see how a person who agrees to perform the obligation of another without reference to him can clothe himself with the right of action against him on the contract or how a person can become a surety without the knowledge and consent of the principal debtor and clothe himself with the rights mentioned in Ss. 140 and 141 or S. 145.

The English Law is clear that no person who is not a party or privy to a contract can sue upon it and it has been laid down as early as *Hodgson* v. *Shaw* (2) that a person cannot make himself the creditor of another by volunteering to discharge the obligations of the other and that the rights of the surety against the principal-debtor can only arise where the suretyship has been undertaken at the request, actual or constructive, of the principal debtor. The law is thus stated in Halsbury's Laws of England, Vol. XV at page 517:

"The implied rights possessed by the surety against the principal-debtor are not identical with those which the creditor has against the latter, but are somewhat similar to those possessed by one surety against another. They are available whether the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no man can make himself the creditor of another by volunteering to discharge the latter's obligations. Once, however, such request has been obtained, an equity of indemnification becomes

(1) [1875-78] 1 All. 487.
(2) [1834] 3 My. and K. 183=3 L. J. Ch.

attendant upon the suretyship, and the principal debtor will be liable without the necessity of any further request for all sums subsequently paid by the surety under the guarantee as money paid to the use of the principal debtor."

I do not think that any difference was intended to be made in the Contract Act between the Indian and English Law on the subject, and I see no reason to depart from the English Law as to the necessity of a request, actual or constructive, of the principal debtor to the surety in order that there may be an effective contract of suretyship.

So far as the contract of indemnity is concerned by which a person agrees to indemnify another against loss caused by the conduct of a third person and which does not require the consent of or the privity with the third person, the person who indemnifies can, on payment or discharge of the obligation, sue but the suit in the absence of any assignment can only be in the name of the promissee. There is no subrogation in law as in the case of a surety who undertakes the obligation at the request of the promissor. I have not been referred to any English case where in a case of a mere indemnity as distinguished from a contract of guarantee a direct right of action on the original contract is given to the person who indemnifies against the person whose conduct has caused loss. In *Simpson* v. *Thomson* (3), which was a case of certain underwriters against the owner of a ship, it was held that there was no independent right in the underwriters to maintain in their own name, and without reference to the person insured, an action for damages to the thing insured. Lord Cairns, after referring to the foundation for the right of underwriters, namely, the well-known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss, observes:

But this right of action for damages they must assert, not in their own name but in the name of the person insured.

Lord Blackburn observes:

In England the action must be in the name of the shipowner, not of the underwriters. I think this material, as showing that it is the personal right of the action of shipowner, the benefit of which is transferred to the underwriters.

In *King* v. *Victoria Insurance Co* (4), their Lordships of the Privy Council observe at p. 256:

It is true that subrogation by act of law would not give the insurer a right to sue in a Court of law in his own name. But that difficulty is got over by force of the express assignment of the Bank's claim.

So far as the Indian law is concerned, there is nothing either in the Contract Act or the Civil Procedure Code which can give any higher rights to a person under a contract of indemnity as distinguished from a contract of guarantee. In the present case as I am of opinion that the evidence only shows that there was a contract of indemnity evidenced by Ex. A, I find it difficult to see how it is open to the Banians to sue the 2nd defendant, between whom and the Banians there is not privity for damages for breach of contract. It is clear in the present case, and it is not disputed before us, that no property in the goods passed to the 2nd defendant and that the claim, so far as the 1st and 2 defendants were concerned, was a claim for damages for breach of contract.

It is contended by the Advocate-General that a contract of suretyship can be entered into without reference to the debtor and that even in such cases the person who indemnifies himself can avail of the provisions of Ss. 140 and 141 though he cannot under S. 145; and reference has been made to *Muthu Raman* v. *Chinna Vellayan* (5), where it was held by Oldfield and Napier, JJ., that a person who becomes a surety without the concurrence thereto of the principal debtor gets as against the latter only the rights given by Ss. 140 and 141 and not those given by S. 145. The main question in that case was whether a suit would lie on a hundi which is a negotiable instrument under the circumstances mentioned therein and both the learned judges differed from the lower Court and held that an action would lie if the hundi was presented for payment within a reasonable time and notice of dishonour was given; and they sent the case back to the lower Court for findings on the above points. The case was also argued on the footing of guarantee and also of Ss. 69 and 70 of

(3) [1877] 3 A. C. 279=3 Asp. M. C. 567=38 L. T. 1.

(4) [1896] A. C. 250=65 L. J. P. C. 38=74 L. T. 206=44 W. R. 592.

(5) [1916] 39 Mad. 965=30 M. L. J. 369=3 L. W. 393=(1916) 1 M. W. N. 290.

the Contract Act, and it was held that Ss. 69 and 70 would not apply. The learned judges in dealing with the argument as to guarantee expressed the opinion above mentioned; with all respect it seems to me that there is nothing in the Contract Act which makes it necessary for us to depart from the well-known rule of English law that no action can be brought on a contract except by the parties or privies to it, and that in cases of a mere indemnity no action can be maintained except in the name of the party to the original contract or on an assignment from him. Oldfield J., observes:

There is then in defendant's favour the English law, stated in *Hodgson* v. *Shaw* (2) already referred to and other cases that the implied rights possessed by the surety are available, when the suretyship has been undertaken at the request, actual or constructive, of the principal debtor, but not otherwise, since no one can make himself the creditor of another by volunteering to discharge his obligations. In these circumstances, the opposite view must be supported unambiguously by S. 145, if it is to be sustained.

I find it difficult to see what there is in S. 145 that departs from the well-known rule of English Law. Napier J., while stating that the Indian Legislature has not used the clear and unambiguous language to be found in Mercantile Law Amendment Act, 19 and 20 Vic. Ch. 97, S. 5, thinks that the Legislature intended to embody the law to be found in the Mercantile Law Amendment Act and to make no distinction between sureties in a bilateral contract and those in a trilateral contract. He, however, is not prepared to hold that S. 145 can be construed as giving effect to that intention. He thinks that the plaintiff must fall back on S. 140. I find it difficult to follow the view taken by the learned Judges. It seems to me that S. 140, 141 and 145, refer not to contracts of indemnity but to contracts of suretyship which has been defined in S. 126.

Treating the position of the Banians as that of persons who, under the contract of indemnity (Ex. A), have discharged the obligations, which the 2nd defendant was bound to perform, their right was either to get an assignment from the 1st defendant or to sue in the 1st defendant's name for their own benefit. In the present case it is difficult to see how on the plaint as framed the plaintiffs can say that they represent the interests of the 1st defendant. Almost the whole of the plaint is taken up with charging the 1st defendant with wrongfully debiting their deposit account with the loss claimed in respect of the 2nd defendant's contract. Paragraphs 14, 15, 16, 17 and 18 charge the 1st defendant with wrongful conduct so far as this contract is concerned and repudiate the plaintiffs' liability as guarantors. The subsequent paragraph refers to other contracts and states that the plaintiffs have been discharged from all liability under the dubash agreement. The only paragraph containing the alternative claim is paragraph 24, where they state:

Plaintiffs charge that if for any reason this Hon'ble Court should hold that there was no breach or default on the part of the 1st defendant, then, and in such event, the 2nd defendant should be directed to pay to the plaintiffs or to the 1st defendant the said sum of Rs. 73,117-5-7, with further interest thereon at 12 per cent per. annum and all other charges incurred by the 1st defendant in storing and keeping the goods up to date of payment; and that, if in default of payment by the 2nd defendant, the goods in question may be sold under the orders of this Hon'ble Court; that the sale prcceeds thereof be paid to the plaintiff and that the 2nd defendant be directed to pay the plaintiffs the balance due by the defendant, in case there is deficiency in the amount due to them from the 2nd defendant.

It cannot be said that in a suit as framed like the present the plaintiffs are suing as persons who have indemnified the 1st defendant against losses which they may incur and it is difficult to see how in this suit they can in any sense be taken to represent the 1st defendant merely because they added an alternative claim against the 2nd defendant.

It was suggested in the course of the argument that the plaintiffs by virtue of the dubash agreement can be treated as *del credere* agents but there is no evidence which would justify me in holding that any such agency exists. A del credere agent is defined as one, who in consideration of extra remuneration, called a *del ceredere* commission undertakes that persons with whom he enters into contracts on the principal's behalf will be in a position to perform their duties. It is necessary that before a person can claim to be a *del credere* agent he must have brought about the contract in question. Reference was made to the observations of Sir John Wallis, C. J., in *South Indian Industrials Ld.* v. *Mindi Ram Jogi* (6).

(6) [1915] 27 M. L. J. 501.

The position of dubashes in this part of India is much the same as that of Banians in northern India which was considered in *Peacock* v. *Baijnath* (7) by Wilson and Cunningham, JJ., in a passage of their judgment at p. 586 which was subsequently approved by the Privy Council on appeal.

But in *Peacock* v. *Baijnath* (7) all that was held was that the Banian in that case, by the course of dealing between him and his principals, became liable as a *del credere* agent and that he could be called upon to pay, though he had been guilty of no fault or neglect. I can find no authority for holding that a dubash who gets a commission thereby becomes a *del credere* agent in respect of contracts entered into without his intervention, Assuming that the plaintiffs are del credere agents, it is difficult to see how they can sue the 2nd defendant for breach of contract. The position of *del credere* agents was considered by Pickford, J., in *Thomas Gabriel & Son* v. *Churchill & Sim* (8). This was a case where a vendor sued the *del credere* agent to recover the amount claimed by him under a contract as to which there were disputes between the vendor and the purchaser who refused payment on the ground that the seller did not duly perform his part of the contract. It was held by Pickford, J., after a review of the authorities that liability of *del credere* agents does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. The learned judge after a review of the authorities observed :

> I do not think that any of these cases affords any ground for the contention set up by the plaintiffs in this case, that where there is a contract effected through a *del credere* broker, if disputes arise between the seller and buyer, the seller is entitled to call on the *del credere* broker to litigate those disputes, taking upon himself all the obligations of the buyer and taking to himself all the defences of the buyer.

This decision was affirmed by the Court of appeal and is reported in *Thomas Gabrial & Sons* v. *Churchill & Sim* (9) Buckley, L. J., after approving of the observations of Pickford, J., as to the extent of the obligation observed :

> The liability of the *del credere* agent is a contingent pecuniary liability, not a liability to perform the contract ; it is a pecuniary liability to make good in the event of the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the *del credere* agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

If the 1st defendant could not under the law sue the plaintiffs as *del credere* agents to recover the sum claimed from the 2nd defendant under the contract as to which there was a bona fide dispute it seems to me difficult to see how, by the mere withholding of the deposit of the plaintiffs and debiting the amount claimed in the deposit account, the plaintiffs, assuming they are del credere agents, can litigate the disputes as between the 1st and 2nd defendants in respect of the contract.

The next question is whether 1st defendant committed breach of contract in not fixing the rate of exchange. (After discussing evidence his Lordship continued as follows.) I am of opinion that the 1st defendant Company failed in their duty to take adequate steps to fix the exchange it being immaterial in my opinion whether that failure was caused either by the 1st defendant not giving instructions to Mr. Todd between February and May or by Mr. Todd (1st defendant's agent) not fixing the exchange though asked to do so. If it is necessary to decide who is in default I think that it is more probable that Mr. Todd who is speaking from his books did not receive from February to May instruction to fix the exchange as deposed to by him. The 1st defendant does not produce the book which Mr. Browning says was kept as a record of the transaction in which the firm agreed to fix the rates of exchange forward and no explanation is given for its non-production. It is clear that the term in the contract Ex. B, relating to the fixing of exchange was a very material term intended to protect the 2nd defendant against fluctuations in exchange. The 1st defendant firm to protect themselves against fluctuations in exchange quoted in sterling and the 2nd defendant in order to protect himself as far as possible required exchange when favourable, to be fixed in advance. When the contract was entered into there is little doubt that the exchange was very favourable, being 2sh. 3¾d, and for some months the fluctuations were not material and were

(7) [1891] 18 Cal. 573=18 I. A. 78=5 Sar. 651 (P. C.).
(8) [1914] 1 K. B. 449.
(9) [1914] 3 K. B. 1272.

very favourable to the 2nd defendant. I am, therefore, of opinion that the 2nd defendant is entitled to claim that he would only pay according to the rate of exchange current between February and May when, according to the finding of the learned trial Judge with which I agree, it was possible to fix the exchange. If that is so, the amount which the 2nd defendant would be entitled to, owing to the difference in exchange would cover the sum decreed against him after the resale of the goods.

I am of opinion that the appeal should be allowed and the suit dismissed against the 2nd defendant with costs in this and the Court below.

Krishnan, J.—(After stating facts and holding that 1st defendant Company was not necessary party to the appeal his Lordship discussed evidence and held that the plaintiffs did not guarantee at the instance of the 2nd defendant Company and there was no privity of contract between them). We have then to decide whether the plaintiffs have any right to maintain this suit against the 2nd defendant Company. We have here thus a position like this : A enters into a contract with B ; C without any connexion with B undertakes to indemnify A against any loss on that contract for a consideration moving from A. Loss occurs by B breaking the contract and C is obliged to make good that loss under his agreement with A. Can C sue B for such damages in his own name ? It seems to me he cannot. The general principle is that a person who is not a party or privy to the contract cannot enforce it. An insurer who pays is no doubt subrogated to the rights of the insured against third parties. See Smith Mercantile Law page 583 (Insurance against fire) and the cases cited ; but it is clear law that the insurer can only sue third parties in the name of the insured and not in his own name : *Simpson* v. *Thompson* (3) and *King* v. *Victoria Insurance Company, Ltd.* (4) and Halsbury's Laws of England Vol. 17, p. 519 para. 1024. My learned brother having referred to all the English authorities quoted I have not thought it necessary to refer to them myself again. Under the Indian Contract Act the agreement between the plaintiffs and the 1st defendant is, it seems to me, a contract of indemnity falling under S. 124 and under such a contract no right is given to the promissor to sue third parties. Feeling this difficulty the parties have expressly stipulated in para. 13 of Ex. A that the defendant Company should, after the plaintiff Company had paid off their liability, sue in their own name, on being properly indemnified, the third parties who are liable, for the benefit of the plaintiffs. This method has not been adopted here.

It is clear that under the English Law such a suit as the present one will not lie against the 2nd defendant Company. But it is argued that the Indian Law is different and that the Indian Contract Act does give a right of suit in such circumstances and reliance is placed on S. 140 of the Contract Act for this contention. It seems to me that the section does not apply to this case as it lays down the rights of a surety in a contract of guarantee as defined in the Act. Such a contract is a tripartite contract to which the surety, the principal debtor and the creditor are all parties. Such a contract results only when at the instance of the debtor the surety guarantees payment to the creditor. S. 126 of the Act which defines a contract of guarantee though it does not say expressly that the debtor should be a party to the contract clearly implies, in my opinion, that there should be three parties to it namely the surety, the principal-debtor and the creditor ; otherwise it will only be a contract of indemnity. S. 145 which enacts that in every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety clearly shows that the debtor and the surety are both parties to such a contract ; for it will be strange to imply in a contract a promise between persons who are not parties to it. As that section deals with *every* contract of guarantee it would seem to follow that in every such contract the debtor must be a party. I can see no reason to suppose that the Indian Legislature intended to lay down a law different from the English Law on this point. I would have had no doubt on the matter but for the ruling in *Muthu Raman* v. *Chinna Vellayan* (5), where S. 140 is construed as applying to a case of a bilateral contract to which the debtor is not a party though it is held in it that S. 145 implies the existence of three

parties. With all respect, I am unable to follow the reasoning of that ruling; I think it is unsound. S. 140 refers to a tripartite contract of guarantee just as S. 145 does, the former stating what rights pass to the surety from the creditor and the latter dealing with the rights of the surety against the principal debtor. S. 141 which immediately follows S. 140 throws light on how S. 140 is to be construed; for S. 141 explains that the surety's right includes a right to the benefit of securities and provides that if the creditor loses the securities, as between him and the surety his claim is restricted to that extent. The case *Muthu Raman* v. *Chinna Vellayan* (5) was a case of a negotiable instrument and the decision seems to have been based mainly on the sections of the Negotiable Instruments Act. It is thus entirely distinguishable from the present case. The observations on the meaning of S. 140 by the two learned Judges who took part in that decision do not seem to be quite concurrent and the decision finally turned on the findings under the Negotiable Instruments Act. I do not, therefore, think it necessary to refer the question as to the correctness of its interpretation of S. 140 to a Full Bench. I would hold that plaintiffs are not entitled to maintain the suit as brought against the 2nd defendant Company. As regards the argument based on the plaintiff Company being del credere agents it is sufficient to say that such a point does not arise as plaintiffs had nothing to do with the making of the suit contract; they did not arrange it as agents at all. This is sufficient to dispose of the appeal but I think it proper to express my opinion on the question raised on the merits as well.

It is 2nd defendant's case that 1st defendant Company committed breach by wrongfully failing to fix the exchange in proper time and thus causing a loss of more than the Rs. 30,000 claimed in suit It is true that the covenant to fix the exchange is not a part of the main contract, Ex. B; but is only a collateral covenant and the breach of it will not justify a breach of the main contract. But it was open to the 2nd defendant Company, if the 1st defendant Company committed breach of that covenant, to set off the damages resulting from it against the damages for the breach of the main contract and as the former is admittedly larger than the latter it furnishes a full defence to the suit. The question then is whether the 1st defendant Company wrongfully failed to fix the exchange. (After discussing evidence his Lordship proceeded.) Whether the fault be the 1st defendant Company's or Mr. Todd's in either case the 2nd defendant Company is entitled to be reimbursed for the loss caused by the failure to fix up the exchange in time. On this view neither the 1st defendant Company nor the plaintiffs will be entitled to any amount as damages from the 2nd defendant Company. On this ground also the suit would fail.

For the above reasons, I agree that the appeal should be allowed and the decree of the trial Judge against the 2nd defendant Company should be set aside and the suit dismissed against them with costs in the trial Court and of the appeal.

Appeal allowed.

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* A. I. R. 1926 Madras 554

COUTTS-TROTTER, C. J., AND RAMESAM, J.

Official Assignee of Madras—1st Defendant—Appellant.

v.

A. Ramalingappa and *another*—5th and 6th Defendants—Respondents.

Original Second Appeal No. 108 of 1925, Decided on 16th December 1925, from the interlocutory order of Srinivasa Aiyangar, J., D/- 15th September 1925.

* *Letters Patent (Madras), Cl. 15—Order on the original side of the High Court transferring defendant as plaintiff is not judgment.*

A determination, call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or in toto is a judgment and is appealable; but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. Every order on a contested petition is not a judgment. The line dividing judgments from orders must be drawn somewhere short of this. An order passed on the original side of the High Court transferring certain persons from the position of the defendants to that of plaintiffs is not a decision the effect of which is to put an end to the suit or proceeding and, therefore, it is

not a judgment within Cl. (15): 35 *Mad.* 1 (*F. B.*) *Appl.* [P. 555, C. 2, P. 556, C. 1.]

K. S. Narayan Aiyangar—for Appellant.

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for Respondents.

Coutts-Trotter, C. J.—The preliminary point is taken in this case that no appeal lies because the pronouncement appealed against was not a judgment but an order. The words have been the subject of great controversy in these Courts and I certainly do not propose to attempt to go through the welter of conflicting decisions, with many of which I may say I do not in the least agree. It seems to me that the matter is left in a state in which all this Court can do is to take the principle underlying the Full Bench case in *Tuljaram Rao* v. *Alagappa Chetty* (1), and apply it as best as it can to the actual matter before it. In this case the learned Judge directed that certain persons who appeared in the first instance on the record as defendants should be added as plaintiffs, the 2nd plaintiff having given up his cause of action and thereby adversely, no doubt, affected the position of the defendants who were transposed, because, if he obtained a decree, in the working out of that decree, they might have their rights affected. However, that is a question on the merits which really does not arise. The learned Chief Justice, Sir Arnold White, laid down the following test in the case cited above, *Tuljaram Rao* v. *Alagappa Chetty* (1) and, if I may respectfully say so, I think he very wisely guarded himself from setting up a too procrustean bed in the language that he adopted in laying down the principle for Courts to work out on the facts of each case, he says :

> The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent.

(1) [1910] 35 Mad. 1=21 M. L. J. 1=(1910) M. W. N. 697 (F. B.).

Then later on he says this and I respectfully agree with it :

> I think the decision may be a judgment for the purposes of the section though it does not affect the merits of the suit or proceeding, and does not determine any question of right raised in the suit or proceeding.

Applying that and endeavouring as best as I can to see what is its true application, I think it is this : that a determination, call it what you will, which has the effect, whether on a technical ground or on the merits, of putting an end to the proceedings as regards the particular people or in toto, is a judgment and is appealable but if the pronouncement leaves the suit free to go on, then it is not a judgment within the meaning of the clause. In my opinion a distinction may be drawn, which unfortunately has not been between the grant and the refusal of leave to sue. It seems to me that it may well be said that refusing leave to sue is a final determination of the matter against the proposed plaintiff. Similarly, in a case where a Court held that it had no jurisdiction to entertain the suit, I make no doubt that these Courts would accept that, in accordance with the decision in *Tuljaram Rao* v. *Alagappa Chetty* (1) as being a final determination. But it seems to me that, if the effect of the order is to allow the proceedings to go on, it is impossible to say that it satisfies the test laid down by Sir Arnold White in the Full Bench case. I do not desire to multiply illustrations, because it is much better to leave these things to be dealt with as they arise. I have therefore contented myself with what appears to me to be a reasonably clear illustration one way or the other. Looking at this order, its effect was to allow the suit to go on for determination on the merits and I am utterly unable to see that the order of transference of these persons from the position of the defendants to that of plaintiffs was in any way a decision the effect of which was to put an end to the suit or proceeding. In my opinion, therefore, without attempting to lay down any different test to that laid down by my learned predecessor in *Tuljaram Rao* v. *Alagappa Chetty* (1), I think it is not a case which is on the line. It is a case where any person applying ordinary language would, without hesitation, say that this was an order and not a judgment. I am, therefore, of opi-

nion that no appeal lies and that this appeal must be dismissed with costs.

Ramesam, J.—I agree. The state of the case law has been aptly described by my Lord and, having regard to it I I will not attempt any definition of the word 'judgment'. I will only say this: that I am not prepared to say that every order on a contested petition is a judgment. The line dividing judgments from orders must be drawn somewhere short of this. Having regard to the fact that in the case before us no substantial right of the defendants has been adversely affected by the order under appeal, I would say that it does not fall on the judgment side of the line. Beyond this I make no further attempt.

Appeal dismissed.

** A. I. R. 1926 Madras 556

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

S. Hari Rao—Insolvent—Appellant.

v.

Official Assignee, High Court, Madras, and *others*—Respondents.

Original Side Appeal No. 47 of 1924, Decided on 18th January 1926, from an order of Waller, J., D/- 4th March 1924, in Insolvency Petition No. 218 of 1922.

** *Insolvency—Order confirming sale of property by Official Assignee—Appeal by insolvent does not lie as interest of insolvent vests in Assignee.*

The insolvent has, after adjudication, no legal interest in his estate which vests in the Official Assignee; and he has, therefore, no legal right to interfere in the realization of that estate and he cannot be treated as aggrieved by any order passed in the course of such realization. It is true that if any surplus remains after the creditors are paid in full, such amount will be paid over to the insolvent, and it is also true that if a certain proportion of his debt is paid from his assets he will be entitled to a discharge. But these are merely expectations which may or may not be realized. They do not give any legal right to the insolvent to inferfere in the realization of his property which is entirely left to the Official Assignee: *A. I. R.* 1924 *Mad.* 163, *Disapproved*; 41 *All.* 243, *Foll.* [P. 557, C. 1]

P. R. Srinivasa Aiyangar and *A. Rajagopala Aiyangar*—for Appellant.

M. S. Venkatrama Aiyar—for Respondents.

Coutts-Trotter, C. J.—The question raised here is whether the insolvent has a right of appeal against an order confirming a sale of part of the estate which was originally his and subsequently vested in the Official Assignee, an order which he sought to oppose. The matter was referred to a Full Bench in view of what were represented to be the directly conflictings decision of this Court in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1), and of the Allahabad High Court in *Sakhawat Ali* v. *Radha Mohan* (2). We observe that the English decisions on the subject were not cited so far as appears from the report to the Madras Court. We have examined those decisions and come to the conclusion that they ought to be followed.

The only ground on which the insolvent's right to appeal can be based is that he is a person aggrieved because his estate having vested in the Official Assignee he is nevertheless entitled to say that if all the claims of the creditors who had proved were set aside or discharged by payment, he would have an interest in the surplus which might be left over. The leading English cases, *Ex parte Sheffield* (3) and *In re Leadbeater* (4) have disposed of this contention on grounds which, we think, are unanswerable. The insolvent has no legal interest but has merely a hope or expectation; and, as James, L. J., pointed out, the mischief of allowing a bankrupt, on the contingent chance of his ultimately acquiring title to some surplus which might never be realized, to interfere with and embarrass the administration of the estate would be immeasurable. We are, therefore, of opinion that the insolvent has no right of appeal which will, therefore, stand dismissed. The question referred to us was perhaps not rightly framed, and I say so with the more freedom because I drafted it myself. I have had the advantage of perusing the judgment about to be delivered by Krishnan, J., and I agree that we can follow the ruling in *Sakhawat Ali* v. *Radha Mohan* (2) without the necessity of saying that *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) was wrongly

(1) A. I. R. 1924 Mad. 163.
(2) [1919] 41 All. 243=17 A. L. J. 229.
(3) [1879] 10 Ch. D. 434=40 L. T. 15=27 W. R. 622.
(4) [1879] 10 Ch. D. 388=48 L. J. Ch. 242=39 L. T. 283=27 W. R. 267.

decided. The right claimed by the insolvent in the latter case was to object to a creditor's proof and that is not directly before us.

Beasley, J.—I concur.

Krishnan, J.—I agree with the learned Chief Justice that we should follow the view expressed in *Sakhawat Ali* v. *Radha Mohan* (2), which is in accordance with the view taken in the English cases cited to us ; *Ex parte Sheffield* (3) and *In re Leadbeater* (4). As pointed out in those rulings the insolvent has after adjudication no legal interest in his estate which has vested in the Official Assignee ; and he has, therefore, no legal right to interfere in the realization of that estate and he cannot be treated as aggrieved by any order passed in the course of such realization. It is true that if any surplus remains after the creditors are paid in full such amount will be paid over to the insolvent and it is also true that if a certain proportion of his debt is paid from his assets he will be entitled to a discharge. But these are merely expectations as pointed out in the English cases which may or may not be realized. They do not give any legal right to the insolvent to interfere in the realization of his property which is entirely left to the Official Agsignee. The reasoning to the contrary in the judgment of Oldfield, J., in *Sivasubramania Pillai* v. *Theethiappa Pillai* (1) cannot be supported. That case itself was, however, one of an appeal by the insolvent against an order admitting proof of a creditor to which he had objected. The question whether the insolvent is a person aggrieved in such circumstances does not arise in the present case, and I express no opinion on the point.

I would answer the reference by saying that the ruling in *Sakhawat Ali* v. *Radha Mohan* (2) should be followed and that no appeal lies in the present case, and I agree in dismissing the appeal.

Appeal dismissed.

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* A. I. R. 1926 Madras 557

DEVADOSS AND WALLER, JJ.

(*Ryali*) *Brahmayya* and *another*—Petitioners—Appellants.

v.

(*Dronamraju*) *Venkatasuryanarayanamurthy*—Respondent.

Appeal No. 20 of 1923, Decided on 13th November 1925, from the order of the Sub-J., Narasapur, D/- 6th September 1922.

* *Religious endowment—Scheme—Clause providing for an application to Court in respect of the scheme is ultra vires.*

A general clause in the scheme providing for application to the Court with regard to the scheme is ultra vires. It is not the function of a civil Court to concern itself with the management of any institution except in so far as it is permitted by the Civil Procedure Code.

Where scheme for a temple provided " liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof " and archakas of the temple applied to the Court to direct the trustee to pay them their salary due for seven months ·

Held : that the archakas' remedy was by a suit ; *A. I. R.* 1925 *P. C.* 155, *Foll.*

[P 557 C 2 ; P 558 C 1]

A. Satyanarayana—for Appellants.

V. Suryanarayana—for Respondent.

Judgment.—The appellants who are archakas of a temple applied to the Subordinate Judge of Narasapur to direct the defendant, the trustee, to pay them their salary due for seven months. The Subordinate Judge dismissed their application and they prefer this appeal, The contention of the appellants is that there is a provision in the scheme for an application of this kind and, therefore, the Subordinate Judge was wrong in refusing their prayer. Para. 14 of the scheme is as follows :

> Liberty to apply to the Court is hereby granted to the trustee or to any person interested in regard to any matter arising out of this scheme or seeking any modification thereof.

The appellants are only archakas of the temple. If the trustee does not pay their salary their remedy is by a suit. If the contention of the appellants is to be upheld it would mean that the Court is to administer the trust estate in which a scheme is framed. Could it be said that a person who gives credit to the trustee for temple expenses is entitled to apply to the Court to direct the trustee to pay the amount due to him ? We are clearly of opinion that the appellants have

mistaken their remedy and they have no right to move the Court by virtue of paragraph 14 of the scheme already referred to, to apply to the Court for relief.

The appellants rely upon *Prayag Doss Ji Varu Mahant* v. *Sri Rangacharlavaru* (1), *Damodarbhat* v. *Bhogilal* (2) and *Prayag Doss Jee Varu* v. *Purisa Srirengacharlu* (3). In view of the recent pronouncement of their Lordships of the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (4) the above decisions cannot be considered good law; and it is unnecessary to consider that question, as the appellants do not ask for execution of the decree wherein the scheme is set out but for reliefs in respect of services rendered to the temple. Granting that paragraph 14 gives power to persons interested in the scheme to apply to the Court for relief, the appellants are not persons who come within its purview. In this connexion we are constrained to observe that a general clause in the scheme providing for application to the Court with regard to the scheme is ultra vires. No doubt such a clause was put in many schemes, and such clause is opposed to the principle of S. 92, Civil Procedure Code. For such of the matters as are concerned by S. 92, the sanction of the Advocate-General is to be obtained. By the introduction of a clause in the scheme that applications for the removal of the trustee and for the framing of a new scheme can be made to a Court, S. 92, Civil Procedure Code, is practically given the go by.

The introduction of such a clause will throw upon the Court not only the heavy burden of deciding petty applications of a vexatious nature, but also of practically administering the trust institution. The Court should as far as possible be saved the trouble of directly or indirectly interfering with the internal management of temples and trust properties. It is not the function of a civil Court to concern itself with the management of any institution except in so far as it is permitted by the Civil Procedure Code. In *Narayanamurthi* v. *Achayya Sastrulu* (5) the learned Judges observe at page 718:

> It is far from desirable that Courts should assume to themselves the continued supervision of institutions for the management of which they are called upon to frame schemes.

They further remark:

> We are disposed to consider though in the view we are taking it is unnecessary to decide the point that such decrees are ultra vires having regard to the express provisions of S. 92 of the Civil Procedure Code which makes it imperative that for the purpose of getting certain relief in respect of public charities, suits should be instituted by persons interested after getting the sanction of the Advocate-General.

Narayanamurthi v. *Achayya Sastrulu* (5) was followed by Spencer and Madhavan Nair, JJ., in C. M. A. No. 75 of 1925.

The cause of action of the appellants is purely a private one and it has nothing to do with the scheme and therefore their application was rightly dismissed by the lower Court.

This appeal is dismissed with costs.

Appeal dismissed.

(1) [1905] 28 Mad. 319=15 M. L. J. 133.
(2) [1900] 24 Bom. 45=1 Bom. L. R. 509.
(3) [1908] 31 Mad 406.
(4) A. I. R. 1925 P. C. 155.
(5) A. I. R. 1925 Mad. 411.

A. I. R. 1926 Madras 558

WALLACE J.

R. Doraiswami Aiyar—Plaintiff—Petitioner.

v.

C. S. Balasundaram Aiyar and *another*—Defendants—Respondents.

Civil Revision Petition No. 745 of 1924, Decided on 19th February 1925, from the order of the Dist. Munsif, Palni, D/- 4th August 1924.

Civil P. C., O. 9, R. 13—Mere assertion of ignorance of decree by defendant is not sufficient Court must decide whether summons was not duly served.

A mere assertion of his ignorance of the decree by the defendant and acceptance of that by the Court will not give the Court jurisdiction to set aside the ex parte decree. It has to decide also whether the summons was not duly served. [P 558 C 2; P 559 C 1]

N. Sivaramakrishna Aigar—for Petitioner.

A. Krishnaswami Aiyar—for Respondents.

Judgment.—The District Munsif has not decided whether the "summons was not duly served" as he was bound to do under Art. 164 of the Indian Limitation Act. A mere assertion of his ignorance of the decree by the petitioner and acceptance of that by the

Court will not give the Court jurisdiction to set aside the ex parte decree. It has to decide also whether the summons was not duly served. This order was, therefore, made without jurisdiction and is hereby set aside and the case sent back for fresh decision.

Costs up to date will abide the result. Refund of Court-fee on the civil revision petition is allowed.

Case remanded.

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* * A. I. R. 1926 Madras 559

DEVADOSS AND WALLACE, JJ.

Abdul Hakim Baig and *others*—Appellants.

v.

Mahomed Burrammudin and *others*—Respondents.

Appeal No. 50 of 1925, Decided on 11th December 1925, from the order of the Sub-J., Bezwada, D/- 16th December 1924.

* * (a) *Civil P. C., S. 92—Provision in scheme for any application to amend the same—Order on such application is not appealable order as it is not in execution.*

Where in a scheme suit under S. 92 a scheme is settled, the suit comes to an end and there is no decree to be executed and no application can be made as if it were in execution of the decree : 31 *Mad.* 406 ; 24 *Bom.* 45 and *A. I. R.* 1926 *Mad.* 130, *Disappr. A. I. R.* 1925 *P. C.* 155 and *A. I. R.* 1925 *Mad.* 411, *Foll.*

Parties cannot give power to a Court to treat the matter in a particular way. [P 560, C 1]

* * (b) *Civil P. C., S. 92—Clauses in a scheme under which relief covered by S. 92 can be got are ultra vires.*

Per Devadoss, J.—A provision made for alteration by an application to the Court by the parties or by persons interested in their working does not give the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme. It would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme : *A. I. R.* 1925 *Mad.* 411, *Foll.*

To empower the Court to exercise disciplinary jurisdiction over the trustees and panchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess ; for under the Civil Procedure Code it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. [P 560, C 2, P 561, C 1]

Per Wallace, J.—The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that clause is such relief that if it was being sought before the scheme was sanctioned, it would have to be sought by a suit under S. 92. If it was, it cannot be granted by any sort of application under the scheme notwithstanding that the scheme itself purports to provide such a means of obtaining that relief. [P 563, C 1, 2]

V. Ramadoss—for Appellants.

S. Varadachari and *P. Satyanarayana Row*—for Respondents.

Devadoss, J.—A scheme suit was framed for a mosque at Bezwada in O. S. No. 113 of 1913. Five worshippers at the mosque applied to the Subordinate Court at Bezwada to have the scheme amended. The Subordinate Judge, after taking evidence, has amended the scheme to a considerable extent. This appeal is by the members of the panchayat who were appointed to hold office for life. The question raised in the appeal is whether the following clause in the scheme is ultra vires or intra vires.

The provisions of this scheme may be altered or modified as if it were in execution of the decree in this suit on the application of not less than three worshippers resident in Bezwada to the Sub-Court exercising original jurisdiction over the town of Bezwada or in the absence of such Court, the District Court of Kistna.

The contention of Mr. Ramadoss for the appellant is that this provision is ultra vires. Before considering the question whether such a clause is ultra vires or not, we have to see what the clause means. Under the clause an application can be made as if in execution of the decree. It has been held by the Privy Council in *Sevak Jeranchod Bhogilal* v. *Dakore Temple Committee* (1) that an order on an application of this kind is not an order on an execution application. In that case, under the decree, the District Court was empowered to frame rules for the working of a scheme. Certain rules were framed and an appeal was preferred to the High Court against the order of the District Judge. The Privy Council held that no appeal lay against the order of the District Judge. In *Ranganath Thathachariyar* v. *Krishna-*

(1) A. I. R. 1925 P. C. 155.

swamy Thathachariar (2), it was held that no appeal lay against the order of appointment of a trustee by the Subordinate Judge in exercise of the power given to him under the scheme. In that case some worshippers interested in the temple presented a petition to the Sub-Court for directions to fill up a vacancy caused by the resignation of a trustee. The Subordinate Judge directed the Board of Supervision to fill up the vacancy. The trustee who is said to have resigned appealed to the High Court. The High Court held that though the order of the Subordinate Judge was a judicial one, it was not passed in execution and therefore no appeal lay. The application of the respondents cannot be considered to be an application in execution. Parties cannot give power to a Court to treat the matter in a particular way. This contention necessarily involves an objection to the maintainability of this appeal. The order passed by the lower Court not being one in execution no appeal lies. It cannot be treated as a decree within the meaning of S. 47. Though in many cases appeals were allowed yet, after the ruling of the Privy Council in *Sevak Jeranchod Bhoji Lal* v. *Dakore Temple Committee* (1) Courts are incompetent to entertain appeals against orders passed by Subordinate Courts with regard to the alteration of a scheme once settled by the Court. I, therefore, treat this as a revision petition as I consider that the lower Court acted without jurisdiction in altering the scheme.

The contention of the respondent is that a scheme once framed is always liable to alteration and that the Courts in India have the same power as the Courts of Chancery in England and that Courts can always alter schemes for proper reasons. That the Court has power to alter a scheme cannot be denied. Any schemes framed for the management of a public, charitable, or religious institution or trust can always be altered for proper grounds. The question is whether it should be done as provided by S. 92, or by an application to the Court which framed the scheme. In several schemes provision is made for alteration by an application to the Court by the parties or by persons interested in their working. In the well-known Tirupathi case such a provision was made in the scheme: vide *Prayag Doss Ji Varu* v. *Trimai Sreerangacharlu Varu* (3). The question is whether such a provision gives the Court jurisdiction to alter the scheme on an application made to it. When a scheme is settled the suit comes to an end. To say that any person could apply to alter the scheme once framed would necessarily mean that the suit is pending. It cannot be said that the suit is pending for all time from the mere fact that the scheme framed contains a provision that an application can be made for altering the scheme. S. 92 of the Civil Procedure Code requires the sanction of the Advocate-General or the Collector of the District to enable persons to bring a suit for obtaining directions of the Court for the administration of a trust or for settling a scheme. If it is held that by virtue of a clause in a scheme providing for its alteration on application, the Court can alter the scheme, the provisions of S. 92 would be practically abrogated. When S. 92, Civil P. C. directs that for the settlement of a scheme and for other reliefs the sanction of the Advocate-General should be obtained, it would be ultra vires of any Court to obtain jurisdiction by inserting a clause in the scheme whereby persons interested in the scheme or others are enabled to apply to the Court for the alteration of the scheme. Before a scheme is actually put in working order, it is open to the parties to the suit in which the scheme is framed to apply to have the scheme modified. But where a scheme has to be modified after the suit comes to an end, though the Court has power to alter the scheme it could do so only after the formalities required by law are complied with. The analogy of the English practice cannot be relied upon in support of the contention that such provision is intra vires. In England the Attorney-General or the Relators can apply for the framing of a scheme and for its modification. The Court of Chancery is in London and the Attorney-General is practically, if not actually, in charge of the conduct of the proceedings. But in this Presidency, where there are so many District Courts and Subordinate Courts entitled to act under section

(2) A. I. R. 1924 Mad. 369.

(3) [1907] 30 Mad. 138=11 C. W. N. 442=9 B. L. R. 588=2 M. L. T. 119=17 M. L. J. 266.

92 it is impossible for the Advocate-General to have control over persons who obtain permission from him to file suits under S. 92. In practice the persons who obtain permission act independently of the Advocate-General and he very seldom interferes in the conduct of the suit. When Courts find some difficulty or when they think that the help of the Advocate-General should be obtained they no doubt call upon the Advocate-General to help them. But in the absence of such request from the Court the Advocate-General does not trouble himself about the conduct of a suit under S. 92. That being so the analogy of the English practice cannot be held to apply to the practice obtaining here. Where a clause in the scheme is opposed to, or contravenes, a specific provision of law, it cannot be said that that clause is intra vires from the mere fact that the Court gives sanction for its inclusion in the scheme. In *Narayanamurthi* v. *Achayya Sastrulu* (1), Spencer Offg. C. J., and Srinivasa Iyengar, J., were of opinion that such a clause was ultra vires having regard to the express provisions of S. 92, Civil P. C. In two cases to which I was a party C. M. A. Nos. 45 of 1923 and 20 of 1925, it was held that such a wide clause as the one in this case was ultra vires of the Court. Spencer and Madhavan Nair, JJ., held the same view in C. M. A. No. 70 of 1925 and in C. R. P. No. 452 of 1924, the learned Chief Justice was of the same opinion. In C. S. No. 430 of 1895, Bakewell, J., held that any relief which was covered by S. 92 should not be dealt with by the Court on an application in the suit in which the scheme was framed.

The argument of Mr. Varadachari for the respondent is that such a clause is intra vires ; for in order to effect proper working of the scheme, or owing to the changed conditions, the scheme can be modified and for doing so an application can be made in the suit itself, whatever may be the distance of time from the actual framing of the scheme to the date on which the application is made ; and he relies upon *Sadupadhya Omoshanand* v. *Ravaneswar Prasad Singh* (5); *Govindasami Naidu* v. *Uchippa Goundan* (6) and *Muhamad Waheb Hussain* v. *Abbas Hussain* (7). In *Govindasami Naidu* v. *Uchippa Goundan* (6), Krishnan, J., doubted the competency of an application to alter a scheme, though Spencer, J., was of a different opinion. In *Sadupadhya Omoshanand* v. *Ravaneswar Prasad Singh* (5), reference was made to *Damodarbat* v. *Bogilal Karsondas* (8). These cases do not really touch the question. If a clause provides for the removal of a trustee on an application, that clause is invalid, for it goes right across the provisions of S. 92. In order to remove a trustee a suit has to be filed with the sanction of the Advocate-General. Obtaining the sanction of the Advocate-General is not merely a matter of form. The Advocate-General, as a responsible officer, is bound to see whether the applicant has made out a proper case and to satisfy himself that the grounds are not frivolous before he grants sanction. To apply for the removal of a trustee, without obtaining the sanction of the Advocate-General, because there is a provision in the scheme for such removal, is not merely overlooking the provisions of S. 92 but it is setting at naught the distinct provisions of law intended to prevent frivolous applications to Court and consequent waste of time. The case in *Ramadoss* v. *Hanumanta Rao* (9), does not help the respondent.

The contention for the respondent is that a suit under S. 92 must be considered to be a suit on behalf of all the worshippers and, therefore, it is not only the parties to the suit but any one interested in the institution that can apply for the alteration of the scheme. As I have already observed the Court's power to alter a scheme at any time for proper grounds is not denied by the appellant. But in order to give jurisdiction to the Court the proper procedure for the purpose should be adopted with the necessary preliminaries, and a scheme cannot be altered by a mere application to the Court simply by reason of the existence of a clause in the scheme to that effect. Even if such a provision is valid, the proper course would be to apply to the Advocate-General for permission to obtain a specific relief and if the Advocate-General gives permission an applica-

(4) A. I. R. 1925 Mad. 411.
(5) [1918] 43 I. C. 772.
(6) A. I. R. 1922 Mad. 413.
(7) A. I. R. 1923 Patna. 420.
(8) [1900] 24 Bom. 45=1 Bom. L. R. 509.
(9) [1913] 36 Mad. 364=21 M. L. J. 954=(1911) 2 M. W. N. 387.

tion may be made. But without it an application cannot be made by anyone at his will and pleasure to alter a scheme. I am prepared to hold that such a general provision in a scheme that anyone interested in the institution can apply for the removal of a trustee, or for any such relief is ultra vires. But in this case it is unnecessary to go that length as the provision here is that the application should be made as if it were in execution of the decree in the suit. There is no decree to be executed and, therefore, no application could be made as if it were in execution of the decree.

There is another clause which is clearly invalid and that is,

The Court may act on the application of not less than three worshippers resident in Bezwada in the matter of its disciplinary jurisdiction over the trustee and the panchayatdars.

Such a clause makes the Court practically the superintendent of the religious institution. The Courts in India are not empowered to interfere in matters religious, but they can only act in civil matters. To empower the Court to exercise disciplinary jurisdiction over the trustee and panchayatdars of a religious institution is practically investing the Court with power of management of the institution. Such a provision cannot empower the Court to interfere in matters of internal arrangement, and parties cannot invest the Court with jurisdiction which it does not possess, for under the Civil P. C. it is only suits of civil nature that can be entertained. A clause of this kind if held valid, would empower the Court to interfere in matters purely religious. For example, suppose the trustee of a temple introduces some new ritual or changes the ritual. Can the Court hold an enquiry whether the ritual is approved by the Shastras and whether it should be introduced in the temple or not? Surely the Court is incompetent to go into such matters and parties cannot invest the Court with jurisdiction which it is incompetent to exercise. As I hold that the clause in para. 9 of the scheme is ultra vires, the order of the lower Court altering the scheme was made without jurisdiction. In this view it is unnecessary to go into the merits of the case.

In the result the order of the lower Court is set aside and the appeal is allowed with costs. Both parties will have the costs out of the Trust estate.

Memo of objections is dismissed.

Wallace, J.—This appeal raises questions of great importance for religious trusts and a satisfactory answer is by no means easy. In O.S.No.113 of 1913 on the file of the Subordinate Judge, Bezwada, the final decree settled a scheme in respect of a Jumma Masjid in Bezwada. In that scheme a committee of one trustee and five panchayatdars was appointed for life. The scheme contains a clause that the trustee or member of the panchayat shall be liable for removal or suspension by the Court for proved misconduct or neglect of duty and that the Court may act in such matters on the application of not less than three worshippers resident in Bezwada. Under this clause five worshippers presented an application asking for the removal of the present committee and for certain modifications of the scheme. The lower Court heard the application and modified the scheme providing inter alia that the panchayat should be appointed for five years only instead of for life, and directing further that as five years had already elapsed since the present panchayat took charge, they must vacate their office.

This was accordingly done and a fresh committee has been appointed under rules framed by the lower Court. Against their removal in this fashion the five panchayatdars have appealed.

Their contention is twofold: first that the clause in the original scheme permitting, if it does permit, such radical alterations in the scheme was ultra vires of the Court which drew it up; and second, even if the clause is intra vires the present circumstances do not call for such measures. The other parties to the appeal raise a preliminary objection that no appeal lies. As to that if the lower Court's proceedings are wholly ultra vires I would, if necessary, allow the appeal to be converted into a civil revision petition and decide the case on the question of jurisdiction. The discussion as to the maintainability of the appeal may be dealt with incidentally in considering the wider question which has been opened up in this case, namely, whether, where a scheme was sanctioned for the administration of a trust, Courts are at liberty on a mere application to grant relief of the nature which, S. 92 of the Civil Pro-

cedure Code says, shall be obtained by a suit.

Where a scheme does not purport to confer on the Court power to remove a trustee or to grant any of the other reliefs of the kind set out in S. 92 the answer is easy. The Court has no authority to grant such a relief on an application; the only method by which they can be obtained is by way of a suit under S. 92. But where a scheme purports to confer on the Court power to grant such reliefs, the question is whether such authority in the scheme is not beyond the jurisdiction of any Court to grant because in effect it abrogates S. 92 of the Code of Civil Procedure.

The principle underlying S. 92, I take it, is that no trustee shall be removed or new trustees appointed or any other reliefs of the nature specified therein granted except by way of a suit filed under the sanction of the Advocate-General, so that trustees may be afforded some protection against frivolous and vexatious attempts to remove them. I do not think the Legislature intended this principle to be any the less applicable when a scheme for the administration of a public trust has once been framed, or intended to countenance any procedure by which once a scheme has been framed, S. 92 will no longer have any application to the trust and that in future if a scheme has been framed the interesting game of attacking, harassing and removing trustees may go on merely on an application under the scheme without any guarantee, such as the necessity of obtaining the sanction of the Advocate-General affords, that the proceedings are either in the interests of the public or in the interests of the institution. I am of opinion that S. 92 was intended to be enforced whenever any of the reliefs mentioned in it are asked for whether or no a scheme has already been framed under it. When therefore, for example, a scheme has been already settled, and it is sought to be altered so that a trustee may be removed and a new trustee appointed, that cannot be done by an application under the scheme even if the scheme purports to allow it to be so done. It can only be done by a suit after obtaining the sanction of the Advocate-General. The true test as to the legal propriety of a clause in a scheme is whether the relief granted by that clause is such relief that if it was being sought before the scheme was sanctioned, it would have to be sought by a suit under S. 92. If it was, it cannot be granted by any sort of application under the scheme notwithstanding that the scheme itself purports to provide such a means of obtaining that relief.

Any other conclusion would lead to fantastic results. If it be held, for example, that under such a clause as that which exists in the scheme under consideration the life membership of a trustee may be reduced to five years, there is nothing to prevent the Court extending the five years period again to a life-period, or reducing the number of trustees or in effect altering the original scheme out of all recognition, while at the same time it removes the wholesome check to frivolous and vexatious applications which S. 92 imposes and which is no less necessary after the scheme is framed than before it is framed.

It is argued and I appreciate the force of the contention, that this conclusion will compel worshippers to bring suits even for the most petty alterations in the original scheme, but that will only be so for such alterations as are within the mischief of S. 92. If the relief is such as does not really alter the lines of the original scheme so as to make it to all intents and purposes a new scheme, or does not otherwise run counter to S. 92, then S. 92 is no bar. But even so I would suggest that in future schemes such alterations should only be made after obtaining the sanction of the Advocate-General. Alterations which go to the root of the scheme, particularly alterations which limit or affect any right conferred on individuals by the original scheme, are on a wholly different footing and cannot be introduced under guise of petty modifications of the scheme.

The present case affords an illustration of both forms of reliefs. The alteration of term of membership from life to five years, whereby, under the guise of modification of the scheme, five members appointed for life are removed, is obviously a radical alteration of the original scheme. Such a proposal is really a new scheme. and therefore within the mischief of S. 92. The other alteration, namely, directing publication of annual balance sheets is a matter of purely administrative detail which the trustees are perfectly compe-

tent to carry out without reference to the Court.

The view which I have put forward above is, I think, the view to which this High Court has been gradually moving. In *Prayag Doss Ji Varu Ma ant* v. *Tirumala Srirangacharlavaru* (10) under S. 539 of the old Civil Procedure Code this Court held that power should be reserved in a trust scheme for an application to the Court by persons interested for directions, which might be enforced by way of execution. On appeal from this decision the Privy Council, in *Prayag Doss Ji Varu* v. *Tirumala Srirangacharlavaru* (3) modified the scheme, and inter alia provided for liberty for persons interested to apply to the District Court with reference to the carrying out of the scheme and the High Court for modification of the scheme. The legal propriety of these directions was not raised before the Board. This scheme coming back to the District Court for framing rules, and rules having been framed, the High Court held in *Prayag Doss Ji Varu* v. *Tirumala Srirangacharlavaru* (11) that the District Court acted, when it framed these rules, by way of execution of the decree and that an appeal lay from such directions to the High Court. This was in 1908. In *Ramdoss* v. *Hanumantha Rao* (9) which is also a case under S. 539 of the old Code, it was held by a Bench in 1911 that a scheme framed under S. 539 can be altered by the Court, and that the section confers the same powers that the Court in England possesses, and the previous cases cited above were relied upon. In *Govindasami Naidu* v. *Uchippa Goundan* (6), Spencer, J., on the authority of 24 *Bom.* 45 was inclined to hold that modifications of an original scheme should be moved before the Court by way of an application by persons interested and not by a suit. But the same learned Judge in *Narayanamurti* v. *Achayya Sastrulu* (4) in 1924 objected to a clause in a scheme permitting general liberty to apply for modifications, being of opinion that such liberty in respect of matters relating to the reliefs mentioned in S. 92 is ultra vires. The same view has been taken by another Bench to which one of us was a party in C. M. A. 45 of 1923. The learned Judges there relied on the Privy Council case in *Sevak Jeranchod Bhogilal's* case (1) which certainly is not reconcilable with 31 *Mad.* 406 or 24 *Bom.* 45, and pointed out that if this view is not taken it would practically throw on the Court the burden of administering such trusts up and down the whole country, whenever a scheme has been framed. I am in full agreement with this view.

The difficulty of holding any other view is enhanced when I consider what remedy a trustee removed under such a removal clause in such a scheme has. If he had been removed by a suit under S. 92 he has the right of appeal, but if he is removed under a clause in the scheme it is very doubtful if he has any right of appeal, even though the scheme confers it. From the decision of the Privy Council, in *Sevak Jeranchod Bhogilal's* case (1) it would appear that alterations in a scheme are not matters in execution as if made under S. 47 of the Civil Procedure Code, which would permit of an appeal. The Patna High Court seems to view such a provision for alterations as an amendment of the decree: see *Muhammad Wehab* v. *Abbas Hussain* (7) where they remark.

> It is to prevent a multiplicity of suits that the Courts in administration actions reserve a liberty to the parties to apply from time to time and so often as may be necessary.

But if that view is adopted an appeal would lie as if from a decree, and there are difficulties in the way of that view. It implies that a suit is, in a sense, never finished, and that the sanction of the Advocate-General given at the commencement of the suit continues ad infinitum and may be used to cover all sorts of motions and prayers never contemplated by the parties when they filed their suit, and never contemplated by the Advocate-General when he gave his sanction, and may in fact be reliefs which, if they had been mooted at the time when the suit was first presented, might have been refused altogether.

It has been held lately in several cases by this Court that no appeal will lie against any action taken by the Court under a sanctioned scheme. In C. M. A. 70 of 1925, reported in *Sivan Pillai* v. *Venkateswara Ayyar* (12), Spencer and Madhavan Nair, JJ., held that 31 *Mad.* 406 is no longer good law in view of the Privy Council decision in *Sevak Jeranchod Bhogilal's* case (1). The cases reported in *Lokasikamani Mudaliar* v. *Thiagaraja*

(10) [1906] 28 Mad. 319=15 M. L. J. 133.
(11) [1908] 31 Mad. 406=4 M.L.T. 92.

(12) A.I.R. 1926 Mad. 130.

Chettiar (13) and *Ranganatha* v. *Krishnasami* (14), 47 *Mad.* 139, were also relied on in C. M. A. 45 of 1923. Devadoss and Waller, JJ., held also that no appeal lies. If the lower Court acts outside the scheme or acts under a clause in the scheme which is itself ultra vires of the Court which framed the scheme, then the Court acts without jurisdiction and its order may be set aside by a civil revision petition : see C. M. A. 45 of 1923 to which one of us was a party.

I think that the view laid down by the Privy Council in the *Sevak Jeranchod Bhogilal's* case (1) is that orders in such matters are orders passed neither in execution nor in a pending suit, but under a jurisdiction conferred by the scheme itself, which will give the Court jurisdiction in a matter which the scheme permits, provided it is otherwise not ultra vires because in conflict with some other jurisdiction conferred by statute or rule having the force of law. If therefore a clause permitting the Court to remove a trustee is intra vires, the trustee removed under it has no remedy by way of appeal such as he would have had if he had been removed by a suit under S. 92. To my mind this is another indication that any clause which conflicts with S. 92, Civil P. C., is ultra vires.

I must hold, therefore, that no appeal lies, but that if the alteration in the scheme is ultra vires or had been obtained by a method, e. g., by way of execution, which is not legal, it is necessary to treat this appeal as a civil revision petition and cancel the order of the lower Court.

It is clear from what I have already said that I regard Cls. 8 and 9 of the present scheme as ultra vires if and in so far as the Court has utilized them to grant reliefs of the nature provided for in S. 92 of the Civil Procedure Code, and Cl. 9 also further because modifications of the scheme are not matters in execution. The modification by the lower Court which changes the period of membership of a panchayat from life to five years, thus ipso facto putting an end to the membership of Respondents 2 to 6, is a form of relief which the worshippers could obtain only by way of a suit under S. 92 and is, therefore, ultra vires : the other alteration is one for the trustees themselves under the scheme.

I therefore agree that the alterations must be and are hereby cancelled.

Costs of both parties in this appeal will come out of the trust estate.

Appeal treated as revision and allowed.

(13) [1917] 5 L.W. 596=(1917) M.W.N. 420.
(14) A.I.R. 1924 Mad. 339.

A. I. R. 1926 Madras 565

WALLACE AND MADHAVAN NAIR, JJ.

Secretary of State—Petitioner—Appellant.

v.

Sarvepalli Venkatalakshmanna—Plaintiff—Respondent.

Appeal No. 186 of 1924, Decided on 4th January 1926 against the order of Dist. J., Nellore, D/- 2nd November 1923.

Civil P. C., O. 33, R. 10—Pauper suit—Suit for future maintenance—Method of recovering Court-fee is appointing a Receiver to collect maintenance.

The proper method of recovering Court-fee decreed as payable to Government from a pauper plaintiff, whenever plantiff's property is confined to a right to future maintenance, is by the Court appointing a Receiver to collect the maintenance amount and pay to Government the fee due by plaintiff. [P 565 C 2]

C. V. Ananthakrishna Aiyar — for Appellant.

B. Somayya—for Respondent.

Judgment.—We cannot subscribe to respondent's contention that Government cannot under a decree recover the Court-fee decreed as payable to Government from a pauper plaintiff, whenever plaintiff's property is confined to a right to future maintenance. That contention is negatived by the Privy Council ruling in *Rajindra Narain Singh* v. *Sundara Bibi* (1), which also indicates the proper method of recovering such Court-fee. That method is by the Court appointing a Receiver to collect the maintenance amount and pay to Government (by instalments if necessary in order that plaintiff may have something to live upon) the fee due by plaintiff. The appellant's execution petition, as it stands, does not ask for relief in that form, and it should be amended. We grant leave to amend it accordingly. The amended petition is forwarded to the lower Court for disposal in the light of the Privy Council decision quoted above. Each party will bear his own costs in this appeal.

Order accordingly.

(1) A. I. R. 1925 P.C. 176.

A. I. R. 1926 Madras 566

ODGERS, J.

T. Kuppusamy Pillai—Appellant.

v.

S. Mahommad Kasim Sahib and *others* —Respondents.

Second Appeal No. 886 of 1923, Decided on 8th January 1926, from the decree of the Dist. J., Chingleput in Appeal Suit No. 298 of 1922.

(a) *Transfer of Property Act, S.* 116—*Lessor's act alone can create tenancy.*

Where the terms of notice were that the sub-tenant holding over should go out or Rs. 75 would be collected together with the costs of Court

Held : that created no privity directly between the landlord and the Sub-tenant and that it was not an amicable consent to either the Sub-tenant's holding over or to the recognition of a new tenancy on the part of the sub-lessee : *A. I. R.* 1924 *Bom.* 322, *Foll.* [P 567 C 1]

(b) *Landlord and Tenant — Sub-tenant's liability—(Obiter).*

Sub-tenant remaining in possession after the determination of the lease is liable for reasonable damages for so remaining in possession. [P 567, C 1]

T. L. Venkatarama Iyer — for Appellant.

A. Sundaram and *P.G. Krishna Iyer*—for 4th Respondent.

Judgment.—This is a case in which it is important to look at the plaint. The plaintiff entered into a lease with Defendants 1 and 2 in 1907. These two persons are said to have since become insolvents and are not represented in second appeal. In 1913 Defendants 1 and 2 sub-leased to the 3rd defendant. The plaint sets out that Defendants 1 and 2 were in enjoyment of the plaintiff's property as tenants and that the 3rd defendant is in enjoyment of the premises as a partner of Defendants 1 and 2. It may at once be said that this case of partnership was given up in both the lower Courts and was not pressed before me here. The plaint then goes on to ask for " losses on account of rent from January 1916 to 15th December 1918" when the plaintiff sold the property to a stranger. Paragraph ? of the plaint runs as follows :

The plaintiff claims relief in this suit for losses on account of rent and for damages for use and occupation at Rs. 50 per month."

The material issue settled in the case is : Is the plaintiff entitled to collect the rent of the suit building ?

It is now contended before me that the plaintiff is entitled to succeed as against the 3rd defendant on any one of the several grounds, (1) as a tenant of the plaintiff under S. 116 of the Transfer of Property Act ; (2) as a trespasser on the premises of the plaintiff and therefore liable for damages for use and occupation. I have set out the only paragraph in the plaint in which damages for use and occupation are referred to except the prayer and there are no introductory averments whatever showing how the plaintiff would be entitled to damages for use and occupation against one or more of the defendants. The plaintiff, no doubt, had a cause of action against the 3rd defendant, but the question is whether on the plaint as framed he could be granted any relief. The District Munsif held that he could on the ground that the 3rd defendant after the notice Ex. B (1) which will be referred to in detail in a moment made himself directly responsible for the rent and continued in possession. The District Judge held that there was no contract express or implied by the 3rd defendant to become the tenant of the plaintiff and to pay rent. As stated above the 3rd defendant is joined clearly in the plaint as a partner of Defendants 1 and 2. The suit is not one in ejectment and he was nowhere treated as a trespasser. Therefore any damages for use and occupation against him as trespasser are out of question. Can any damages for use and occupation or by way of rent be awarded against him as a tenant ? That the plaintiff knew that the 3rd defendant was a sub-lessee is clear. No objection was raised to the sub-lease and the possession of the 3rd defendant is said to have been more than once admitted by the plaintiff. Now, the plaintiff terminated the lease to Defendants 1 and 2 by a notice. He sent Ex. B (1) to the 3rd defendant specifically as sub-tenant enclosing the notice he had addressed to Defendants 1 and 2 terminating their tenancy. Exhibit B (1) demands that the 3rd defendant should vacate the premises within a month of the receipt of the notice and concludes : " In default of so vacating I write this, with a pure mind, that Rs. 75 per month will be collected for the said tenancy along with the costs of Court." To this the 3rd defendant gave no reply and continued in possession. Now, it is said that the concluding words of Ex. B (1) bring the case within S. 116 of the

Transfer of Property Act and that the lessor has by them "otherwise assented" to 3rd defendant's continuing in possession. It is clear from *Meghji Valabadhas* v. *Deyjlai & Co.* (1) that it is for the lessor to do some act, receive rent or otherwise to give consent and not for the lessee to do anything under the Transfer of Property Act. I have been referred to a case in *Dugal* v. *Macarthy* (2) in the Court of appeal which is said to resemble the present case in that there the tenants held over and when the landlord wrote demanding a quarter's rent in advance they did not answer the letter but remained in possession. The Master of Rolls says :

The evidence appears to me clearly to show that the landlord consented to their so remaining in possession as tenants ; and that he treated them as tenants from year to year on the terms of the previous tenancy."

The whole question here is whether from the terms of Ex. B (1) it can be said that the landlord consented to 3rd defendant remaining in possession as his tenant in direct privity with him. It seems to me it cannot. The terms are that he should go out or Rs. 75 will be collected together with the costs of Court. That does not look like an amicable consent to either the tenant's holding over or to the recognition of a new tenancy on the part of a former sub-lessee. The 3rd defendant has paid no money up to this date and the landlord has taken no steps till 1919 when this suit was filed.

Another contention is that even though the 3rd defendant has been recognized as sub-tenant remaining in possession after the determination of the lease he must be liable for reasonable damages for so remaining in possession on the authority of old English cases like that of a man who takes a bun from a railway refreshment room or of a man to whom wine is delivered without an order and who receives it and consumes it. That no doubt might be another good cause of action for the plaintiff had it been foreshadowed in his plaint, or had an issue been taken about it below. One must say with some sympathy for the plaintiff that there was no doubt he had a remedy against this 3rd defendant but either he was badly advised or his remedy has been misconceived : and in my opinion, on his plaint he is not entitled to succeed as against the 3rd defendant. It may be that when he first launched the case the 3rd defendant occupied a very minor place in his consideration and that the subsequent insolvency of Defendants 1 and 2 caused him to turn to and try to recover from the 3rd defendant. But on the state of the pleadings and the issues and the shape in which the case was originally put I am clearly of opinion that he cannot succeed in doing so.

The second appeal must therefore be dismissed with costs.

Appeal dismissed.

(1) A. I. R. 1924 Bom. 322.
(2) [1893] 1 Q. B. 735.

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* A. I. R. 1926 Madras 567

JACKSON, J.

(*Pokala*) *Mahalakshmi Ammal*—Plaintiff—Petitioner.

Civil Miscellaneous Petition No. 1353 of 1925, Decided on 12th August 1925, against the decree of the Dist. J., Chingleput in O. S. No. 23 of 1923.

* *Civil P. C., O. 33, R. 1—Pauper appeal—Amount deposited in Court at pauper's credit should be taken into account.*

Where appellant gets a decree in the lower Court but wants to appeal as pauper for higher amount, the amount deposited in Court by judgment-debtor to the appellant's credit in pursuance of the decree should be taken into consideration in deciding whether he should be allowed to appeal as a pauper. [P 568, C 1]

T. R. Ramachandra Aiyar and *S. Srinivasa Aiyar*—for Petitioner.

Order.—The petitioner applied for leave to prefer an appeal in this Court from the decree of the District Court, Chingleput, in forma pauperis. Her petition was sent to the District Judge for enquiry whereupon the judgment-debtor (she herself has obtained a decree for maintenance and is appealing for a larger amount) paid Rs. 571 (Five hundred and seventy one rupees) into Court to her credit. The District Judge passed an order allowing her to draw out the money, and reported that she had means to pay the stamp duty of Rs. 200 (two hundred rupees) on her appeal. To this report she objects. Of course Rs. 571 (Five hundred and seventy-one rupees) is the subject-matter of the suit, though not of the appeal, but this causes no difficulty be

cause it has been ruled in *Krishna Bai* v. *Manohar* (1) that " the subject-matter of the suit " in O. 33, R. 1, Civil Procedure Code, does not qualify " sufficient means" and the subject-matter of the suit is excluded as being presumably out of the pauper's reach which is not so in the present case : cf. *Dwarkanath Narayan* v. *Madhavrav Vishvanath* (2). But another Bombay Bench, *Bai Balagauri* v. *Motilal Ghellabhai* (3), besides holding that the subject-matter of the suit cannot be taken into consideration in calculating the plaintiff's means, apparently overlooking *Krishna Bai* v. *Manohar* (1), has also held that the pauper applicant is not obliged to take out of Court what is deposited or paid in and cannot, therefore, if he chose to allow the deposit or payment made in Court to remain there, be said to be possessed of sufficient means as if the deposit were actually in his possession. This differs from a previous ruling of the same Court in *Dwarkanath Narayan* v *Madhavrav Vishvanath* (2) and with all respect I think it a most genuine definition of " possessed " to confine the phrase to actual possession on one's own person. I see no distinction between moneys deposited in Court and ordered to be delivered to a person and moneys lying at a person's credit in a Bank. I should hold that a person with Rs. 571 (Five hundred and seventy one rupees) at her disposal in the Court is possessed of sufficient means to enable her to pay stamp-fee of Rs. 200 (Two hundred rupees). Nor do I think it necessary to contemplate that possibly the Rs. 571 (five hundred and seventy-one rupees) might have been attached ; it was not attached when the District Judge passed his order. I also think it unnecessary to go into the question whether supposing the petitioner's estate went into liquidation she would have sufficient balance to pay the stamp fee. It is enough to find that at the time of hearing her application she had sufficient means.

I have been asked to refer the matter to a Bench because of *Bai Balagauri* v. *Motilal Ghellabhai* (3), but the Bombay rulings are so contradictory that I do not consider it to be in the face of clear authority that I am deciding that petitioner is possessed, in the circumstances, of sufficient means and not entitled to sue as a pauper.

The petition to be allowed to appeal as a pauper is dismissed ; the petitioner can pay the requisite fee within one month from the date of this order.

Petition dismissed.

(1) [1906] 30 Bom. 593=8 Bom. L, R. 671.
(2) [1886] 10 Bom. 207.
(3) A. I. R, 1923 Bom. 247.

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* A. I. R. 1926 Madras 568

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

B. Munuswami Naidu—In the matter of

Proceedings under Cl. 10 of the Letters Patent, Decided on 6th October 1925.

* *Letters Patent (Madras), Cl. 10—Negligence by itself is not professional misconduct.*

Negligence by itself is not professional misconduct ; into that offence there must enter the element of moral delinquency ; *In the case of G. M. C.* 86 *L. T.* 468, *Foll.*

Advocate-General—for the Crown.

P. Venkatramana Rao and *T. R. Ramchandra Aiyar*—for the Vakil.

Coutts-Trotter, C. J.—The charges framed, if they were substantiated, would prove no more than negligence on the part of the vakil's clerk. It is only fair to the vakil to say that he has throughout accepted civil responsibility for his clerk's negligence to the extent of any proved loss in consequence of it by the client. But it has been laid down clearly in England *In the case of G. M. C.* in the proceedings against *Mr. Mayor Cooks, a Solicitor* (1), and also by a Bench of this Court in a judgment delivered on the 7th December 1923, *In the matter of Dr. T. C. K. Kurup, Bar-at-Law, Advocate, High Court, Madras*, the Court consisting of the then Chief Justice, Phillips and Ramesam, JJ., that negligence by itself is not professional misconduct ; into that offence there must enter the element of moral delinquency. Of that there is no suggestion here, and we are, therefore, able to say that there is no case to investigate, and that no reflection adverse to his professional honour rests upon Mr. Munuswami Naidu.

Order accordingly.

(1) 86 L. T. 568.

* A. I. R. 1926 Madras 569

DEVADOSS, J.

Kathamuthu Pillai—1st Defendant—Appellant.

v.

Subramaniam Chettiar — Plaintiff's Successor—Respondent.

Second Appeal No. 694 of 1923, Decided on 2nd November 1925, from the decree of the Sub-J., Madura, in A. S. No. 68 of 1919.

* (a) *Specific Relief Act, S.* 18 (c)—*S.* 18 (c) *applies also to cases where vendor undertakes to discharge encumbrances—Court may direct discharge in a decree for specific performance.*

When a vendor undertakes to discharge the encumbrances on the property, the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid the consideration for the sale, as S. 18 (c) applies not only to undisclosed encumbrances but to cases where the vendor undertakes to discharge the encumbrances on the property: *A. I. R.* 1926 *Mad.* 173, *Appr.*; *A. I. R.* 1926 *Cal.* 385, *Dist.*

[P 569, C 2, P 570, C 1, 2]

* (b) *T. P. Act, S.* 55—*Covenants in S.* 55 *apply to contracts of sale also.*

The convenants contained in S. 55 apply to contracts of sale as well as to completed contracts; *Sadasive Iyer's view in* 40 *Mad.* 338 (*F.B.*), *Dissented from.* [P 570, C 1]

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for Appellant.

K. Bhashyam Aiyangar—for Respondent.

Judgment.—The plaintiff's suit is for specific performance of a contract of sale entered into with him by the 1st defendant. The District Munsif gave a decree for specific performance and the Subordinate Judge dismissed the appeal of the 1st defendant. He has preferred this second appeal.

The contention of the appellant is that the direction in the decree

"That 1st defendent do draw the above amount on discharging the decree in O. S. No. 185 of 1910 of the Principal District Munsif's Court of Madura and file a copy of the record of satisfaction"

is bad in law. The argument of Mr. Rajah Aiyar is that when a decree for specific performance is given against the vendor he should not be directed to redeem any encumbrance on the property which was not disclosed to the vendee. The agreement, dated the 18th day of October 1909, does not mention the existence of any encumbrance on the property contracted to be sold, nor is there any recital in it that there are no encumbrances on the property. The finding of the learned Subordinate Judge is that the 1st defendant did undertake to free the property from two encumbrances which were mentioned in the certificate of sale, Ex. C. The 1st defendant purchased the property in Court auction in execution of his decree in O. S. No. 141 of 1902. In the sale proclamation he stated that the encumbrances had been discharged. In Ex. C, which was drawn up by the Court, there is a recital that the encumbrances have been discharged. The finding is that the 1st defendant knew that these encumbrances had not been discharged and that he undertook to discharge them when the agreement, Ex. A, was entered into. The question is, when a vendor undertakes to discharge the encumbrances on the property whether the Court decreeing specific performance can direct him to discharge the encumbrances before he is paid the consideration for the sale. The contention of Mr. Rajah Aiyar is that the Court should decree specific performance, and if the vendee finds that there are encumbrances on the property, he should bring a suit for damages against the seller. Under S. 55, Cls. (i) and (g) of the Transfer of Property Act, a seller is bound to discharge all the encumbrances on the property then existing. If the vendee is not aware of the existence of any encumbrance on the property when the contract of sale is entered into, and he comes to know of the existence of any encumbrances he can ask the seller to discharge those encumbrances before a sale is effected, and when he sues for specific performance of the contract of sale could it be said that he is not entitled to have a direction in the decree that the seller should discharge the enbumbrances on the property before he is paid the consideration for the sale? The provisions contained in S. 18 (c) of the Specific Relief Act apply to this case: where the vendor professes to sell unencumbered property and if it is afterwards found that the property is mortgaged for an amount not exceeding the purchase money, the purchaser may then compel the seller to obtain a conveyance from the mortgagee, or himself pay off the encumbrances out of the unpaid purchase money. Here, on the finding of fact that the vendor undertook to discharge the encumbrances, the purchaser was entitled to insist upon his discharging them before a conveyance is

effected through Court. He is entitled to ask the Court to give a direction in the decree that the encumbrances should be discharged before the consideration for the sale is paid to him.

Considerable argument was advanced by Mr. Rajah Aiyar that the provisions of S. 55 do not apply to executory contracts, in other words, the covenants contained in S. 55 of the Transfer of Property Act apply only to completed sales and not to agreements of sales. Under S. 55 the seller is bound to do certain things. One of them is to answer to the best of his information all relevant questions which may be put to him by the buyer in respect of the property and the title thereto, and the other is to produce before the buyer on his request for examination all documents of title relating to the property which are in the seller's possession. It cannot be said that these two things should be done after the sale is effected. The covenants contained in S. 55 apply to contracts of sale as well as to completed contracts. In this connexion, with great respect, I am unable to agree with the reasoning of Sadasiva Aiyar, J., in *Adikesavalu Naidu* v. *Gurunatha Chetty* (1). Abdur Rahim, J., was of opinion that the covenants contained in S. 55 apply to contracts of sale as well.

It is argued for the appellant that it was open to the plaintiff to repudiate the contract and to claim damages as the vendor was not able to give him a clean title. No doubt the vendee can repudiate the contract of sale if he finds that the vendor has no title to convey or that the property is encumbered : vide *Reeve* v. *Berridge* (2). The case in *Eastern Mortgage & Agency Company* v. *Md. Fazlul Karim* (3) does not apply to the facts of this case. There it was held that it was open to a vendee to resist a suit for specific performance on the ground that the defects in the property were not disclosed by the vendor. But here the 1st defendant did undertake to discharge the encumbrances on the property and the plaintiff is entitled to enforce the terms of that agreement. The argument that S. 18 (c) applies only to undisclosed encumbrances and does not apply to cases where the vendor undertakes to discharge the encumbrances of the property before the sale cannot be accepted. When the vendor undertakes to discharge the encumbrances on the property, he contracts to sell the property unencumbered and, therefore, Cl. (c) applies to a case like this. The Court granting specific relief is entitled to direct the vendor to discharge the encumbrances which he undertook to do before he is paid the consideration for the sale. The clause in the decree objected to is perfectly legal. In this connexion I may refer to a recent decision of Spencer and Viswanatha Sastri, JJ., in *Venkataranga Aiyar* v. *C. S. Ramasami Aiyar* (4) in which a similar direction was given by them.

It is stated that the amount secured by the two mortgages on the property which the vendor undertook to discharge is about Rs. 300 or Rs. 400. As the consideration for the sale is Rs. 1,950, the direction in the decree may be varied by directing that the amount which would be necessary to discharge the encumbrances be kept in deposit and the balance be drawn by the 1st defendant. This would be an equitable arrangement as the plaintiff cannot be damnified to a larger extent than the amount of the two mortgages. If the mortgagees try to enforce their mortgages the amount in Court would be sufficient to meet their demands and the 1st defendant need not be kept out of a large sum of money by reason of a portion thereof being necessary to meet the demands of the mortgagees.

With this modification I dismiss the second appeal with costs.

Appeal dismissed.

(1) [1916] 40 Mad. 338=32 M. L. J. 180=5 L. W. 425=(1917) M. W. N. 171 (F.B.).
(2) [1888] 20 Q. B. D. 523=52 J. P. 549=36 W. R. 517=58 L. T. 836=57 L. J. Q. B. 265.
(3) A. I. R. 1926 Cal. 385.
(4) A. I. R. 1926 Mad. 173.

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* A. I. R. 1926 Madras 570

COUTTS-TROTTER, C. J., AND MADHAVAN NAIR, J.

Kannammal—Prisoner—In re.

Criminal Reference No. 94 of 1924 and Criminal Appeal No. 641 of 1924, Decided on 14th January 1925, made by the S. J., Chingleput.

** Criminal P. C., S. 342—Object of section is to give the accused opportunity of explaining his conduct—Magistrates should warn accused before asking for such explanation that he is not obliged to state, and if he states, his statement may be read against him.*

It is extremely desirable that Magistrates should follow the practice of warning accused persons when they invite their explanation under S. 342 that they are not obliged to say anything unless they desire to do so. The object of the section should be to give them an opportunity, if they so desire, to explain their conduct and further warn them that anything they say will be put in evidence against them at their trial. [P 573, C 1]

C. Sambasiva Rao—for Prisoner.

J. C. Adam—for the Crown.

Coutts-Trotter, C. J.—This is an unusual case not so much from the circumstances of the crime but from the walk in life of the accused. She is a widow some 29 years of age, who was undergoing a course of training to fit her to be a teacher in the Government Training School at Conjeevaram. She had six months further training to undergo before she became qualified to earn a salary as paid teacher. One of the pupils at the school was a little girl, Kamalakanni by name, and about 9 or 10 years old. In the view we take of this case, it does not matter what her exact age was. It is a short and terrible story. It is not necessary to dissect the evidence ; the learned Judge has done it very carefully and the story that emerges is simply this : This woman decoyed this child away from the school, took her to Walajabad about ten miles off, had the ornaments with which the unfortunate child was bedecked taken off and it is practically undisputable that those ornaments were afterwards sold by her. So open and careless was she in her proceeding that she actually had two goldsmiths in succession to endeavour to remove the ornaments from the child's arms and legs. She hereself does not dispute that at a later date she sold them and received the proceeds. The occurrence was on the night of the 15th of September last. Of course, the child's parents made inquiries when they found she disappeared. People came forward to say that they had seen the child with a woman ; some of them positively identified her as being the accused while others described her in a way that left no reasonable doubt that she was the accused. Indeed the accused herself does not deny it. The next morning the child's body was found floating in a tank some four miles from Walajabad. It was very much decomposed and the doctor who gave the post mortem certificate and gave evidence in Court declined to express any positive opinion as to what was the cause of death. We think that it is clear that the child died of asphyxia. What is not clear on the meagre materials supplied to us is whether the child was strangled before her body was put into the tank or whether she was thrown into the tank and died of drowning. From what one can ascertain from the accredited text books, Taylor and Lyons, it seems on the whole the balance of probability is that the child was dead when her body was put into the tank. We should like to say and think that notwithstanding the decomposition, extensive as it was in this case, that a more careful examination by the medicial officer would probably have put us in a much better position to express an opinion one way or the other about this, and it is a matter which might possibly make some difference in the view that has to be taken of the degree of guilt of the accused.

The accused set up a story which is absolutely uncorroborated by any one of the numerous witnesses for the prosecution that, while she was a party to the taking of the child's ornaments and to the disposing of them, she was induced to do that by a man called Sesha Chetti and a woman called Tayaramma. She says that the former told her that the girl's father owed him money and that he was going to repay himself by this cavalier method of removing the child's ornaments and selling them and appropriating the proceeds in satisfaction of his debt. There is no sort of corroboration of that statement : no witness for the prosecution supports any of the facts on which it is supposed to be based. It is denied by Sesha Chetti and Tayarammal who were very properly brought before the learned Sessions Judge when that defence had been set up. We can only come to the conclusion that this woman is responsible for the murder of this child to hush up the robbery which she committed by taking her ornaments from her. The motive for the crime was obviously a desire to get money and it may very well be that this unfortunate woman who was left a widow with three children and had not yet qualified herself for earning her livelihood in her new profes-

sion was in real straits for lack of funds. That is, we think, all that can be said in extenuation : she was a mother, she had little children of her own, she took somebody else's child and savagely murdered it for the sake of Rs. 250.

The sentence of the Court below and the conviction must be confirmed. We have pointed out the only circumstance in possible mitigation that can be pointed out and the case will be brought to the notice of Government. One is naturally reluctant to pass the extreme penalty of the law on a woman comparatively young who has been struggling to maintain a family, she herself being left a widow ; but in this case the other circumstances weigh so heavily against her that we think that, if any leniency is to be extended to her, it cannot be extended by a Court of law, but must be left, if it is to be exercised at all, to the prerogative of mercy which is inherent in Government. The appeal will be dismissed and the sentence and conviction confirmed.

I should like to add a word on one matter which arose during the trial. By S. 342 (1) of the Code of Criminal Procedure the committing Magistrate or the Court, at the trial, is entitled to put questions to the accused. Sir John Wallis, C. J., and myself have held in a decision which, so far we know, is unreversed, *Re-Abibulla Ravuthan* (1) that the object of that section is to give the opportunity to the accused, if he so desires, to tender any explanation he likes of his part in the case that is presented against him. Sub-S. (2) of that section runs as follows :

> The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

In that state of things a Full Bench of this Court has held in *Varisai Rowther* v. *King-Emperor* (2), —in that particular case it was in the interests of the accused although we cannot think otherwise than that it will more often be greatly to his detriment—that the provision in S. 342 (1) of the Code that the Judge shall ask the accused what he desires to say is mandatory and not discretionary.

There is no provision in the Code for the accused being warned of the consequences of the statement he makes. The main consequence, of course would be that thestatement he makes must be given in veidence against him. We contrast with that the provision of 11 and 12 Vic. Ch. 42, S. 18 which runs as follows :

> After the examination of all the witnesses on the part of the prosecution of a person brought before any Justice or Justices of the Peace charged with any indictable offence, shall have been completed, the Justice of the Peace, or one of the Justices, before whom such examination shall have been completed as aforesaid, shall, without requiring the attendance of the witnesses read or cause to be read to the accused the depositions taken against him and shall say to him these words or words to the like effect : 'Having heard the evidence, do you wish to say anything in answer to the charge ? You are not obliged to say anything unless you desire to do so but whatever you say will be taken down in writing and may be given in evidence against you upon your trial' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said Justice or Justices, and kept with the deposition of the witnesses, and shall be transmitted with them as hereinafter mentioned and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the Justice or Justices . . . . . purporting to sign the same did not in fact sign the same : provided always that the said Justice or Justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat which may have been holden out to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial notwithstanding such promise or threat.

The first thing we desire to observe is that the English Act says that the statement made by the prisoner in such circumstances may be given in evidence against him. It is within the experience of all barristers who have practised in the English criminal Courts that the prosecution will always put in the statement of a man as part of their case when it helps him or amounts to a denial of the charge. But there are cases in which an accused person makes a foolish incriminatory statement, not understanding the position he is in, where prosecuting counsel, with that sense of fair play, which we think, we may say, invariably characterizes them, think it is in the interests of the man himself not to put in the statement. They always point out the statement to the presiding Judge and he understands why it is the prosecuting counsel does not think it fair to let the

(1) [1915] 39 Mad 770=2 L. W. 939=(1915) M. W. N. 413.
(2) A. I. R. 1923 Mad. 609 (F.B.).

statement of the prisoner go before the jury. If the Judge thinks it ought to go in, he says so.

It seems to us that it would be a salutary amendment of the Indian Law if it were not compulsory to put in such a a statement. If there were any danger of prosecutors unfairly keeping back a statement that helped the accused, the Judge is there to insist on its being put in. Further, speaking for ourselves, we think it is extremely desirable that some such form of caution as is prescribed by 11 and 12 Vic. Ch. 42 S. 18 should be introduced into the Code of Criminal Procedure. The form in which this woman was invited to make a statement by the committing Magistrate in this case was as follows :

You have heard all the statements of the prosecution witnesses: you have heard, read, all the records filed in Court on the side of the prosecution. What explanation do you offer for it.

That seems to us a most undersirable method of inviting the accused person to make a statement. He is not warned that, it will be usable in evidence against him : he is not warned that, if he does not wish, he need not offer any explanation whatever. We think it is extremely desirable that Magistrates should follow the practice of warning accused persons when they invite their explanation under S. 342 of the Code that they are not obliged to say anything unless they desire to. The object of the section is to give them an opportunity, if they so desire, to explain their conduct and further warn them that anything they say will be put in evidence against them at their trial. The Local Government will necessarily have this judgment before them when the question of confirmation comes up and they may possibly consider it advisable to approach the Govenment of India to amend the law in this respect and bring it into conformity with the very careful provisions of the Indictable Offences Act intended to safeguard the liberty of. the subject.

Conviction & sentence confirmed.

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* A. I. R. 1926 Madras 573

DEVADOSS AND WALLER, JJ.

Radhakrishna Ayyar—Petitioner—Appellant.

v.

P. Srinivasa Aiyar and *others*—Respondents.

Letters Patent Appeal No. 99 of 1924, Decided on 20th November 1925, from the order of Jackson, J., in S. R. No. 24570 of 1923, D/- 18th September 1924.

* *Civil P. C., S. 146—Section is not limited only to filing fresh suit or appeal but also covers continuing of a suit or appeal already filed.*

The proper interpretation of S. 146 is that a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted or when such person dies before the application or appeal is disposed of. [P 574, C 1]

N. Chandrasekhara Aiyar—for Apellant.

M. S. Venkatrama Aiyar—for Respondents.

Judgment.—The only point in this Letters Patent appeal is whether a person who is claiming an interest in a portion of the subject-matter of the suit is entitled to continue an appeal filed by his vendor. In this case the appellant's vendor filed an application for leave to appeal in forma pauperis on 10th July 1923, with a memorandum of appeal. He died on 24th September 1923, and on 5th December 1923, the appellant made an application to be made a party appellant for the purpose of prosecuting the second appeal. The application to appeal in forma pauperis was dismissed and the appellant was directed to pay the Court-fee, and a month's time was granted him for the purpose. He has paid the Court-fee. His application for stay of proceedings in C. M. P. No. 2221 of 1923 was dismissed by Mr. Justice Jackson on the ground that the appellant had no right to continue the appeal which was filed by his vendor. The learned Judge distinguished the case of *Muthiah Chettiar* v. *Govinddoss Krishnadoss* (1) from this case on the ground that the appellant wanted to continue the

(1) [1921] 44 Mad. 919=14 L. W. 287=41 M. L. J. 316=(1921) M. W. N. 649.

appeal already filed by his vendor and not that he wanted to file another appeal. S. 146, Civil Procedure Code, says:

Where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Mr. M. S. Venkatarama Aiyar for the respondent contends that S. 146 applies to the filing of a fresh suit or a fresh appeal, and not for continuing a suit or appeal pending. We are unable to accept this contention. If the appellant is entitled to present another appeal to this Court against the decree passed against his vendor we fail to see why he should not be allowed to continue the appeal which was filed by his vendor. The proper interpretation that of S. 146 is a person who is entitled to make an application or file an appeal which could have been made or filed by another under whom he claims but which has not been made or filed is also entitled to continue the application or appeal which has been made or filed by such person when that application or appeal is not properly prosecuted or when such person dies before the application or appeal is disposed of.

In this connexion we may refer to the decision in *Seshadri Reddi* v. *Venkata Reddy* (2). We, therefore, hold that the appellant is entitled to prosecute the appeal filed by his vendor and we set aside the order of the learned Judge and direct that the appellant be brought on the record in the second appeal. The costs of this appeal will be costs in the second appeal.

Appeal allowed.

(2) A. I. R. 1924 Mad. 709.

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* A. I. R. 1926 Madras 574

VENKATASUBBA RAO AND MADHAVAN NAIR, JJ.

S. Adaikkala Thevan and *another*—Appellants.

v.

Imperial Bank, Madura Branch and *others*—Respondents.

Appeal No. 59 of 1925 and Civil Misc. Petition No. 1015 of 1925, Decided on 17th November 1925, from the order of the Sub-J., Dindigul, D/- 10th February 1925, in I. A. No. 29 of 1925.

* (a) *Civil P. C., O. 39, R. 2 (3) and S. 94—Rule 2 (3) applies also to disobedience of all injunctions issued under S. 94—Civil P. C., S. 94.*

The drafting of R. 2 (3) of O. 39 is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. It applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application; it applies alike to disobedience of all the injunctions issued under S. 94. [P 575 C 1]

(b) *Civil P. C., Ss. 136 and 94—Order by High Court in its appellate jurisdiction—Person against whom the order is passed residing within appellate jurisdiction—High Court can proceed under the section and transfer warrant of arrest to a proper District Judge.*

Where an order made by the High Court in its appellate jurisdiction is disobeyed and there is some difficulty as to the application of S. 136 due to the fact that though the person against whom the order is made is outside the limits of the ordinary civil jurisdiction of the High Court he is within the limits of its appellate jurisdiction, there is nothing to prevent the High Court from adopting the procedure laid down in S. 136 and sending to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. The District Courts, their officers and staff are undoubtedly subject to the jurisdiction of and are under the supervision of the High Court and there is no difficulty in directing this mode of execution. [P 575, C 1 2]

T. M. Krishnaswami Aiyar—for Appellants.

B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Respondent.

Order:—(After setting out the facts of the cases which are not necessary for the report the order proceeded. The respondent have been guilty of a serious contempt in failing to appear before us. Their conduct throughout has been fraudulent and they have deliberately defied the injunction issued by this Court. We do not at present feel called on to deal with the respondents for their failure to comply with our order to appear in Court. Nor do we propose in regard to their disobedience of the injunction, to commit them in the exercise of our inherent and extensive jurisdiction in respect of contempt. We think that it is unnecessary to use the very large powers that the High Court possesses, as in our opinion the respondents can be adequately punished under the provisions of the Code.

Under S. 94, Civil Procedure Code, the Court is empowered to commit a person guilty of disobedience of an injunction to the civil prison and to direct that his property shall be attached and sold. O. 39, R. 2 (3) prescribes the punishment and under it, the person in default may

be detained in the civil prison for a term not exceeding six months, and his property may be attached. The drafting of this rule, as has been pointed out in *Ramprasad Singh* v. *Benares Bank, Ltd.* (1) is somewhat inartistic, but there is no doubt that it applies to disobedience generally of an injunction granted by the Court. O. 39, R. 2 (3) applies not only to disobedience of an order issued under Clauses (1) and (2) of that rule but has a more general application, it applies alike to disobedience of all injunctions issued under S. 94. See also *Vidyapurna Thirthaswami* v. *Vicar of Suritkal Church* (2).

We think that the respondents are deserving of no consideration and we order that they be detained in a civil jail for a period of six months and that their property be attached.

Then remains a matter of some importance to be considered. How is our order to be executed ? S. 136 of the Code prescribes the procedure to be followed where any person is to be arrested or any property is to be attached under a provision not relating to the execution of decrees and such person resides or such property is situate outside the jurisdiction of the local limits of the Court. In this case the arrest and attachment are under the provisions of the Code not relating to the execution of decrees. So far the section applies. But there is some difficulty in regard to the other portion of the section which says that the person shall reside or the property shall be situate outside the local limits of the jurisdiction of the Court. In the present case our order is one made in the exercise of our appellate jurisdiction and the High Court has jurisdiction on its appellate side over the whole of the Presidency. The respondents are outside the limits of the City and it may be said that though they are outside the limits of the ordinary civil jurisdiction of the High Court they are certainly within the limits of its appellate jurisdiction. We do not think that it is necessary to decide this point. Whether S. 136 strictly applies to the case or not there is nothing to prevent us from adopting the procedure laid down in that section and sending to the appropriate District Court the warrant of arrest and the order of attachment for necessary action being taken. The District Courts, their officers and staff are undoubtedly subject to the jurisdiction of and are under the supervision of the High Court and we see no difficulty in directing this mode of execution. The District Court Court on receipt of the warrant and order will adopt the procedure prescribed by S. 136.

It is suggested to us that we might send a special bailiff from this Court. This is more cumbrous and expensive than the procedure which we have resolved to adopt.

The respondents besides disobeying the order of injunction have behaved very dishonestly and fraudulently. Having first obtained an adjodurnment they utilized the interval to commit further acts of depredation. They again obtained an adjournment agreeing to give security and they failed to do so and not only did they fail to do so but they also wilfully kept away from Court with the deliberate object of evading its process. The 1st respondent, we understand, is the principal offender and he will, therefore, pay the costs of the application which we fix at Rs. 200 (two hundered).

Since delivering the above judgment it has been brought to our notice that the 2nd respondent did not file in Court the counter-affidavit dated 27th March to which we have referred. The case was argued on the footing that that affidavit was in Court, and we had before us only a copy of it. It would seem that Mr. T. M. Krishnaswami Aiyar, the learned vakil for the 2nd respondent, furnished a copy to Mr. Sitarama Rao, but omitted to file the original affidavit in Court. So, far as our judgment is concerned, this makes very little difference, for, without that affidavit the case of the respondent is distinctly worse. The order of attachment and warrant shall be transmitted to the District Court of Madura. The properties to be attached shall be specified in the order to be transmitted by this Court. Mr. Sitarama Rao undertakes to give a list of the properties in two weeks from this day.

A. A. O. No. 59 of 1925 is dismissed with costs.

No order is necessary on any other application.

Appeal dismissed :
Contempt application allowed.

(1) [1920] 42 All. 98=17 A. L. J. 1127.
(2) [1917] 7 L. W. 323.

A. I. R. 1926 Madras 576

DEVADOSS AND WALLER, JJ.

Madura Municipality—Complainant—Petitioner.

v.

P. M. Muthu Balu Chetty—Accused—Respondent.

Criminal Revisions Nos. 503 and 419 of 1925, Decided on 20th January 1926, from the judgment of the 2nd Class Mag., Madura, in Calendar Case No. 335 of 1924.

Madras District Municipalities Act (5 *of* 1920), *Ss.* 249 *and* 250—*S.* 249 *applies to industries only—After permission to erect factory under S.* 250 *is granted license for its being worked cannot be refused.*

The Act clearly intends to draw a distinction between what it describes as "industries" and "factories," and S. 249 applies only to industries. It would be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working The machinery referred to in Sch. V is machinery of a kind that is propelled by means other than those described in S. 250, which contemplates some sort of mechanical motive power. The machinery referred to in Cl. (q) of Sch. V must be such as is likely to be dangerous to human life, health or property: (*A. I. R.* 1924 *Mad.* 375, *Foll.*) The whole clause is not governed by the words "which is likely to be dangerous to human life or health or property:" (*A. I. R.* 1924 *Mad.* 375, *Dist.*) The last clause governs that part of Cl. (q) which begins with the words "using for any industrial purpose . . ." [P 576 C 2, P 577 C 1]

F. S. Vaz and *C. S. Viswanatha Aiyar*—for Petitioner.

Public Prosecutor, *T. Rangachariar* and *S. T. Srinivasagopalachari*—for Respondent.

Waller, J.—This petition has been filed by the Municipal Council of Madura against the decision of the Sub-Magistrate of Madura Town. Respondent was charged under Ss. 249 and 338 of the Madras District Municipalities Act with having failed to take out a license for using a 22 horse-power gas engine to work a rice hulling machine. The Sub-Magistrate refused to convict. He found that the case was governed by S. 250 and not by S. 249 of the Act. He was further of opinion that machinery used for rice hulling was not the kind of machinery contemplated by Sch. V (q).

It is argued on behalf of the Municipal Council that all that is required by S. 250 is permission for the original construction or establishment of a factory and that for the actual working of the factory an annual license is necessary under S. 249. I agree with the Sub-Magistrate that the argument is unsound. The Act clearly intends to draw a distinction between what it describes as "industries" and "factories." The former are dealt with in S. 249 and the latter in S. 250. The industries included in S. 249 and Sch. V are licensed by the Chairman subject to the control of the Council. The power factories referred to in S. 250 are regulated by the Council itself subject to the orders of the Governor in Council. It would, I think, be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working.

I think that the Magistrate was right in holding that a license under S. 249 of the Act was not necessary in this case. I am also of opinion that the machinery referred to in Sch. V is machinery of a kind that is propelled by means other than those described in S. 250, which contemplates some sort of mechanical motive power. A decision of Krishnan, J., has been cited *In re Ramchandra Rao* (1) which deals with Cl. (q) of Sch. V. As I consider that S. 249 and Sch. V do not apply to this case at all, that decision does not really call for any discussion. All that I need say in regard to it is that I agree with Krishnan, J., that the machinery referred to in Cl. (q) of Sch. V must be such as is likely to be dangerous to human life, health or property. The object of the clause is, as he says, to bring under control the storing, manufacturing, and using of things which are dangerous to human life, or health or property. The "fuel or machinery" referred to in the clause must, I think, be of a sort that comes within that category. At the same time, I do not agree with him that the whole clause is governed by the words "which is likely to be dangerous to human life, or health or property." The first two parts of it cannot be so governed. The words "manufacturing anything from which offensive or unwholesome smells arise" cannot grammatically be subject to a

(1) A. I. R. 1924 Mad. 375.

clause which begins "which is likely." Nor is it necessary to hold that the first two clauses are governed by the last. It is sufficiently obvious that the storing of explosives or combustibles and the manufacturing of things from which offensive or unwholesome smells arise are likely to be dangerous to human life, or health or property, and no further qualification of them as such appears to be necessary. In my opinion the last clause governs that part of Cl. (q) which begins with the words "using for any industrial purpose . . . . . ." In the result, I must dismiss the revision petition.

Devadoss, J.—I agree.

Petition dismissed.

A. I. R. 1926 Madras 577

DEVADOSS AND WALLER, JJ.

V. Samanna Iyer— Defendant—Appellant.

v.

Kadathur Village Rajavaikal Channel Silt Clearance Committee— Plaintiff—Respondent.

Appeal No. 83 of 1925, and Civil Rev. Petition No. 144 of 1925, Decided on 4th November 1925, from the order of the Sub-J., Coimbatore, D/- 20th December 1924.

Civil P. C., O. 6, R. 17—Plaintiff having no right to sue—Amendment of plaint cannot be allowed to bring in proper plaintiff.

When a person brings a suit alleging that he has the right to sue and when it is found that he has not the right, the Court would not be justified in directing an amendment of the plaint in order to enable the proper party to sue.

[P. 577, C. 2]

Watrap S. Subramania Aiyar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondent.

Judgment.—The petitioner was a secretary of the Kadathur Village Committee for the purpose of silt clearance in 1915. The plaintiff has brought the suit on behalf of a committee elected in 1922 for collecting subscriptions for carrying on silt clearance. The contention of the petitioner is that the plaintiff is not entitled to bring the suit against him. The District Munsif tried the suit and dismissed it on the merits. The Subordinate Judge held that the suit was not properly framed, that the villagers were entitled as a body to sue for any sum that might remain in the hands of the petitioner and directed an amendment of the plaint and remanded the suit to the Munsif's Court for disposal on the merits. We think the order for amendment was made without jurisdiction. The plaintiff's case was that the committee of 1922 was entitled to demand from the petitioner the amount which remained in his hands in 1915. There is no averment in the plaint that the suit was on behalf of the whole village. From the attitude of the plaintiff throughout the case it is apparent that he fought the case on the footing that the committee of 1922 was entitled to maintain the suit against the defendant. We do not think that this is a case in which an amendment of this kind should have been allowed; for by allowing an amendment different sets of plaintiffs will be introduced into the case and their cause of action would be different from the cause of action set up by the present plaintiff. The committee of 1915, or if such a committee is not existing now the villagers would be entitled to sue. When a person brings a suit alleging that he had the right to sue and when it is found that he has not the right the Court would not be justified in directing an amendment of the plaint in order to enable the proper party to sue. We, therefore, think the Subordinate Judge acted without jurisdiction in ordering the amendment. We, therefore, set aside his order directing an amendment of the plaint. In one sentence he has stated that the findings of the lower Courts on other points which are mixed questions of fact and law are reversed. This is a very unsatisfactory way of disposing of the contentions raised in the issues. The issues raised are plain questions of fact. We, therefore, set aside the decree of the Subordinate Judge and direct him to restore the appeal to file and dispose of it according to law. Costs of the appeal will abide the result. The petitioner will have the costs of this petition in this Court. The civil miscellaneous appeal is dismissed with costs.

Appeal dismissed; Petition allowed.

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* A. I. R. 1926 Madras 578

RAMESAM, J.

Sagi Venkatasubbayya — Plaintiff — Appellant.

v.

Sagi Kotamma and *others*—Defendants —Respondents.

Second Appeal No. 476 of 1923, Decided on 12th October 1925 from the decree of the Dist. J. Guntur, in A. S. No. 223 of 1921.

* *Hindu Law—Family Settlement—Compromise of doubtful claim—Surrender by father in favour of one of the members of the joint family in settlement of another member's possible claim and that member having no knowledge of the settlement—Settlement is invalid at least to the extent of son's share.*

The real consideration and motive of a compromise is not the sacrifice of a right but the abandonment of a claim. There can be no abandonment of a claim except by the person who has the title or set up his own title to the thing claimed. A, while compromising with C, cannot abandon a claim that may possibly be made by B, but not made by B and without B's knowledge, and, therefore, such a compromise between A and C is not a bona fide family settlement in compromise of a doubtful claim; and whatever surrender is made by C is not binding on members of the joint family. [P 578 C 1, 2]

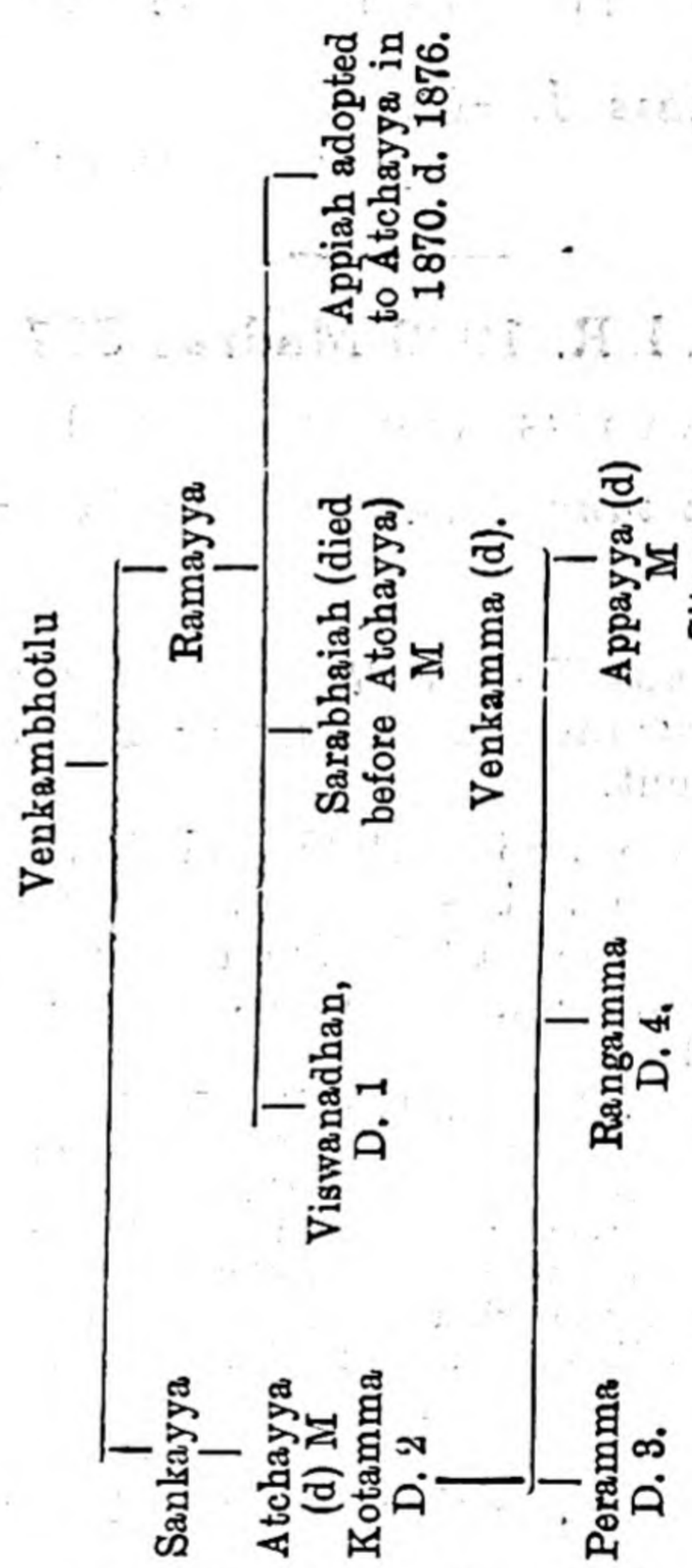
T. V. Ramanatha Aiyar—for Appellant.

Ch. Raghava Rao--for Respondents.

Judgment.—The facts of this second appeal may be briefly stated as follows: The following pedigree shows the relationship of the parties: (See next colum)

When Atchayya died in 1867 he left his widow Kotamma (2nd defendant) and two daughters, the 3rd and 4th defendants. In 1870 the widow Kotamma adopted Appiah the youngest brother of 1st defendant. This Appiah died in 1876 leaving a widow Sitamma. The family possessed about 160 acres of land. Sitamma was allotted 16 acres of land in Miriyala for her maintenance. The 2nd defendant was also given a definite plot of 18 acres and 17 cents in Voppicherla village for her life (as admitted by her in her deposition) for her maintenance: vide paragraph 4 of the District Judge's judgment where the plaintiff's version on this point was found true.

According to the finding of the Courts below, when Atchayya died the family was undivided. This is a finding of fact which I must accept and which has not been questioned before me. But for some reason the names of the 2nd defendant and her daughter-in-law Sitamma were also entered in the patta relating to the family lands along with that of the 1st defendant. In 1908 Ex. V, dated 18th July 1908, was executed by the 1st and 2nd defendants in favour of a stranger in which they agreed to sell one of the family lands, obviously the vendee insisted on the 2nd defendant joining in the agreement because the patta stood in her name also. A suit for specific performance of this agreement was filed in the District Munsif's Court



of Narasaraopet (O. S. No. 580 of 1911). The present Defendants 1 and 2 were also Defendants 1 and 2 in that suit and Ex. V was then Ex. B. The 1st defendant did not contest the suit, but the 2nd defendant stated that she was willing to carry out the terms of the agreement if half of the sale price was paid to her. If the family was undivided the property wholly belonged to the 1st defendant, and the 2nd defendant was not entitled to any portion of the consideration. Apparently, taking advantage of the fact that she was also a party to the agreement

she put forward a claim for half of the consideration and thus obstructed the completion of that transaction. The District Munsif dismissed the suit on the 26th August 1911. The same pleader appeared for the 1st and 2nd defendants. Within three months after the dismissal of the suit, that is, on 16th November, 1911, the 1st defendant executed Ex. I in favour of the 2nd defendant giving 48 acres of land including the 18 acres 17 cents already allotted. Two days before the execution of Ex. I the land, in respect of which the agreement was executed and the suit for specific performance was filed, was sold to the vendee under Ex. VI, dated 14th November 1911, and on the same date as the sale deed (Ex. I), Ex. VII was executed by the 2nd defendant in favour of the 1st defendant by which the patta was agreed to be transferred entirely in favour of the 1st defendant. The District Judge has found that these three documents, I, VI and VII, came into existence and were executed at the same time, by which he apparently meant to say that they are all parts of one transaction. I agree.

The District Judge also found that at that time the question whether Atchayya died undivided or not was not free from doubt though now a finding is given that he died undivided. Though the undivided status of the family at the time of Atchayya's death must have been known to all the parties concerned still it is also clear that, in 1911, if the 2nd defendant and her daughter-in-law Sitamma chose to dispute it, the 1st defendant was not in a position to establish the joint status beyond all doubt. This is what the District Judge must have meant when he said: "The question as regards the status of Atchayya was not, however, free from doubt." The District Judge finally winds up paragraph 9 of his judgment by saying:

> Those two, namely, (1) giving up her right to half the sale proceeds; and (2) admitting that Atchayya was not joint with the 1st defendant, formed the consideration for the execution of Ex. I in her favour.

(He had previously found all the other pleas of the 2nd defendant as the motive for Ex. I not true). The second part of the sentence I accept unreservedly; that is, I have no doubt that, in 1911, the 2nd defendant set up a case that her husband, Atchayya, died divided and, therefore, the 1st defendant and his adopted son, the plaintiff, were not entitled to more than a half share of the family property. So far I am of opinion that the view taken by the lower Court is correct. But what does this amount to? If the family was not undivided but was divided when Atchayya died, the property would descend to his adopted son Appiah, and, when he died in 1876, the half share would descend to his widow Sitamma and Sitamma would be entitled to a half share of the whole of the family property in 1911 and 2nd defendant would still be a maintenance holder out of the half share. So that the dispute raised by the 2nd defendant in 1911 amounts to putting forward the title of Sitamma to half of the share in the property and not to put forward a claim in her own behalf; for, I do not think in 1911 there would have been anybody so ignorant of Hindu Law in the country that one could plausibly suggest that the mother of a last male owner was entitled to succeed in preference to the widow. If there is any foolish person who could put forward such a claim there is no foolish person who can admit such a claim. So that, what happened in 1911 was this. Kotamma threatened the 1st defendant by putting forward the case that Atchayya died divided and therefore her daughter-in-law Sitamma was entitled to half the property, not that she was herself entitled to any portion of the property. This was done behind the back of Sitamma. If this is the claim that was put forward in 1911 she could not have put forward any title to half of the sale proceeds of the land agreed to be sold in 1908. Any claim to the sale proceeds on the ground that her name was included in the patta was illusory, especially when, as to half the family property, a claim was simultaneously put forward on behalf of the daughter-in-law. I am, therefore, satisfied that the substantial dispute raised in 1911 was only a doubt about the joint status of the family (as found by the Courts below) resulting in the putting forward of a title to half of the property in Sitamma, but did not, and could not, legally include a claim to half share of the sale proceeds on the ground of a possible title in 2nd defendant. The 1st defendant was, therefore, interested in shutting the mouth of the 2nd defendant.

The situation then was that the daughter-in-law herself did not put forward her title to a half share of the property, but another person, the mother-in-law, raised a cloud over the 1st defendant's title by suggesting that the daughter-in-law was entitled to half the property. If both the mother-in-law and daughter-in-law raised the dispute, a compromise would have been perfectly binding. But then the compromise which would then have been effected would be entirely unlike the compromise effected under Ex. I. Under Ex. I nothing was allotted to Sitamma, but all the 48 acres were given to the 2nd defendant. If Sitamma herself had put forward the claim she would have got the substantial bulk of the property surrendered by the 1st defendant as the price of peace and the 2nd defendant would have either got nothing or a very small addition to her allotment for maintenance. It is obvious therefore that what has happened is this: the 1st defendant closed the mouth of the 2nd defendant by bribing her by executing Ex. I behind the back of Sitamma whose name was used by the 2nd defendant as a Damocles' sword to threaten the 1st defendant and to induce him to execute Ex. I as a price of peace. On these facts, does Ex. I come within the scope of the rule of law which protects bona fide family settlements in compromise of doubtful claims or disputes and declares them to be valid, a rule of law not questioned before me by both the parties? Mr. Venkatarama Aiyar for appellant contends that the suit transaction does not come under the protection of that rule.

In *Miles* v. *New Zealand Alford Estate Company* (1) Fry, L. J., says

I do not think the policy of the Court is to prevent real bona fide compromises of real and bona fide claims. When there is a pending action it is easy to suppose that the giving up of that action is the consideration for the compromise. Again, when there is real cause of action slight evidence of the claim being made may be admissible.

Those sentences imply that the claims set up must be that of the person who is getting the benefit under the compromise. His Lordship then proceeds to say:

Now, in the present case, was there any real cause of action or any evidence on the part of the company that there was no cause of action.

After discussing the evidence he says:

But was there any claim by a shareholder It is not suggested that any shareholder has been advised to make any claim, or, except the angry words that passed at the meeting, that he had ever asserted a claim.

I think these remarks of Fry, L. J., are applicable to the present case. Here, the title set up is of a person who does not put it forward. Sitamma never put forward any title. The same idea is implied in the language of Cockburn, C. J., in *Callisher* v. *Bischoff Sheim* (2). He says:

The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. . . . . Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bona fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it.

In *Shyam Lal* v. *Rameswari* (3) the Court observed at page 95:

In some of the cases, the compromise was based on the assumption that there was an antecedent title of some kind in the parties, and the compromise merely acknowledged and defined what that title was.

In the present case that anteceent title is not in Kotamma but in Sitamma who had no knowledge of the compromise. At page 97 it is observed:

It is contended, that it was a family settlement, but a family settlement presupposes that there are boda fide claims on either side and an honest settlement after full disclosure of facts on either side. Here one party secretly and fraudulently obtained probate of a will and when the other party wanted to have it revoked, the former agreed to pay a larger annuity, and obtained an admission of the genuineness of the Will which might be used against the reversioners. We do not think that in these circumstances the principle of family settlements applies.

In the present case there is no claim on the part of one of the parties to the compromise who merely set up the title of a third person and the settlement was made secretly without the knowledge of the person. If all the three were parties it would have been regarded a family settle-

(1) [1886] 32 Ch. D. 266=55 L. J. Ch. 801=54 L. T. 582=34 W. R. 669.

(2) [1870] 5 Q. B. 449=39 L. J. Q. B. 181=18 W. R. 1127.

(3) [1915] 23 C.L.J. 82.

ment. A settlement made for the purpose of getting rid of a certain title set up without the knowledge of that person and without resulting in any benefit to that person cannot be regarded as a settlement of that claim. The language used in some of the other cases cited before me: *Krishna Chandra Dutt* v. *Hemaja Sankar Nandi* (4) and *Chabti* v. *Parmal* (5) also implies the same idea. In the notes to *Stapilton* v. *Stapilton* (6), it was said:

> The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim.

Now there can be no abandonment of a claim except by the person who has the title or set up his own title to the thing claimed. A cannot abandon a claim that may possibly be made by B, but not made by B and without B's knowledge. This is exactly the case here. The dictum of Lord Westbury in *Dixon* v. *Evans* (7) also shows the same thing. He says:

> The claim on the one side or the defence on the other shall be admitted or not.

It is suggested by the learned vakil for the respondent that Kotamma would be a reversioner after the death of her daughter-in-law and that she might be entitled to a larger rate of maintenance if the family was divided. In the first place, the evidence does not disclose that these claims were set up. But assuming that they were set up—they might well have been, for, if Sitamma was entitled to half, Kotamma was entitled to maintenance from that half and would be a reversioner if the daughter-in-law predeceases her—this only amounts to putting forward the title of Sitamma. A claim by Kotamma for larger maintenance out of the half-share of Sitamma is merely a pendant to a claim by or on behalf of Sitamma for a half-share in the property. Again, a claim by Kotamma that she will be reversioner after the death of Sitamma amounts to merely putting forward a spes successionis and is also merely a pendant to a claim by her or on behalf of Sitamma. Either way, it cannot be regarded as a substantial claim by Kotamma for herself. Nor can the dispute set up by Kotamma be regarded as a claim for maintenance directly against the whole property in the hands of the 1st defendant. In whatever way we look at the transaction, it is difficult to avoid the main feature of it, namely, that Sitamma's name and supposed title was used to threaten the 1st defendant with and ended in a substantial benefit to Kotamma with Sitamma remaining in the background altogether. I am therefore of opinion that the nature of the transaction is substantially that of a bribe to Kotamma to keep quiet and not to stir up litigation by another claimant, namely, Sitamma, in which possibly Kotamma might have given evidence. Sitamma herself being totally igorant of the settlement, it is impossible to regard such a settlement as a family settlement or a bona fide settlement of a doubtful claim. I do not think, therefore, it will be upheld as against the plaintiff in this case.

The question next arises: What is the relief that should be awarded to the plaintiff? Mr. Venkatrama Aiyar contends that Ex. I should be entirely set aside and the plaintiff should be given a decree for the extra lands covered by it beyond the original 18 acres and odd given to Kotamma. I do not think the cases cited by him support this plea *Ramkishore Kedarnath* v. *Jainarain Ramrachpal* (8), *Beevi Ammal* v. *Radhakrishna Aiyar* (9) and *Deivachilai Aiyangar* v. *Venkatachariar* (10). In the present case I do not see why the alienation under Ex. I should not be binding at least to the extent of the father's half-share. In the subsequent partition between the 1st defendant and the plaintiff these lands have not been allotted to the plaintiff's share but were left out of the partition. I think the proper decree to be passed in this case is that the plaintiff should be given a decree for partition and recovery of half the land conveyed under Ex. I beyond the original 18 acres and odd with mesne profits from the date of plaint to be determined in execution . . . . . Plaintiff will be entitled to recover the 18 acres and odd after the death of the 2nd defendant. The decree will be modified accordingly. As each party succeeds only to the extent of a half, each party will bear its own costs throughout.

Decree modified.

(4) [1914] 22 C.W.N. 463.
(5) [1919] 41 All. 611=17 A.L.J. 822.
(6) 1 W.T. Leading Cases 241.
(7) [1872] L.R. 5 H.L. 606=42 L.J. Ch. 139.
(8) [1913] 40 Cal. 966=40 I.A. 213 (P. C.).
(9) A.I.R. 1923 Mad. 467.
(10) A.I.R. 1926 Mad. 46.

* A. I. R. 1926 Madras 582

WALLACE AND MADHAVAN NAIR, JJ.

T. Venkatasubba Mudali—Appellant.

v.

Manickammal and *another*—Rsspondents.

Civil Misc. Appeal No. 270 of 1925, Decided on 7th December 1925, from the order of the Dist. J., Chingleput, D/- 6th April 1925, in E. P. No. 45 of 1924.

* *Execution of decree—Pre-decree arrangement not to execute decree can be pleaded as a bar.*

It is open to a judgment-debtor to plead in bar of execution of a decree against him a pre-decree arrangement that the decree was not to be executed ; *C. M. A. No.* 270 *of* 1925, *Foll.* [P. 582 C. 2]

K. Bhashyam Aiyangar—for Appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit*—for Respondents.

Wallace, J.—The point for decision is whether it is open to a judgment-debtor to plead in bar of execution of a decree against him a pre-decree arrangement that the decree was not to be executed. The lower Court has held that it was not so open to him, relying on three decisions of this Court, which in my view, so far as they may be used to support his view, run counter to the general trend of decisions in this Court. The most important decision on this point is the Full Bench case in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). The question referred to the Full Bench there was whether a pre-decree arrangement to postpone the execution of a decree for a certain time can be pleaded as a bar to immediate execution. Two learned Judges of the Full Bench held that it could, and another learned Judge differed. The former based their decisions on the principle of stare decisis, the previous cases relied on by them and on which they elected to stand being *Rama Aiyan* v. *Srinivasa Pattar* (2), *Rukmani Ammal* v. *Krishnamachary* (3) ; *Krishnamachary* v. *Rukmani Ammal* (4) and *Subramania Pillai* v. *Kumaravelu Ambalam* (5). Now, curiously enough, it was not noticed and has been overlooked also in other judgments on this matter that *Rama Aiyan* v. *Srinivasa Pattar* (2) is not really in point. The agreement in that case was post decree and not pre-decree. The other three cases lay down in general terms the principle that a pre-decree arrangement that a decree, when obtained, should not be executed, can be pleaded in bar of execution. *Rukmani Ammal* v. *Krishnamachariar* (3) and *Subramania Pillai* v. *Kumaravelu Ambalam* (3) follow the Full Bench rulings in *Laldas* v. *Kishordas* (6). No previous authority was quoted in *Krishnamachariar* v. *Rukmani Ammal* (4). It is clear that these cases lay down a principle wider than the principle raised in the question referred to the Full Bench. In the Full Bench case the question was whether a pre-decree arrangement for a temporary postponement of execution can be pleaded ; while in the three cases above quoted, the general principle was that a pre decree arrangement not to execute at all can be pleaded. The concurring judgment in the Full Bench proceeded however on the footing that this general principle adopted furnishes the answer to the question raised, although it is not necessary for the decision to go so far as the three cases above quoted. I have no doubt that the concurring Judges did intend to take their stand on the wider principle enunciated in these cases, and that they meant to uphold and confirm that principle and lay down that this Court in doing so was proceeding on the principle of stare decisis.

Subsequent to *Chidambaram Chettiar* v. *Krishna Vathiar* (1) there have been two divergent lines of decisions. One follows the general principle already stated ; for example *Sambasiva Aiyar* v. *Thirumalai Ramanuja Thathachariar* (7), in which it is adopted in the clearest terms as inherent in and flowing from the Full Bench decision and *Veluthevan* v. *Krishnaswami Reddi* (8), to which one of us was a party. The other set of cases springs from the ruling in *Arumugam Pillai* v. *Krishnaswami Naidu* (9), but before that is considerad, reference may be made to the case in *Singa Raja* v.

(1) [1917] 40 Mad. 233=32 M. L. J. 13=5 L. W. 132=(1917) M. W. N. 44 (F. B.).
(2) [1896] 19 Mad. 230=5 M. L. J. 218.
(3) [1910] M. W. N. 798.
(4) [1905] 15 M. L. J. 370.
(5) [1916] 39 Mad. 541.
(6) [1898] 22 Bom. 463.
(7) [1919] 37 M. L. J. 356.
(8) A. I. R. 1925 Mad. 591.
(9) [1920] 43 Mad. 725=39 M. L. J. 222=12 L. W. 41.

Pethu Raja (10). That case turned on a rather strict interpretation of O. 34 and not on this general principle, and no reference was made either to *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) or *Arumugam Pillai* v. *Krishnaswami Naidu* (9). In *Arumugam Pillai* v. *Krishnawami Naidu* (9), which was decided in 1920, one learned Judge held that *Chidamdaram Chettiar* v. *Krishna Vathiyar* (1).

" does not oblige us to extend the principle to the extent required by the appellant's contention."

I would point out that the one case referred to by the learned Judge, Oldfield, J., as the only case appearing in the authorised reports supporting the appellant's contentions before him is *Rama Ayyan* v. *Srinivasa Pattar* (2), which, as I have observed, has no application to a pre-decree arrangement while the learned Judge has overlooked *Subramania Pillai* v. *Kumaravelu Amablam* (5).

Next comes the case in *Mallaya* v. *Chinna Kottayya* (11) which really seems to me hardly in point. It was a case of a pre-suit, and not of a pre-decree arrangement, which the learned Judges held, could and should have been pleaded as an absolute defence to the suit. This was sufficient for the disposal of the case but the learned Judges went on to consider the general question of the right of a party to plead a pre-decree arrangement in bar of executions, and referred to the cases already quoted. The Full Bench case is put aside on the ground set out in *Arumugam Pillai* v. *Krishnaswami Naidu* (9); but it is quoted at the end of the judgment as supporting the plea that the agreement in that suit could not be pleaded in bar of execution. It is clearly a case distinguishable from *Chidambaram Chettiar* v. *Krishna Vathiar* (1). The next case is *Ramanathan Chettiar* v. *Venkatachalam* (12) passed in 1923 which was decided on the ground that the agreement there pleaded was more similar to the one in *Arumugam Pillai* v. *Krishnaswami Naidu* (9) than to that in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1).

In this divergence of authority I think we are bound to follow the Full Bench ruling which does undoubtedly adopt and follow the general principle laid down in *Rukmani Ammal* v. *Krishnamachariar* (3), *Krishnamachariar* v. *Rukmani Ammal* (4) and *Subramania Pillai* v. *Kumaravelu Ambalam* (5) and hold to the principle which has been followed since 1903 until it was doubted in *Arumugam Pillai* v. *Krishnaswami Naidu* (9). It is essential that in such matters, there should be uniformity of procedure, and I see no reason to refer the case again to a Full Bench as we have been requested to do.

We must, therefore, reverse the decision of the District Judge and direct him to re-hear the case. Costs up to date will abide the result.

Madhavan Nair, J.—I concur with my learned brother throughout in his judgment. I have not been convinced by the arguments of Mr. T. R. Ramachandra Aiyar that the decision in *Velutheva* v. *Krishnaswami Reddi* (8), to which I was a party, does not lay down the correct law. It was held in that case that a judgment-debtor could plead in bar of an execution a pre-decree arrangement between him and the decree-holder that the decree should not be executed. That decision was based upon the Full Bench ruling in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1). The decision in *Krishnamachariar* v. *Rukmani Ammal* (4), *Rukmani Ammal* v. *Krishnamachariar* (3) and *Subramania Pillai* v. *Kumaravelu Ambalam* (5), which lay down the general principle that an arrangement prior to a decree not to execute the decree at all can be pleaded in bar of an execution, furnished the ground for the decision in the Full Bench case. These cases laid down a principle wider than the one raised in the question referred to the Full Bench. There can be no doubt that the learned Judges who decided the case in *Chidambaram Chettiar* v. *Krishna Vathiyar* (1) accepted the principle of these three cases as correct law. The decision mainly relied upon by Mr. T. R. Ramachandra Aiyar in *Arumugam Pillai* v. *Krishnaswami Naidu* (9), as pointed out by my learned brother, refers to *Rama Ayyan* v. *Srinivasa Pattar* (2) which has no application to a pre-decree arrangement and overlooks the decision in *Subramania Pillai* v. *Kumaravelu Ambalam* (5), and apparently brushes aside the decisions mainly relied upon in the Full Bench case on the ground that they do not appear in the

(10) [1918] 42 Mad. 61=35 M. L. J. 579=8 L. W. 497=(1919) M. W. N. 809.
(11) [1921] 14 L. W. 317=(1921) M. W. N. 382.
(12) A. I. R. 1923 Mad. 619.

authorized reports. The other decisions quoted for the respondent, namely, *Singa Raja* v. *Pethu Raja* (10), *Mallayya* v. *Chinna Kottayya* (11) and *Ramanathan Chettiar* v. *Venkatachalam* (12) do not advance his contentions in any appreciable degree.

In this state of authorities I agree with my learned brother that we are bound to follow the Full Bench ruling, and reverse the decision of the District Judge and request him to re-hear the case. The costs up to date will abide the result.

Appeal remanded.

A. I. R. 1926 Madras 584

COUTTS-TROTTER, C. J.

Seth Chand Mull Dudha—Plaintiff.

v.

Purushothamdoss—Defendant.

Civil Suit No. 114 of 1926, decided on 3rd March 1926.

(a) *Civil P. C., O. 38, R. 1—Power can be exercised only when plaintiff's claim is unimpeachable and real danger of defendant's escaping from Court's jurisdiction exists.*

Before exercising the powers conferred by O. 38 a Court should be satisfied on two points. The first is that the plaintiff's cause of action is prima facie an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. [P 584 C 2]

(b) *Practice — Jurisdiction — Court exercising jurisdiction over foreign subject should protect his interests as if he were a British subject.*

When the jurisdiction of a Court in British India is involved against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of that Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon the Court to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. [P 586 C 1]

Nugent Grant and *N. T. Shammanna*—for Plaintiff.

S. Varadachari and *V. C. Gopalarathnam*—for Defendant.

Judgment.—This is an application under O. 38, R. 1, Civil Procedure Code, for arrest before judgment of the defendant and an order that he should be made to show cause in compliance with S. 94 (a), Civil Procedure Code, why he should not give security for his appearance. At the close of the argument I intimated what I proposed to do in the matter, but as it is one of considerable general importance I thought it best to state my reasons formally. The facts are shortly as follows: The suit was brought on the original side of this Court for a sum of very nearly 50 lakhs and it was founded upon what he described as "the decree dated 19th December 1925, at Hyderabad, Deccan, of the Court of the Judicial Commissioner in the State of His Exalted Highness the Nizam of Hyderabad." That suit is not before me but will be tried in the ordinary course by a Judge sitting on the original side of this Court and I desire to say nothing that would in any way seem to anticipate that decision. But I am asked here to exercise a jurisdiction the effect of which might be to compel a man either to furnish security in a very large sum of money, or possibly, on his failure to do so, to undergo imprisonment. I think it is desirable that I should state what are the principles which in my opinion should guide me in exercising that jurisdiction. It appears to me that before exercising the powers conferred by O. 38 a Court should be satisfied on two points. The first is that the plaintiff's cause of action is prima facie an unimpeachable one subject to his proving the allegations made in the plaint. The second is that the Court should have reason to believe on adequate materials that unless the jurisdiction is exercised there is a real danger that the defendant will remove himself from the ambit of the powers of the Court. For the reasons which I am about to give I do not think it necessary for me to go into the second point in this case as I do not think that the plaintiff has succeeded in establishing his position on the first point.

The debt on which the Hyderabad proceedings were founded was incurred about 50 years ago before the present defendant was born, in any event before the year 1877, because in that year a suit of some sort was launched for this very debt against Hargopaldoss, the brother of the present defendant's grandfather. It appears to have been started in a tribunal called the Court of Bankers which ceased to exist before any conclusion was arrived at; and, according to the plaintiff, the suit was then transferred to the High Court of Hyderabad which I take to be the ordinary and regular tribunal in that

State for the disposal of civil cases. No final judgment was ever delivered in that Court because, owing to some failure by the plaintiff to pay stamp-duties or fees in the regular course, the High Court ordered the suit to be taken off its list of pending cases. This statement I take from the affidavit of the plaintiff himself. The defendant says that that order was passed as long ago as 1881, and his statement is uncontradicted. In March 1922 a petition was addressed by the plaintiff to His Exalted Highness the Nizam of Hyderabad and in response to the petition a firman was issued by His Exalted Highness appointing a special Commission to hear and report to him upon the claim and apparently some special directions were given in the firman, a complete copy of which has not been put before me, as to how the plea of limitation which, it was doubtless anticipated, the defendant would set up was to be dealt with. The Commissioners were two Judges of the High Court and a gentleman who is described as holding the office of Sadrul Maham which is translated as Head of the Department of Commerce and Industries. That tribunal issued a report a copy of which is before me furnished by the plaintiff. The Commissioners framed issues, heard evidence, and examined accounts. The wording of a portion of the firman is quoted to the effect that the suit is to be heard by the Commission "irrespective of limitation". The issue that was framed is this: "Is this case different from the case of Amersi Sejan Mal and Mahanand Ram Puran Mal (that is apparently the original suit in the Court of Bankers), and is it not covered by the firman and is it not exempt from limitation with a note: 'onus on the defendant'?" The reason for framing this issue in this form appears to be as follows, that the plaintiff contended that the proceedings before the Commissioners were a mere continuation of the old suit that was filed before the defunct Court, the Court of Bankers, in 1877, and it was alleged that in that Court no question of limitation was ever entertained and no such plea was ever open to a defendant there.

I have not had put before me any information as to how the Courts of Ordinary Civil Jurisdiction in Hyderabad are constituted nor under what authority the ordinary law of limitation is in force as it undoubtedly appears to be in the Ordinary Civil Courts of the State. I have no information as to how far the prerogation of His Exalted Highness extends and I am not suggesting any doubts that His Exalted Highness was acting entirely within his constitutional powers in issuing the firman of 1923. So far as I can ascertain from perusing the document, the proceedings of the Commission really amounted to what I should call a report to be laid before His Exalted Highness and I gather that the mandate to pay a sum of money issued to the defendant took the form of an order passed by His Exalted Highness in the amount reported by the Commissioners to be the sum in their opinion due. I may add that the principal debt was found by them to be a sum of about 2¾ lakhs and that interest at the rate which is alleged to have been originally agreed upon between the parties would, on a rough calculation, appear to amount to nearly 8 lakhs at simple interest and to the stupenduous figure of about half a crore at compound. Such a conclusion obviously staggered the Commissioners and they cut down the interest to the exact sum of the principal: I do not know on what legal basis. I have already said that I do not propose to say anything about the merits of this case, but I think before I make an order under O. 38 I must at least be satisfied that the plaint does not reveal on the face of it any matter which is obviously doubtful and arguable. In my opinion this plaint discloses highly contentious matters.

Assuming as I do for the purposes of this case that the acts of His Exalted Highness as a sovereign prince cannot be questioned in these Courts and that his subjects cannot be heard to say that any orders passed by him in relation to them are not binding upon them or that he has not power to take away any matter from the jurisdiction of the ordinary Courts, to be dealt with by himself or anybody appointed for the purpose by them, it nevertheless seems to me that there are two matters apparent on the face of this plaint which preclude me from exercising the jurisdiction conferred on me by O. 38. The plaint is founded on the proceedings of the Special Tribunal created under the firman and describes it as a decree of that Commission. As I have already pointed out,

it is at least highly arguable that the proceedings before the Commissioners terminated not in anything that could be called a decree or a foreign judgment within the meaning of S. 13 of the Civil P. C. but a report submitted to his Highness to guide him as to what action he should take. It is also obvious that it is highly arguable that the order to pay passed by His Exalted Highness, though binding on the defendant as a subject, is not a judgment but an executive act. I pass no opinion as to whether those arguments are sound or unsound, but it appears to me that it would be wrong for me to subject this defendant to any process before he has had an opportunity of urging them. It is inapposite to speak in this case of safeguarding the liberty of the subject because the matter comes before me on the footing that the defendant is not a subject of His Majesty the King-Emperor but of His Exalted Highness the Nizam. But at the same time, when the jurisdiction of this Court is involved against a subject of a foreign State on the ground that by coming within the physical boundaries of the jurisdiction of this Court he is liable to be sued as if he were a subject of His Majesty, a duty is cast upon me to be as jealous in safeguarding his liberties as if he were for all purposes a subject of His Majesty. I do not think it necessary to refer to the provisions of S. 13 of the Civil P. C. except in so far as inferentially I may be taken to have founded myself on Cl. (a) of that section as being a provision which it will be open to the defendant to invoke in his favour, and I do not feel called upon to pay any attention to the argument about natural justice which is referred to in Cl. (d). It would obviously be grossly disrespectful of this Court to entertain any argument to the effect that an order passed by a sovereign power by virtue of its prerogative was opposed to natural justice; nor for the matter of that am I able to see how natural justice, whatever the expression may mean, can be said to include the right of a defendant to plead limitation, unless it is granted to him by a statute acknowledged by the Sovereign Prince to be binding upon him and to limit by its terms the exercise of his prerogative. I may add that the impossibility of this Court taking upon itself to question the act of a Sovereign Prince on any such ground adds additional force to the defendant's contention that the act of His Exalted Highness was an executive act performed by him by virtue of his prerogative as a Sovereign Prince and not in any sense a judgment or a judicial decree. In conclusion, I wish to repeat once more that all these matters which I have discussed are ultimately matters for the Judge before whom the suit will come for trial, and that I need say no more than this: that they raise to my mind sufficient ground for my refusing to act in anticipation of that determination by that tribunal. The summons be dismissed with defendant's taxed costs in any event.

Summons dismissed.

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* * A. I. R. 1926 Madras 586

Full Bench

COUTTS-TROTTER, C. J., AND KRISHNAN AND BEASLEY, JJ.

Venkatakrishna Reddi and *others*—Defendants—Appellants.

v.

Krishna Reddi—Plaintiff — Respondent.

Appeal No. 346 of 1924, Decided on 29th October 1925, from the order of the Dist.-J., South Arcot, D/ - 30th August 1924, in A. S. No. 325 of 1923.

* * *Civil P. C., O. 22. R. 5—Application to be brought on record as legal representative—No rival claimants—Order dismissing application is not appealable*; 43 *M.* 812, *Overruled.*

No appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant even when there is no rival claimant for being brought on the record as his legal representative; 43 *Mad.* 812, *overruled.* [P. 589, C 2, P. 591, C, 1]

K. Bhashyam Aiyangar—for Appellants.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar*—for Respondent.

Order of Reference

Devadoss, J.—The plaintiff in O. S. No. 451 of 1922, on the file of the District Munsif's Court of Villupuram, died pending the suit and the respondent herein applied to be brought on record as the legal representative of the plaintiff. The District Munsif held that the Will under which the respondent claimed the property of the deceased plaintiff was not

genuine and dismissed his petition. The respondent preferred an appeal to the District Court of South Arcot. A preliminary objection was raised by the appellents herein to the appeal on the ground that no appeal lay against the order of the District Munsif. The District Judge overruled the preliminary objection and held that the Will under which the respondent herein claimed was a genuine Will, set aside the order of the District Munsif dismissing his application for being added as the 2nd plaintiff and remanded the suit for disposal according to law. Against that order the defendants have preferred this appeal.

It is contended by Mr. Bhashyam Aiyangar for the appellants that no appeal lay to the District Court from the order of the District Munsif passed under R. 5 of O. 22 of the Civil P. C. Under O. 22, R. 3, Cl. (1)

Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

Clause (2) is as follows :

Where within the time limited by law no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, . . .

Rule 5 provides :

Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court.

Section 367 of the old Code was :

If any dispute arise as to who is the legal representative of a deceased plaintiff, the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit.

The present Rule 5 does not allow a separate suit to be brought for the purpose of determining who the legal representative is, nor does it require that the question should be decided at or before the hearing of the suit as to who shall be admitted to be the legal representative for the purpose of prosecuting the suit. It is, therefore, the duty of the Court to determine the question whether the person claiming to be the legal representative is the legal representative or not. Where there is a conflict between two or more persons, as to who the legal representative is, the Court should determine the question and the person who is found by the Court to be the legal representative should be made a party to the suit.

The question is : does O. 22 contemplate the case of the Court dismissing the application of a person to be brought on record as the legal representative of the deceased plaintiff when there is no conflict between rival claimants. I think, considering the changes made in the new Code the evident intention of the Legislature was to allow the sole applicant to be brought on record as the legal representative. It did not contemplate the dismissal of a petition to be brought on record on the objection of the defendant ; for it did not provide for the abatement of the suit in case such an application was dismissed. It has specifically provided for the abatement of the suit when no application is made within the time limited by law. It is open to the defendant to prove in the course of the suit that the right of the deceased plaintiff did not survive to the person brought on record. As that is the course contemplated by O. 22 there is no appeal provided against an order made under R.5.

Under the old Code S. 588 (18) appeals were provided against an order refusing to bring the legal representative on record as well as against an order bringing the legal representative on record. The present Code advisedly has not mentioned orders under R. 5, O. 22, among the appealable orders in O. 43. The question, therefore, is whether an order refusing to bring a person as the legal represantative of the deceased plaintiff, when he is the only applicant for the purpose, is a decree or only an order. If the Court refuses to bring the sole applicant on record as the legal representative of the deceased plaintiff, the Court has to dismiss the suit as it abates so far as the deceased plaintiff is concerned. The abatement of the suit is a necessary consequence of the refusal of the Court to bring the sole applicant on record. Under R. 9 when a suit abates or is dismissed under O. 22, no fresh suit would lie on the same cause of action. The result is the applicant even though he is the real legal representative, has neither an appeal against the order refusing to make him a party nor has the right to bring a separate suit on the same cause of action. He cannot bring a suit for declaration that he is the legal represen-

tative of the deceased plaintiff ; for such a suit for obvious reasons would not lie. Did the Legislature intend to lay down in O. 22 that a person who is the real legal representative of a deceased plaintiff, but who, on the objection of the defendant, is not made a party to the suit in the place of the deceased plaintiff, should go without any remedy and lose his right to the property in the suit ? I think from the wording of R. 3 it is clear that an order refusing to bring the applicant on record as the legal representative of the deceased plaintiff, when there is no rival claimant to dispute his right, is a decree ; for it determines final rights between the parties.

It is contended by Mr. Bhashyam Aiyangar that the decision of the Court that the applicant was not the legal representative of the deceased plaintiff would not operate as res judicata in subsequent proceedings as the order was not in a suit. Granting for argument's sake that such an order is not one which is made in the suit, the principle of res judicata would apply ; for it determines finally the question whether the applicant is the legal representative of the deceased plaintiff entitled to continue the suit on the cause of action alleged in the plaint or not. It was laid down by their Lordships of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (1), that the principle of res judicata would apply to a decision which finally determines the rights of the parties even though the decision was not in a suit. In that case an order made, in land acquisition proceedings as regards the title of the parties barred a subsequent suit in respect of the matter which was in dispute in the land acquisition proceedings. It was contended in that case that the order in the land acquisition proceedings was not a decision in a former suit. Lord Buckmaster, who delivered the judgment of their Lordships observes at page 331 :

> It has been suggested that the decision was not in a former suit but whether this were so or not makes no difference for it has been recently pointed out by this Board in *Hook v. Administrator General of Bengal* (2), that the principle which prevents the same case being twice litigated is of general application and is not limited by the specific words of the Code in this respect.

In the light of this decision it is not possible to hold that a decision under O. 22, R. 5, would not operate as res judicata in a subsequent suit. As there is conflict of authorities, I proceed to consider the most important cases on the point.

In *Rama Rao* v. *The Rajah of Pittapur* (3), it was held by Sir John Wallis, C. J., and Seshagiri Aiyar, J., that an order striking out from the array of parties the defendant as an unnecessary party and dismissing the suit against him was in effect a decree and was appealable as such. In *Ayya Mudali Velan* v. *Veerayee* (4), Oldfield and Seshagiri Aiyar, JJ., held that an order rejecting the claim of a person to be the legal representative of the deceased plaintiff and to continue the suit amounted to a decree dismissing the suit and gave him the right of appeal from that order. The District Court relied upon these two decisions for overruling the preliminary objection. I am inclined to hold that the decision in *Rama Rao* v. *The Rajah of Pittapur* (3) and in *Ayya Mudali Velan* v. *Veerayee* (4) are correct.

In *Pakkai* v. *Pathumma* (5), it was held by Benson and Sundara Aiyar, JJ., that an order that a person is not the legal representative of a deceased plaintiff did not bar a separate suit. In that case the question whether an appeal lay against the order refusing to make a person the legal representative of the deceased plaintiff was neither raised nor considered ; what the learned Judges held was that the decision of the Court refusing to make a person the legal representative of the deceased plaintiff was not a question arising for decision in the suit and therefore the principle of res judicata did not apply. But in view of the decision of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (1), this decision cannot be said to be good law. Further there is a specific provision in R. 9 against a separate suit on the same cause of action.

Reliance is placed by Mr. Bashyam Aiyangar on *Subramania Aiyar* v. *Muthu Vaithilinga Mudaliar* (6) for the position that no appeal lies from an order refus-

(1) A. I. R. 1922 P. C. 80=45 Mad. 320.

(2) [1921] 48 Cal. 499=48 I. A. 187 (P. C.).

(3) [1918] 42 Mad. 219=36 M. L. J. 169=9 L. W. 329.

(4) [1920] 43 Mad. 812=12 L. W. 188=39 M. L. J. 218=(1920) M. W. N. 467.

(5) [1913] 25 M. L. J. 279=(1913) M. W. N. 673.

(6) [1918] M. W. N. 198.

ing to make a person the legal representative of a deceased plaintiff. The facts of the case are distinguishable from the facts of the present case. There the Court did make one of the rival climants a party in the place of the deceased plaintiff, and the suit did not abate in consequence. The Court held that the rival claimants who were not made parties to the action had no right of appeal. The case is different when the sole applicant is not made a party on the ground that he is not the legal representative, for the order amounts to a final determination of one of the questions in issue between him and the defendant and that decision finally determines the result of the suit.

The case in *Venkata Seshamma* v. *Guneswara Rao* (7), is also distinguishable from the present case. In that case also the suit did not abate as one of the applicants was not made a party to the suit. Spencer and Kumaraswami Sastri, JJ., held that no appeal lay against an order refusing to make some of the claimants parties to the action and they distinctly say that there was no abatement of the suit. In *Subbayya* v. *Saminadaiyar* (8), it was held that an appeal lay against an order dismissing the application of a person to be brought on record as the legal representative of the deceased party. The learned Judges observe at page 497:

> The title to represent being denied, there is in the present case a dispute between the claimant and the defendant. We therefore think the District Judge ought to have entertained the appeal. We also think that the appeal lay against the decree dismissing the suit.

This was followed by a Bench of the Allahabad High Court in *Hanwant Singh* v. *Ramgopal Singh* (9).

In *Ram Sarup* v. *Moti Ram* (10) it was held that no appeal lay from an order dismissing the application of a person to be brought on record as the legal representative of a deceased plaintiff and that such an odrer was not a decree. In *Sital Prasad* v. *Bajrangi Sahai* (11) it was held that such an order did not come within the definition of the word "decree" as the question was not in controversy in a suit and as the person seeking to be added as a party was not a party to the suit. In a recent case in *Rukhmani Ammal* v. *Veeraswami Aiyangar* (12) Jackson, J., held that no appeal lay against an order under R. 5 of O. 22. It is unnecessary to deal with the other cases quoted by Mr. Bashyam Aiyangar. I think the proper course in such cases would be to make the sole applicant a party to the suit and then raise an issue as to whether he is the legal representative or not as the preliminary issue and try the other issues if the preliminary issue is found in favour of the person brought on record. Such a decision would amount to a decree and the person who is brought on record as the legal representative would have a right of appeal against the decree.

As, however, there is conflict of authorities on this point I would refer for the decision of a Full Bench the question whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on record as his legal representative.

Waller, J.—I agree that there being a conflict of authority on the question it should be referred for the decision of a Full Bench. My own view is that no appeal lies. An order of this kind could be appealed against as an order under the old Civil Procedure Code. Under the present Code no appeal lies against it under O. 43, and I do not think that it can be appealed against as a decree. The decision on an application under O. 22, R. 3, is not a matter that is in controversy in the suit itself. If there is a dispute whether the applicant is or is not the legal representative, it has to be determined under R. 5 before the suit can be proceeded with.

Opinion.

The question referred to us is in the following terms:

> Whether an appeal lies against an order refusing the application of a person to be brought on record as the legal representative of a deceased plaintiff on the objection of the defendant when there is no rival claimant for being brought on the record as his legal representative.

The facts of the case are that on the 14th April 1923 the plaintiff on record died. On the 20th June, within the

(7) A. I. R. 1924 Mad. 622.
(8) [1895] 18 Mad. 496=5 M. L. J. 63.
(9) [1908] 30 All. 348=5 A. L. J. 363=(1908) A. W. N. 139.
(10) [1920] 1 Lah. 493.
(11) [1911] 13 I. C. 70.
(12) A. I. R. 1924 Mad. 813.

period demarcated by law, the petitioner (respondent herein) petitioned to be brought on the record as the legal representative of the deceased plaintiff. The ground on which he sought to be brought on record was that he was the legatee of the deceased plaintiff and took under her Will the properties in suit. The learned District Munsif made an order on the 30th June in the following terms:

Subject to the proof of the genuineness of the Will, the petitioner may be brought on record as the operation and validity of the will turns upon the finding of the first issue.

That, of course, was purely a conditional order. On the 14th August the District Munsif proceeded to inquire into the questions outlined in the provisional order, viz., the genuineness of the Will, and passed the order of that date. He found the Will was not genuine, and as a consequence, of course, the provisional order as to the appellant being brought on record fell to the ground.

The material provisions of the Code are parts of O. 22 and O. 43. By O. 22, R. 5, where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff or a deceased defendant, the said question shall be determined by the Court. By R. 9 (2) the plaintiff, or the person claiming to be the legal representative of the deceased plaintiff so far, he may apply for an order to set aside the abatement or dismissal; and, in certain circumstances which are set out in the rule, the Court shall set aside the abatement. The question is whether an appeal lies from an order made in pursuance of O. 22, R. 5 if the determination, to call it by an unequivocal term for a moment, was an order within the meaning of the Code.

If it is, then, under O. 43, R. 1, such an order does not fall within the list of orders there given from which appeals lie to a higher tribunal. We may notice in passing that the order does provide for an appeal against an order made under O. 22, Rr. 9 and 10, but not against orders made under any other rules in that order. It appears to us therefore that, assuming this to be an order, the Code expressly excludes its being appealed against as an order. Whether the respondent in this case would or would not have a remedy by way of appeal against the abatement which follows as a consequence of this order, is another matter. But we are not concerned with that; there is nothing about it in this order which was simply one refusing to make him legal representative and was entirely silent as to any question of abatement or dismissal of the suit. But it is sought to say that it is appealable for the reason that it is not in truth an order but a decree. The definition of "decree" is contained in S. 2 (2) of the Code and runs as follows:

A decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the right of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

The line of argument appears to be this—and that is the reason for the appearance of the words in the reference—"When there is no rival claimant for being brought on the record as legal representative," that where there is only one claiming to be the legal representative, the effect of rejecting that person's claim is ipso facto to bring the suit to a close and that therefore the order dismissing the claim is a final adjudication as between the only possible parties. It was held in *Ayya Mudali Velan* v. *Veerayee* (4) by Oldfield and Seshagiri Aiyar, JJ., that an order rejecting the claim of a person to be the legal representative of a deceased plaintiff and continue the suit amounted to a dismissal of the suit and was therefore appealable as a decree. The extreme inconvenience of that view would be this: that an order rejecting the claim of a person to be legal representative would be a decree if he were the only available legal representative, but would only be an order if there were rivals, any one of whom might have applied to be declared to be the legal representative and brought on record. We ought to point out that at the time when this person applied to be made a legal representative, namely, on the 20th June, it might quite well have been that other claimants would have come forward before the date when the time for applying expired, namely, the 14th July; so that at the time the plaintiff was petitioning there was nothing to show that, even if his petition was rejected, other persons might not come forward to represent the interests of the deceased plaintiff. On that ground we think it impossible to say that a mere refusal per se to appoint a person the legal representative of a deceased plaintiff or a deceased defendant can be regarded as a final decree,

partly because the Court would have to go into all sorts of inquiries to ascertain what were the surrounding circumstances before it could decide whether such refusal was a decree or an order. It seems to us that the Code cannot have contemplated the institution of such an enquiry as that. For these reasons we are of opinion that we should answer this reference by saying that no appeal lies against the order in this case; but we give no expression of opinion as to what would be the consequence if the petitioner appeals against the actual order of abatement or dismissal.

It follows that in our opinion that *Ayya Mudali Velan* v. *Veerayee* (4) was wrongly decided.

Reference answered in the negative.

A. I. R. 1926 Madras 591

JACKSON, J.

(*Pothi*) *Annapurnayya* — Plaintiff—Petitioner.

v.

(*Pothi*) *Nagaratnamma* and *others*—Defendants—Respondents.

Civil Revision Petition No. 936 of 1923, Decided on 13th August 1924, from an order of the Sub-J., Bezwada, in C. M. P. No. 741 of 1923.

Civil P. C., S. 115—Suit for appointment of Receiver and injunction restraining widow from committing waste—Plaint valued at Rs. 10,000, while no valuation for Court-fee, and Rs. 100 paid as Court-fees—Court's order to pay ad valorem Court-fees on Rs. 10,000 is not without jurisdiction—Court-fees Act, S. 7, Cl. (iv) (c).

Petitioner filed a plaint valued for the purposes of jurisdiction at Rs. 10,000 and with a Court-fee of Rs. 100 on the assumption that he was at liberty to put his own value on the suit which was for the appointment of a Receiver, and for an injunction restraining the defendant, a widow from wasting her estate. The petitioner applied to amend his plaint to change the valuation to Rs. 5,000 and the Subordinate Judge ordered that he should first pay the Court-fee;

Held: that if the plaintiff had entered as his value for jurisdiction Rs. 10,000 and his value for ad valorem Court-fee, say Rs. 5,000, the Court, no doubt, would take Rs. 5,000 as the value for purposes of jurisdiction. But if the plaintiff enters as his value for jurisdiction Rs. 10,000 and owing to his misreading of the Court-fees Act omits an ad valorem valuation altogether considering that the two valuations must be the same, the Court is justified in assuming that Rs. 10,000 would also be the ad valorem valuation and therefore his order was not wfthout jurisdiction.

[P. 591, C. 2, P. 592, C. 1]

P. Satyanarayana—for Petitioner.

P. Somayya—for Respondents.

Judgment.—Petition against the order of the Court of the Subordinate Judge of Bezwada on C. M. P. No. 471 of 1923 in O. S. No. 6 of 1923. Petitioner filed a plaint valued for the purposes of jurisdiction at Rs. 10,000 and with a Court-fee of Rs. 100 on the assumption that he was at liberty to put his own value on the suit which was for the appointment of a Receiver, and for an injunction restraining the defendant, a widow from wasting her estate. In the light of *Nandan Mal* v. *Salig Ram* (1). and *Arunachalam Chetty* v. *Rangasawmy Pillai* (2) the learned Subordinate Judge has held that plaintiff must pay an ad valorem fee and that is now admitted. The order concludes:

> In the present case he has valued the suit as Rs. 10,000 for purposes of jurisdiction. So he cannot give another valuation for purposes of Court-fee.

To this petitioner objects urging that he is at liberty to give another value for purposes of Court-fee. I see from C. M. C. No. 942 of 1923 that the petitioner applied to amend his plaint and the Subordinate Judge ordered that he should first pay the Court-fee.

It is difficult to say that the order of the Court is ultra vires or that he has exercised his jurisdiction with material irregularity. O. 7, Rule 1 (i) requires that a plaint shall contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and of Court-fees. It is not contemplated that the subject-matter shall be given two values, one purely arbitrary and fanciful for the purposes of jurisdiction and one in strict conformity to the real value for the purposes of Court-fees.

In either case the valuation should conform to reality. Therefore, when a plaint contains a valuation for purposes of jurisdiction it is a natural assumption that the same valuation would apply, if it were necessary to have a valuation for an ad valorem Court-fee.

Th case cited by petitioner in *Sailendranath Mitra* v. *Ramcharan Pal* (3) is not quite in point. There, for purposes of jurisdiction the suit had been valued at Rs. 1,200 and the Court-fee leviable under S. 7, sub-S. (x), Cl. (c) Court-fees Act, was on a value of Rs. 32.

(1) A. I. R. 1922 Lah. 236.
(2) [1915] 38 Mad. 922=28 M. L. J. 118=(1915) M. W. N. 118 (F. B.).
(3) [1921] 25 C. W. N. 763=34 C. L. J. 94.

It was held that Rs. 32 and not Rupees 1,200 was the value for the purposes of jurisdiction. In the present suit the Court-fee leviable under S. 7, Cl. (iv) (c) is according to the amount at which the relief sought is valued in the plaint. Plaintiff has not stated the amount, but as this value, whether determined for the computation of Court-fees, or whether for the purposes of jurisdiction shall be the same, (see S. 8, Act VII of 1887), it is taken to be at Rs. 10,000, the amount which plaintiff has stated for the purposes of jurisdiction.

If the plaintiff had entered as his value for jurisdiction Rs. 10,000 and his value for ad valorem Court-fee, say Rs. 5,000 following the ruling in *Sailendranath Mitra* v. *Ramcharan Pal* (3) the Court, no doubt, would take Rs. 5,000 as the value for purposes of jurisdiction. But if the plaintiff enters as his value for jurisdiction Rs. 10,000, and owing to his misreading of the Court-fees Act omits an ad valorem valuation altogether considering that the two valuations must be the same, the Court is justified in assuming that Rs. 10,000 would also be the ad valorem valuation.

Nor does plaintiff really contest this position, his plea being merely one of fact, that he has made a gross blunder in giving Rs. 10,000 as his figure. If he had reckoned the valuation for jurisdiction more carefully and put it say at Rs. 5,000, or whatever he thinks fair he would have no objection at all to the Court's carrying that figure over to the valuation for Court-fees.

In the circumstances I consider that the Subordinate Judge was acting within his discretion in asking petitioner to pay the Court-fee according to his own figure; and then if he wished to correct any error in his plaint to proceed by way of amendment.

The petition is dismissed with costs.

Petition dismissed.

A. I. R. 1926 Madras 592

MADHAVAN NAIR, J.

Srinivasa Pillai—Petitioner.

v.

Balasubramani Odayar—Respondent.

Civil Revision Petition No. 1119 of 1923, Decided on 25th January 1926, against the decree of the Dist. Munsif, Nannilam, in S. C. S. No. 2 of 1923.

Contract Act, S. 68—Bulls can be necessaries under certain circumstances.

It cannot be said that bulls can never be considered necessaries. There is no law laying down such an absolute proposition. The question in each particular case will have to be decided with regard to the evidence let in by the parties on the question. [P. 592, C. 2]

S. R. Dikshit and *L. A. Gopalakrishna Iyer*—for Petitioner.

N. S. Srinivasa Iyer—for Respondent.

Judgment.—It is not disputed that the plaintiff supplied the defendant with two bulls; the defendant being a minor he is liable to pay for them only if the plaintiff is able to show that these were "necessaries" to the defendant. This position is accepted by both of the parties. The plaintiff has given evidence on the question. It appears to me that the learned District Munsif has not given proper consideration to the evidence on record because in his view "bulls" can never be considered "necessaries." There is no law laying down such an absolute proposition. The question in each particular case will have to be decided with regard to the evidence let in by the parties on the question. I cannot for these reasons accept the finding of the learned District Munsif as a satisfactory finding. I would, therefore, ask him to review the evidence in the light of S. 68 of the Indian Contract Act and submit a fresh finding on the question whether the sale of bulls to the defendant in this case can be considered to have been for the necessaries of the infant. These will be submitted within four weeks, and ten days will be allowed for filing objections. (In compliance with the order in the above judgment the District Munsif submitted the finding called for).

Judgment.—The District Munsif has found that the sale of the bulls was for the necessaries of the defendant. There is evidence to support this finding. Accepting this finding I set aside the decree of the lower Court and give the plaintiff a decree as prayed for with costs throughout. The decree will be against the properties of the defendant.

Decree set aside.

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* A. I. R. 1926 Madras 593

DEVADOSS AND WALLER, JJ.

Ramalingayya and *others* — Defendants—Appellants.

v.

Velluri Narayanappa and *others* — Plaintiffs—Respondents.

Letters Patent Appeal No. 157 of 1924, Decided on 20th November 1925, from a judgment of Madhavan Nair, J., in S. A. No. 969 of 1921, Printed in *A. I. R.* 1925, *Madras* 368.

* (a) *Civil P. C., O. 21, R. 58—Objection to attachment on the ground that property is not liable to attachment—Order passed against it is conclusive unless a successful suit determines it—Objector's being mortgage-decree-holder does not make any difference.*

If a person prefers a claim under R. 58 objecting to the attachment on the ground that the property is not liable to attachment and if an order is passed against him, unless he brings a suit within one year for a declaration that the property is not liable to attachment and succeeds, the order is conclusive against him. The fact that the objector has a mortgage decree, preliminary or final, in his favour at the date of the objection, does not make any difference, and even if a claim to release the property from attachment relying upon the mortgage decree is filed, and if the Court rightly or wrongly dismisses the claim and he does not choose to file a suit for declaration that the property was liable to attachment he can not afterwards set up a right as against the decree-holder who brings the property to sale or against the person who purchases the property in Court auction.

[P 593 C 2, P 594 C 1]

(b) *Civil P. C., O. 21, R. 63—Order on claim petition stating it to be too late is an order rejecting claim.*

An order on a claim petition merely stating that it is too late but it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of R. 63 will apply.

[P 594 C 1]

B. Seetharama Rao—for Appellants.

B. Somayya—for Respondents.

Judgment.—In this case a money decree was passed in O. S. No. 661 of 1899 against one Pullanna and his three sons on the 7th March 1900. After Pullanna's death, the properties of the family were attached in execution of the decree in 1912. The appellants, who are Defendants Nos. 1 to 3, put in a claim petition on 16th January 1913. The District Munsif passed the following order :

The petition is presented too late. The claim will be notified. Petition is dismissed.

The defendant who had obtained mortgage-decrees in O. S. Nos. 719 and 720 of 1911, brought the property to sale and 1st defendant bought it in Court-auction on 26th August 1915 and took delivery of possession on 7th April 1916. The plaintiffs, who purchased the property in auction on 17th January 1913, in execution of the money-decree in O. S. No. 661 of 1899, have brought the suit for possession of the property. The District Munsif and the District Judge held that the defendants were concluded by the order on their claim petition and that they could not resist the plaintiff's suit.

Mr. Justice Madhavan Nair dismissed the second appeal of the defendants. The contention of Mr. Seetharama Rao, for the appellants, is that inasmuch as the appellants had obtained a preliminary decree on 5th November 1913 and a final decree on 1st November 1915, the doctrine of lis pendens applies to the sale held between the passing of the preliminary decree and the final decree. It is difficult to follow the argument that because the appellants brought a suit on a mortgage in their favour, and that the suit was pending, the order on the claim petition against them, which has not been set aside by a suit, is not binding upon them. Under O. 21, R. 58, a person who objects to an attachment on the ground that the property is not liable to attachment may prefer a claim. And under R. 63, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive.

Mr. Seetharam Rao's contention is that this provision does not apply to this case, as the appellants had a preliminary mortgage-decree in their favour before the date of sale which was made final after the date of sale, the Court sale in execution of the money-decree should be held subject to their right under the decree. It was unnecessary for the appellants to have preferred a claim, but inasmuch as they preferred a claim they are bound by the provisions of R. 63. It does not matter what their right is. If a person prefers a claim under R. 58, objecting to the attachment on the ground that the property is not liable to attachment, and if an order is passed against him, unless he brings a suit within one year for a declaration that

the property is not liable to attachment and succeeds, the order is conclusive against him, and the fact that the appellants had a decree in their favour would not in any way help them. Even if they had obtained a final decree before the date of attachment, and preferred a claim to release the property from attachment relying upon their mortgage-decree, and if the Court rightly or wrongly dismissed their claim, and they did not choose to file a suit for declaration that the property was not liable to attachment, they could not afterwards set up a right as against the decree-holder who brings the property to sale or against the person who purchases the property in Court auction.

The next contention of Mr. Seetharama Rao is that the order of the District Munsif did not amount to a dismissal of his petition, as he directed that the claim be notified inasmuch as he prayed in the alternative that, if it is found to be impossible to enquire into the claim now, it is prayed that the contents of this petition may be intimated to the intending bidders and that their signatures may be taken before the sale is held. The claim petition was put in under R. 58 of O. 21 and the right under which the appellants claimed was also set out and documents upon which they relied were also mentioned in their claim petition and there was the prayer, that the claim may be allowed. In the light of these, it cannot be said that their claim petition was not dismissed.

Mr. Seetharama Rao relied upon *Ayya Pattar* v. *Attupurath Manakkal* (1) and *Parambil Saharabi* v. *Chekkutti* (2). Those cases have no application to the present as the claim petitions therein were not dismissed. Where a claim is not pressed, or where a claim petition is withdrawn or where the Court says it is unnecessary to dispose of a claim petition there is no order under R. 61. But where there is an order under R. 61 disallowing the claim, it cannot be said that there is no order against the claimant. This case is governed by the Full Bench ruling in *Venkataratnam* v. *Ranganayakamma* (3). There it was held that an order refusing to investigate a claim to attached property on the ground that there was delay in filing, it is an order passed against the claimant within the meaning of O. 21, R. 63, Civil P. C., and that an order on a claim petition merely stating that as it was late it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of O. 21, R. 63, will apply. It was held in *Lakshumanan Chettiar* v. *Parasivan Pillai* (4) that if a claim is dismissed after investigation or otherwise the mortgagee is barred after one year from the date of the order under R. 11 of the Limitation Act from suing, on the mortgage, the execution purchaser or his representatives. The appellants not having filed a suit within one year for a declaration that the property was not liable to attachment the order on their claim petition is conclusive against them and, therefore, they cannot set up a valid defence to the plaintiff's suit. The judgment of Mr. Justice Madhavan Nair is correct and we dismiss the Letters Patent appeal with costs.

Appeal dismissed.

(1) [1919] M. W. N. 805.
(2) A. I. R. 1923 Mad. 295.
(3) [1918] 41 Mad. 985=35 M. L. J. 335=8 L. W. 292=(1918) M. W. N. 599 (F. B.).
(4) [1919] 37 M. L. J. 159=(1919) M. W. N. 653.

A. I. R. 1926 Madras 594

SPENCER, J.

(*Mylavarapu*) *Rangayya Naidu*—Appellant.

v.

Basana Simon and *others*—Respondents.

Second Appeal No. 197 of 1923, Decided on 7th October 1925, from the decree of the Addl. Sub.-J., Vizagapatam, in A. S. No. 19 of 1922.

(a) *Evidence Act, S. 115—Mortgage by Hindu widow as guardian of her adopted son—Subsequent sale of the equity of redemption by her as owner—Purchaser is not estopped from redeeming.*

Where a Hindu A. N. died leaving a widow and the widow put forward A. R. as her adopted son and executed a mortgage as his guardian, and subsequently sold the mortgaged properties as her own after the alleged adopted son attained majority and where the vendee sued to redeem the mortgage:

Held: that he was entitled to redeem as the purchaser of the widow's interest in the properties mortgaged in absence of proof that the widow had no interest to convey.

Held: further, that there was no estoppel.

[P 595 C 2]

(b) *Transfer of Property Act, S. 60—Usufructuary mortgage fixing 15 years for repayment—No redemption can be allowed before 15 years.*

Where the mortgage deed provided that the rent of the land should go towards the interest due upon the principal and that the mortgagee should keep the surplus as a deposit with him, and where the principal was to be discharged by seven instalments of not less than Rs. 200 each within 15 years' time :

Held : that as there were no clear words which permitted the mortgagor to pay the whole of the principal on or before the expiry of the mortgage term and to obtain possession of the land, and as it was a usufructuary mortgage, the mortgagee was entitled to insist on the term which provided for 15 years' enjoyment. 36 *All.* 195 (*P. C.*) and 27 *M. L. J.* 483, *Foll* : *Case law discussed.*

(c) *Practice — Subsequent events —Suit premature on date of filing—Dismissal with liberty to file fresh suit is the right course.*

If a suit is premature at the date of institution, though not at date of decision, a decree cannot be granted and the only course in such cases is to dismiss the suit with liberty to bring a fresh suit upon a proper cause of action.

[P. 597, C, 2]

A. Krishnaswami Aiyar and *K. Kameswara Rao*—for Appellant.

T. M. Krishnaswami Aiyar and *P. Bapiraju*—for Respondents.

Judgment.— This is a suit for redemption. The plaintiffs obtained a decree for redemption in the Court of the District Munsif of Vizagapatam and the decision was confirmed on appeal. The defendants, who represent the mortgagees, contend that the plaintiffs' suit is not maintainable : first because the plaintiffs have no locus standi to maintain the suit and they are estopped from asserting that their vendor had any title to convey to them ; and secondly because the term of the mortgage has not expired and the suit is premature.

The lands in dispute were the property of one Anga Narasimhulu who died in 1901 leaving a widow Rangamma and two daughters. After his death the widow put forward Anga Ramaswami as having been adopted to her deceased husband. On 6th April 1902, she executed a usufructuary mortgage for Rs. 1,000, in favour of the 1st defendant. The mortgagor under this document was her adopted son Ramaswami, represented by his guardian, the adoptive mother. On 2nd May 1906, another usufructuary mortgage was executed by the widow as guardian of her adopted son for Rs. 1,400. In this mortgage the prior mortgage of 6th April 1902 was merged. This mortgage, Ex. B, is sought to be redeemed in the present suit. On 2nd July 1910, Rangamma sold the suit property to the plaintiffs' father. On 6th July, 1910, the adopted son, who had attained majority, sold the property to Vaddadi Ramaswami, who in his turn, on 11th January 1912, sold the same property to Mylavarapu Venkata Rao. The plaintiff's father brought a suit in 1910, O. S. No. 51 of 1910, on the file of the Court of the Subordinate Judge of Vizagapatam to eject the present appellants after declaring the mortgage in their favour to be invalid. That suit was dismissed, the plaintiffs' right to redeem the mortgage being left open and he being given liberty to bring another suit. In 1912 the two daughters instituted a suit, O. S. No. 18 of 1912, in the Court of the Subordinate Judge of Vizagapatam to declare the adoption of Anga Ramaswami invalid. It was held that the adoption was not proved and this decision was confirmed by the High Court on appeal. One other fact requires to be mentioned, namely, that Rangamma executed a Will on 13th April 1902, bequeathing all her properties in favour of her adopted son and two daughters, one-third to him and two-thirds to the daughters. As Rangamma is still alive, though not a party to the present suit, it is unnecessary to consider the effect of this testamentary disposition.

On the first point the appellant's vakil argues that the mortgage having been given in the name of the adopted son, the plaintiffs who claim by purchase from the widow have no equity of redemption in their favour, and that the adopted son having sold the property to Vaddadi Ramaswami, who again conveyed it to Mylavarapu Venkata Rao, it is suggested that, if anyone has the equity of redemption, it must be Mylavarapu Venkata Rao. Again he contends that the widow, having executed the plaint mortgage deed as guardian of her adopted son, would be estopped from claiming any right of redemption in herself, and that the plaintiffs, being representatives of the interest of the widow, are similarly estopped.

In my opinion there is no estoppel in this case. The plaintiff's father purchased the property under Ex. A from the widow who sold it in her own right and not as guardian of her adopted son. In fact she would have had no right to

sell the property on his behalf if the adoption was a valid one as by that time he had attained his majority. The validity of the adoption was the subject of O. S. No. 18 of 1912. It has not been put in issue in this suit, although the Subordinate Judge in his appeal judgment states that there was in fact no adoption. The appellants who claim to set up jus tertii in Venkata Rao as a defence to plaintiff's suit do not themselves claim under Venkata Rao. The plaintiffs have never made any representation as to the ownership of the property conflicting with their case in the present suit, and defendants have not been misled by their conduct. Their father purchased the widow's interest in the suit property under Ex. A. and, as possessing that interest, they certainly have the right to redeem the property from any encumbrances upon it, as they are persons having an interest within the meaning of S. 91 of the Transfer of Property Act. The defendants could only defeat the plaintiffs' rights to redeem by showing that at the date of the plaintiffs' father's purchase the widow had no interest to convey. This they have not done, as they have not attempted to show that Anga Ramaswami was validly adopted.

I now pass on to the second question whether the suit is premature. The mortgage deed, Ex. B, is a peculiar document. It provides that the rent of the land should go towards the interest due upon the principal and that the mortgagee should keep the surplus as a deposit with him. As the rate of interest was 6 per cent. and the amount of the principal was Rs. 1,400, Rs. 84 out of the rent of Rs. 147 went towards interest, and the balance of Rs. 63 was to be kept by the mortgagee towards the discharge of the principal. Then there is a provision that the principal shall be discharged by seven instalments of not less than Rs. 200 each within 15 years' time. Finally the mortgagor contracts to take back the land and the bond at the end of the mortgage which does not appear to mean upon the mortgage amount being cleared off. The time for the payment of the instalments is not specified. Apparently the mortgagor was at liberty to pay off the instalments at any short intervals at his pleasure, provided that not less than Rs. 200 were paid at a time. There is no express provision in Ex. B that on payment of the whole of the mortgage amount at any time before the expiry of 15 years the mortgagor can recover the land. It is conceivable that the parties intended this, but failed to express their intention in proper language. As such a term gives an advantage to the mortgagor, it was necessary that it should be clearly expressed. The mortgage deed being dated 2nd May 1906, the term of the mortgage did not expire till 2nd May 1921, and this suit, having been instituted on 23rd April 1919 is prima facie premature. In the plaint the cause of action is stated to have arisen on the date when the mortgagor gave notice of his intention to redeem, which is obviously wrong.

In *Bakhtawar Begam* v. *Husaini Khanum* (1) their Lordships of the Judicial Committee quote the judgment of the Allahabad High Court to this effect :

> Ordinarily, a mortgagor cannot, before the time limited for payment to the mortgagee expires, take proceedings to redeem. The reason for this is that it was the agreement of the parties that the mortgage should, during the intervening time, remain as security for the money advanced, and, therefore, it is not competent for either party to disturb that relation.

They go on to observe in their own words :

> But there is nothing in law to prevent the parties from making a provision that the mortgagor may discharge the debt within the specified period and take back the property. Such a provision is usually to the advantage of the mortgagor.

In *Bir Mohamad Rowther* v. *Nagoor Rowther* (2) a Bench of this Court, following the Privy Council ruling held, that a mortgagor could not be allowed to redeem the mortgage before the expiry of the term mentioned in the mortgage deed unless there was a contract to the contrary in favour of the mortgagor. In *Vadju* v. *Vadju* (3) it was held that the mere use of the word "within" was not sufficient indication that the mortgagor might redeem before the expiration of the term. Westropp, C. J., stated the general principle to be that the right to redeem and the right to foreclose must ordinarily be regarded as co-extensive. He remarked that if there was an intention to make the mortgagor's position more favourable than the mortgagee's, some stronger expression should have been used in the document than the Marathi word "*ant*" which signifies "within a cer-

(1) [1914] 36 All. 195=41 I.A. 84 (P.C.).
(2) [1914] 27 M. L. J. 483.
(3) [1880] 5 Bom. 22.

tain date." In *Rose Ammal* v. *Rajarathnam Ammal* (4), Shephard, J., observed that the rule of mutuality is not an inflexible and universal one and that if the parties intend that redemption should take place only at the end of the given term, they should indicate that intention in the words of the deed. This seems to put the onus on the wrong shoulders, as the learned Judge was dealing with an exception to a general rule. In *Chandu* v. *Koaja Poojari* (5), Wallis, C. J., and Seshagiri Aiyar, J., referred to the mortgagor's right to redeem before the end of the period and to the Privy Council decision in *Bakhtawar Begam* v. *Husaini Khanum* (1) and they allowed redemption to be made in view of the provision in the mortgage before them providing for payment by mortgagor on or before a certain date. In *Narasimha Rao Pantulu* v. *Seshayya* (6) Devadoss, J, allowed a mortgagor to redeem before the expiry of the term as an equitable remedy called for in the circumstances of that case.

In the document before me there are no clear words which permit the mortgagor to pay the whole of the principal on or before the expiry of the mortgage term and to obtain possession of the land. As it is a usufructuary mortgage the mortgagee is entitled to insist on the term which provided for 15 years' enjoyment: see Shephard and Brown's Commentary on S. 60 of the Transfer of Property Act, p. 260, of 7th Edition. The mortgagee, under the terms of this document, could not enforce his rights until the full 15 years were over. There must be mutuality in such an agreement. It is provided that the profit or loss arising from the yield of the mortgagee land should be borne by the mortgagee. He may have been unwilling to take a mortgage for less than 15 years, and he may fairly have expected the losses in unfavourable years to be made good by gains in more favourable years. I think that I am bound to follow the decision in *Bakhtawar Begam* v. *Husaini Khanum* (1) and the decision of a Bench of this Court in *Bir Mohamad Rowther* v. *Nagoor Rowther* (2).

The respondents' vakil has pointed out that although the cause of action for redemption may not have arisen at the date of the plaint, more than 15 years had elapsed at the date of the hearing of the first and the second appeals. The Subordinate Judge has also relied on this circumstance. In *Subbaraya Chetty* v. *Nachiar Ammal* (7) a Bench of this Court under special circumstances, granted a decree where the cause of action arose subsequent to the date of suit. That case is inconsistent with the decision in *Ramanadan Cheiti* v. *Pulikutti Servai* (8) where the rule of procedure that a party suing for possession must show that on the date of suit he was entitled to relief is followed. Suits for partition are exceptions to the general rule. In *Doraiswami Pillai* v. *Chinnia Goundan* (9) it was held that a suit for redemption was liable to be dismissed on the pleadings in the plaint, and the plaintiff during the pendency of the suit obtained a conveyance which cured his want of title and he was to amend his plaint and obtain a decree for redemption. In that case, the flaw in the plaintiff's right to redeem was not that his suit was premature in point of time, but that he had not got title from the true owner. The case is not an authority for the proposition that if a suit is premature at the date of institution a decree can nevertheless be granted. In my opinion the only course where the plaintiff brings his suit before the cause of action arises is to dismiss the suit with liberty to bring a fresh suit upon a proper cause of action.

The second appeal is, therefore, allowed and the suit will be dismissed with costs throughout.

Appeal allowed.

(4) [1900] 23 Mad. 33.
(5) [1915] 29 M.L.J. 86.
(6) A. I. R. 1925 Mad. 825.
(7) [1918] 7 L. W. 403=(1918) M.W.N. 199.
(8) [1898] 21 Mad. 288=8 M. L. J. 121.
(9) [1918] 7 L. W. 335.

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* A. I. R. 1926 Madras 597

KUMARASWAMI SASTRI, J.

A. V. K. Mayappa Chettiar—Plaintiff—Petitioner.

v.

N. K. L. Kolandaivelu Chettiar and *another*—Defendants Nos. 1 and 2—Respondents.

Civil Revision Petition No. 707 of 1924, Decided on 26th March 1925, against the finding of the Temporary Sub-J., Devakottah, D/- 6th September 1924, in Original Suit No. 6 of 1924.

** Civil P.C., O. 1, R, 3—Suit for specific performance of a contract to sell—Property agreed to be sold mortgaged to a third person—Vendor denying validity of mortgage—Mortgagee can be made a party defendant.*

If in a suit for specific performance of a contract for sale it is found that the property agreed to be sold is mortgaged but the vendor contends that the mortgage is not binding on him being without consideration the just and proper course will be to implead the person who claims to be a mortgagee and to adjudicate on all questions of the validity of the mortgage in the suit itself so as to enable the purchaser to be free from all future risk and liability of the property so agreed to be bought from the person agreeing to sell, although there can be no objection to the general rule that persons who do not claim under the parties to a contract and are strangers to it should not be made parties and there is also the other rule that persons claiming adversely to both the parties to a suit for specific performance or for redemption of a mortgage ought not to be made parties. It is difficult to see how it can be said that a person, who claims under a mortgage created by the predecessor in title of the person who agrees to sell, claims an interest which is hostile to both parties or that he is a person who ought not to be joined under any provisions of the Civil P. C. Considerations of justice and equity demand that in such a case there should be one suit filed to adjudicate all matters in dispute and the plaintiff should not be made to have a recourse to another suit.

[P. 599, C. 2, P. 601, C, 2]

A. Krishnaswamy Iyer and *M. Patanjali Sastri*—for Petitioner.

A. Srinivasa Iyengar and *S. R. Muthuswamy Iyer*—for Respondents.

Judgment.—This is an application to set aside the order of the Subordinate Judge who dismissed the suit against the second defendant holding that he was an improper party. The suit was filed by the plaintiff to enforce specific performance of a contract to purchase certain property for Rs. 70,000. There was a mortgage over the property created by the predecessor-in-title of the first defendant, who was the person who contracted to sell the suit property to the plaintiff, for a principal sum of Rs. 50,000. The first defendant denied that the mortgage was binding on the property on the ground that it was a fraudulent and collusive transaction entered into by the predecessor-in-title through whom he claims for the purpose of defrauding the creditors and that any consideration passed for that mortgage. The plaintiff who had agreed to purchase the properties, got a varthamanam letter, Ex. C., whereby the first defendant agreed to indemnify the plaintiff against all claims by third persons. The plaintiff in this suit joined both the first defendant who was the person with whom he entered into the contract to sell, and the second defendant who was the person who claimed as a mortgagee under a mortgage created by the predecessor-in-title of the first defendant for a principal sum of Rs. 50,000 the interest on which would amount to a great deal more, the defendants inter se disputing the validity of the mortgage, the first defendant saying that there was no mortgage which can be enforced against the property and the second defendant that it was a valid mortgage.

Now the difficulty in this case is as to what the plaintiff has to do? If the second defendant is discharged from the suit, the plaintiff would be in the position of having to pay the second defendant the full mortgage-money which the first defendant may draw out, and the day after there might be a suit against the plaintiff on the mortgage under which the second defendant claims, and, if the first defendant's case that the mortgage was fictitious or a sham transaction is not true, then the plaintiff would have to pay that amount over again. It was suggested that the plaintiff might pay the money in Court under S. 83 of the Transfer of Property Act and leave it to the defendants to fight out the question; but the trouble is that the plaintiff on the date of the suit was merely an individual in possession of an agreement to sell and S. 54 of the Transfer of Property Act says that a contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties and that it does not of itself, create any interest in or charge of such property; the plaintiff, therefore, is a person who, by reason of the agreement to sell, has no interest in the property.

As regards the paying of money into Court under S. 83, the section states that the person who can deposit in Court would be a person who could file a suit for redemption. It says that the mortgagor or any other person entitled to institute such suit (that is a suit to redeem) may deposit the money into Court. S. 91 enumerates the persons who may redeem and a person who has merely got an agreement to sell the property does not fall under any of these categories. So that, the remedy under S. 83 is not open to the present plaintiff.

Turning to the Specific Relief Act, we find in Cl. (c) of S. 27, (which states against whom a contract can be enforced that it can be enforced) against "any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant." In this case the first defendant, if his case is true, can file a suit against the second defendant to have that mortgage declared invalid and not binding, so that he can displace a title which was created by his predecessors-in-title. S. 27, therefore, seems to me to provide for a case like the present and enable the plaintiff to file a suit against the first defendant who executed the agreement to sell and the second defendant who claims under a title of the first defendant, which title the first defendant can file a suit to displace, on the ground that it was a fraudulent transaction brought about to defraud the creditors and that no consideration passed therefor. It seems to me that in a case like the present, the only convenient course would be to allow both the first defendant, who executed the agreement, and the second defendant who claims under an encumbrance, to be joined as parties, whereby the dispute between the person who claims an interest in the property as a mortgagee may be settled. That is the only safe way of keeping the plaintiff really indemnified. In that suit if it is decided that the mortgage is valid, the money which the plaintiff has paid into Court under the decree would be appropriated in such a way as to keep the plaintiff free from all future troubles. I see very little justice in making the plaintiff, in a suit like this, pay the money into Court, and allowing the defendant to draw the money and then leaving the plaintiff at the mercy of the person who claims under a mortgage which he can enforce later on with interest for the intervening period; for that would be the result of striking out the second defendant in a case like this and letting the suit to proceed against the other party.

Reference was made to the fact that in the varthamanam letter there is actually a promise to indemnify the plaintiff against any loss ultimately sustained, and that, till the loss is sustained, the plaintiff has to pay the money and take his chance of getting it back or not under the indemnity clause. I think the decisions cited by Mr. Patanjali Sastri, are in favour of the view that it is not necessary that actual damage should be caused before the party affected can act. In *Wolmershausen* v. *Gullick* (1) and *Eastern Shipping Co.* v. *Quah Beng Kee* (2) the person who was ultimately to pay was made a party. The case of the plaintiff here is this. He has got an agreement to sell ; that the person who has got to sell denies that there is any mortgage on the property which is binding on it and there is the second defendant who claims under a mortgage not executed by a stranger claiming a paramount title but by the predecessor-in-title of the first defendant. There is also an indemnity clause in the varthamanam letter saying that he should be indemnified against any loss he may sustain if rival claims were established. Now, the plaintiff naturally says:

> I am ready to pay money to the first defendant as I am bound to do under the contract. If there is any mortgage, I am entitled to see that the money is paid to the discharge of the mortgage so as to give me a clear title. Therefore let that question be decided before the money is paid into Court.

Cl. 18 (c) of the Specific Relief Act says :

> Where the vender professes to sell unencumbered property but the property is mortgaged for an amount not exceeding the purchase-money, and the vendor has in fact only a right to redeem it, the purchaser may compel him to redeem the mortgageo and to obtain a conveyance from the mortgagee.

I see there is nothing either in justice or in equity to compel this to be done by a separate suit, and where the vendor says that there is no mortgage which he has to redeem and that the mortgage set up was a sham transaction, I see nothing to prevent that question being tried if the suit for specific performance itself by making the person, who claims a title, a party to that suit, where that party claims under a sale created by the vendor's predecessors-in-title. Having regard to these considerations it seems to me that, in cases like the present the just and proper course will be to implead the person who claims to be a mortgagee and to adjudicate on all these questions in the suit itself so as to enable the purchaser to be free from all future risk and

(1) [1893] 2 Ch. 514=3 R. 610=68 L. T. 753
(2) [1924] A.C. 177=40 T.L.R. 109=93 L. J P.C. 72=130 L.T. 462.

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liability. Unless I am compelled to hold by any provisions of the Civil. P. C., or the Specific Relief Act that such a suit would be bad, I do not see why the most general principles as to not making persons, not parties to contract, parties should stand in the way.

There can be no objection to the general rule that persons who do not claim under the parties to a contract and are strangers to it should not be made parties. There is also the other rule that persons claiming adversely to both the parties to a suit for specific performance or for redemption of a mortgage ought not to be made parties. Applying these general principles to the facts of a case like the present it is difficult to see how it can be said that a person, who claims under a mortgage created by the predecessor in title of the person who agrees to sell, claims an interest which is hostile to both parties or that he is a person who ought not to be joined under any provisions of the Civil P. C. The Specific Relief Act makes ample provision for protection of the interests of the person who agrees to buy the property subject to encumbrances.

Reference was made by the respondent to the case reported as *Appala Naidu* v. *Chengalvala Jogiraju* (3). That was a case where a suit for specific performance was filed against a person who agreed to sell and against mortgagee on a mortgage created by the person who contracted to sell the property. The mortgage was with possession. The learned Judges in that case stated that there was misjoinder as regards the mortgagee dealing with the disputes between the mortgagee and the mortgagor. They say.

Further as the 1st defendant now disputes the validity of the mortgage, the amount due thereunder will be paid into the Court by the plaintiff under S. 83 of the Transfer of Property Act, and if, within three months, the 1st defendant has not taken proceeding to set aside the mortgage and to establish his right to the money it will be paid over to the mortgagees.

But the learned Judges unfortunately failed to see that S. 83 would not cover a case like that, because the vendee (the plaintiff) could not pay the money into Court under that section as he had no right to redeem the property. With great respect, it seems to me that that remedy would not help the parties in this case, because they may be met by the objection that the money could not be paid into Court under S. 83.

Cases have been referred by the respondents' vakil which relate to paramount titles set up by a person not a party to the contract, for example *Howard* v. *Miller* (4). That was clearly a case where the person claiming the property was not a party to the contract but a person who claimed adversely both to the vendor and to the vendee. The cases reported as *Rangayya Reddi* v. *Subramanya Aiyar* (5) and *Ahmedbhai* v. *Dinshaw* (6) are cases where joint family property was agreed to be sold and it was held that the co-owners who disputed the validity of the transaction were not proper parties. The claim was by persons not parties to the contract but by persons who claimed adversly both to the person who contracted to sell and to the person who contracted to buy. I do not think that these cases afford much help in a case where there is a mortgage created by the predecessor-in-title which mortgage is attacked and there is a dispute between the vendor and the vendee as to the validity of that mortgage. It seems to me that considerations of justice and equity demand that in such a case there should be one suit filed to adjudicate all matters in dispute and, as I find no decided cases which actually decide the present question, I do not see why the suit as framed should not go on.

I reverse the order of the Subordinate Judge and direct that he proceed to try the suit as framed according to law. It will be open to him in the process of the suit to direct any moneys which the parties are legally bound to pay to be paid into Court and to pass such orders as to taking security or on payment as he thinks fit.

I allow the petition with costs against the second respondent.

Petition allowed.

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(3) [1916] 1 M. W. N. 77.

(4) [1915] A. C. 318=84 L. J. P. C. 49=112 L. T. 403.

(5) [1917] 40 Mad. 365=32 M. L. J. 575=5 L. W. 797 (F. B.).

(6) [1911] 13 Bom. L. R. 1061.

* * A. I. R. 1926 Madras 601

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

Ramabhadra Thevar and *others*—Defendants 1 to 3—Appellants.

v.

Arunachalam Pillai and *another*—Plaintiffs 1 and 2—Respondents.

Appeal No. 226 of 1924, Decided on 15th January 1926, from the decree of the Sub-J., Tanjore, in O. S. No. 183 of 1922.

* * *Transfer of Property Act, S. 84—Deposit in Court is special form of tender—Mortgagee refusing to withdraw—Mortgagor withdrawing money from Court after such refusal—If mortgagor is still willing and ready to pay, he is not liable for interest.*

A deposit in Court under S. 84 is only a special kind of tender, designated to make available a sure mode of proof to the mortgagor of the fact that he has made a tender, and when the deposit is withdrawn by the mortgagor from Court on mortgagee's refusal to withdraw, mortgagor's liability to pay interest depends upon the question whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay throughout. The fact of the tender raises the presumption that the debtor continued ready and willing to pay, and the burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utilized the moneys for other purposes; 35 *Mad.* 44 and *A. I. R.* 1922 *All.* 181, *Dissented from.*

[P 604 C 2, P 605 C 1]

K. S. Krishnaswami Aiyangar—for Appellants.

N. S. Srinivasa Aiyar and *S. V. Narayana Aiyar*—for Respondents.

Order of Reference.

Phillips, J.—The first point for consideration is the construction of the mortgage deed executed by the father of the Defendants Nos. 1 to 3 in favour of the 1st plaintiff's manager, 4th defendant. The 1st plaintiff on his own behalf and on behalf of his minor son, 2nd plaintiff, sold certain property to the father of 1st defendant under Ex. 1 on 11th September 1909. There was a prior mortgage on this property, dated 9th February 1908. As there was this prior mortgage and also because one of the vendors was a minor, the 1st defendant's father did not pay the whole of the purchase money, but retained a sum of Rs. 4,625. On the 15th September 1909 the 1st defendant's father hypothecated the property he bought for this amount and stipulated that the 1st plaintiff should execute a security bond for Rs. 6,000 on or before the 14th September 1910.

The relevant provisions in this mortgage deed, which we have to construe, are as follows:

I shall pay the aforesaid amount of principal together with the interest . . . . . as soon as you execute and get registered before the 14th September 1910, a security bond in respect of immovable properties estimated by the mediators at Rs. 6,000 . . . . . If security is not given before the said stipulated date, I shall, up to the date on which the security is given, add interest on principal and interest on interest at the said rate with twelve months' rests and pay you the amount of principal and interest accruing due. . . .

The lower Court has held, and I think rightly held, that the execution of this security bond was a condition precedent to the demand for the mortgage money and that therefore this suit for the money is not maintainable because the security bond had not been executed, but as the parties came to an agreement during the suit that the mortgage should be adjusted by means of this suit and that the suit should not be dismissed, the lower Court proceeded with the trial and held that there was no obligation on the 1st plaintiff to execute a security bond on any particular date and that therefore the mortgagor must pay compound interest on the amount of the mortgage from September 1910, because the deposit made in Court was not a valid deposit, being conditional. This conclusion is somewhat inconsistent with the finding that the execution of the security bond was a condition precedent to the enforcement of the mortgagee's right, and it is now contended for the appellant that the 1st plaintiff was bound to execute the security bond after the date fixed therefor, namely, 14th September 1910, and that therefore, when the mortgagor deposited the mortgage amount coupled with a request for the execution of the security bond, it was a valid tender under S. 83 of the Transfer of Property Act, although it was coupled with this condition. The question therefore for determination is whether the mortgagee was under an obligation to execute the security bond, an obligation which can be enforced by the 1st delendant.

To adopt the interpretation put upon the document by the lower Court is to hold that the mortgage is irredeemable except at the option of the mortgagee, and this would constitute a clog on the equity of redemption which cannot be

enforced. Consequently, if the language is ambiguous, I think that we must adopt an interpretation which would remove that clog. The document itself is an extraordinary document because it provides that on default by the mortgagee the mortgagor is to be penalized, and, similarly, if the mortgagee fulfils his bargain, and the mortgagor commits default, the mortgagee is to be penalized by the compound interest being reduced to simple interest. However this may be, I think it is undoubted that there was an obligation on the mortgagee to execute this security bond, and consequently that obligation could be enforced by the other party to the contract. He was therefore entitled to demand a security bond before paying the money, and the execution of the security bond was not left to the will of the mortgagee to perform at any time he chose. If that is the correct view, the deposit of the mortgage money, coupled with a request for the security bond, is not a deposit coupled with a condition outside the contract; for the condition was one enforceable under the contract. The deposit was therefore a valid deposit under S. 83.

There remains then the question whether the mortgage money ceases to bear interest from the date of deposit under the terms of S. 84 of the Transfer of Property Act. Notice of the deposit was sent to the plaintiff, but he refused to accept the money and subsequently the 1st defendant withdrew the amount from Court. On similar facts it was held in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) that interest did not cease to run, the ground for the decision being that the deposit must be left in Court in case the mortgagee changes his mind. This dacision is somewhat at variance with the decision in *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), where it was held that once a tender had been made and refused, interest ceases to run, although in that case the money had been taken back from the mortgagor by the lender after refusal by the mortgagee. The decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was considered in *Thevaraya Reddy* v. *Venkatachala Pandithan* (3) where Ayling and Tyabji, JJ., differed. The case went up in appeal and was decided in *Thevaraya Reddy* v. *Venkatachala Pandithan* (4). I was one of the members of that Bench and dissented from the decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), and apparently Abdur Rahim, Offg. C. J., was inclined to the same view, although he held that it was not necessary to decide the point. On the other hand Seshagiri Aiyar, J., was of opinion that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was rightly decided. The question has been considered in *Hukam Singh* v. *Babu Lal* (5), and there a Bench of that Court followed my judgment in *Thevaraya Reddy* v *Venkatachala Pandithan* (4), and accepted the reasoning therein.

I have very little to add to my judgment in that case, but I will add a few words regarding the decision in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), from which I venture to differ. In the judgment in that case the question was asked whether, when the mortgagor had deposited the money, and issued a notice to the mortgagee, he had not done all that has to be done by him to enable the mortgagee to take the amount out of Court: and can he then withdraw the money even before the mortgagee appears to claim it? The answer was given in the negative; and a further question was asked: Why should he be at liberty to do so because the mortgagee appears and refuses to take it? The answer I would give to that question is that the mortgagee is under a duty to take the money when tendered, and the cessation of interest on his refusal is a penalty for not performing his duty of submitting to redemption. A mortgagor might be able to collect the mortgage money and interest accrued to date of deposit, but unable to raise any more to meet further interest. Is he to be compelled either to forgo his undoubted right to redeem, or else to leave his money lying idle, until the mortgagor chooses or is compelled to accept it? In the case of a usufructuary mortgage the injustice to the mortgagor is obvious as he is deprived of the benefit of his property and of his money. One consideration which appears to have escaped the notice of

(1) [1910] 35 Mad. 44=(1911) 1 M. W. N. 89.
(2) [1909] 33 Mad. 100.
(3) [1914] 1 L. W. 595.
(4) [1916) 40 Mad. 804=31 M. L. J. 548=4 L. W. 433=(1916) 2 M. W. N. 321.
(5) A. I. R. 1922 All. 181.

the learned Judges in that case is that if the mortgagor leaves his money in Court deposit after refusal by the mortgagee it might lapse to Government before the amount is withdrawn; who, in that case, is to bear the loss, the mortgagor or the mortgagee?

In the present case the deposit was made in 1913 and this suit was not brought until 1922. If, therefore, the 1st defendant had left the money in deposit, the money would long ago have lapsed to Government. Section 84 is very clear and says that interest shall cease when once the mortgagor has done all that he can to enable the mortgagee to draw the money. When a mortgagee has received notice that the money is actually in Court and that he can draw it at that time, what more can be done by the mortgagor to enable him to draw it? Proceeding strictly on the interpretation of the section I still adhere to my opinion that *Krishnaswami Chettiar* v. *Ramswami Chettiar* (1) is wrong and I am inclined to think that the Legislature did not intend to make the law in India identical with the law in England. In England, when a tender has been made it is also necessary that the mortgagor should always be ready to pay the amount, but the burden of proving that he is not so ready is on the mortgagee. I take it therefore that, when there has been a tender and there is no evidence of any subsequent refusal to pay, the provisions of the English Law would be complied with, and the tender would be valid, except perhaps in cases where it was shown that the tenderer had subsequently derived profit from the money tendered.

As the question is one of some importance, and there is a divergence of views in this Court, I think that the question should be referred for decision to a Full Bench. Accordingly the appeal is submitted to a Full Bench for decision.

The Memorandum of Objections is dismissed with costs.

Odgers, J.—(His Lordship set out the facts as given in the judgment of Phillips, J. and proceeded.) The clause as to the furnishing of the security bond seems to be clearly a clog on the equity of redemption as the mortgage money cannot be claimed without such bond and no time is provided within which (after 14th September 1910) such security bond is to be furnished and compound interest is to run "up to the date on which the security is given." Therefore interest is to run on for any length of time until the mortgagee thinks fit to render himself competent to accept it by executing the security bond. This appears to render the clause invalid. The minor has, however, become a major and has offered to accept mortgage money. The real question is therefore the second, the question as to the deposit. On 6th August 1913, the father of Defendants 1 to 3 deposited the necessary amount in Court and tendered it to 4th defendant who however refused to take it out, whereupon the Court referred the father of Defendants 1 to 3 to a regular suit by its order, dated 15th November 1913. The Subordinate Judge held that the tender was not unconditional because Defendants 1 to 3 requested that 4th defendant should first furnish security as provided for in Ex. A before he drew the money. The Subordinate Judge holds that the condition is against the terms of Ex. A. This I am unable to understand as the money can clearly not be taken by the mortgagee unless and until a security bond is provided as stated in Ex. A. I do not see how under the circumstances this can be regarded as a conditional deposit so as to render the deposit invalid. The main question argued before us, however, was as to the consequent cessation of interest for another reason, viz., that although defendants made a deposit and kept the money in Court for about a year, they subsequently withdrew it. This is a pure question of law on which there is some apparent conflict of opinion. S. 84, Transfer of Property Act, reads as follows:

> When the mortgagor or such other person as aforesaid has tendered or deposited in Court under S. 83 the amount remaining due on the mortgage interest on the principal money shall cease from the date of the tender or as soon as the mortgagor or such other person as aforesaid has done all that has to be done by him to enable the mortgagee to take such amount out of Court, as the case may be.

In *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), a case of tender, the Court held that "tender" does not imply that the tenderer must always be ready to pay and that the cases to the contrary in English Law and in Calcutta did not apply. There does not appear to be any

distinction drawn in the section between tender and deposit. In *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), a case of deposit, it was held that a continuance of the deposit was necessary to obtain the benefit of the section. The English cases as to the necessity for continued readiness to pay in the case of tender were relied on and the case in *Velayuda Nayakar* v. *Hyder Hussan Khan Sahib* (2), distinguished on the ground that there was there no allegation of a subsequent demand by the mortgagee for the amount and that mortgagor failed to pay and also because the matter was clearer as regards deposit as distinguished from tender. "We cannot speak of a person having deposited in Court if he has withdrawn his deposit."

In *Thevaraya Reddy* v. *Venkatachala Pandithan* (3), a case heard by Ayling and Tyabji, JJ., there were disputes among the mortgagee's representatives, and the money deposited was not taken out for a year after which the mortgagors withdrew it. Ayling, J., thought that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) governed the case and that the ruling should be sustained in the absence of a reference to a Full Bench. Tyabji, J., on the other hand, thought the ruling in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), was wrong and that *Velayudha Nayakar* v. *Hyder Hussan Khan Sahib* (2), was the correct view on the ground that it was not shown that the English Law differed from the Indian Law and that the English Law makes a tender perfect and complete unless the party impeaching its completeness shows an absence of readiness to pay. He examined the English Law and added that the facts in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1), and in the case before him, were different. On this difference of opinion a Letters Patent appeal was taken and the decision is reported in *Thevaraya Reddy* v. *Venkatachala Pandithan* (4). It was heard by a Bench of three Judges of whom my learned brother was one. Abdur Rahim, Offg. C. J., held that the interpretation of S. 84 in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was that :

> The deposit in order to be effective under S. 84 must remain in Court until the mortgagee or his successor in interest has been enabled or is in a position to withdraw it.

Seshagiri Aiyar, J., held that *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) was rightly decided. Phillips, J., on the other hand, thought that this decision was wrong. He said :

> the cessation of interest is the penalty imposed upon the mortgagee for refusal to accept the money when offered and this penalty is not remitted because he changes his mind when it is too late.

The learned Judges, however, held that, in the case before them, the circumstances were different, and as the mortgagors failed to have the deposit in Court sufficiently long to enable the mortgagees to draw the amount they failed to do all they had to do under the section. This opinion of Phillips J., in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) has recently been approved by the Allahabad High Court in *Hukam Singh* v. *Babu Lal* (5). The English Law is set forth inter alia in *Bank of New South Wales* v. *O'Connor* (6).

In Fisher on Mortgages (6th Edition), S. 1851, it is stated that

> interest will cease to run upon the mortgage debt from the time at which a proper tender of the whole amount is shown to have been made. But it ought to appear, that, from the time of the tender, the money was kept ready by the mortgagor, and that no profit was afterwards made of it ; upon proof of the contrary whereof the interest will still run.

The principle in English Law being apparently that if the mortgagor was to have the benefit of cessation of interest on the mortgage, he must not have earned interest on the money elsewhere in the meantime.

In this state of the authorities, I think it is desirable that the point should be settled. The point is essential to the appeal which therefore should be referred to a Full Bench as proposed by my learned brother.

Judgment.—In our opinion a deposit in Court under S. 84 is only a special kind of tender, designed to make available a sure mode of proof to the mortgagor of the fact that he has made a tender. If he tenders in the ordinary way and that tender is denied he may be defeated by false evidence ; if he tenders by deposit in Court the matter is proved for him by the record.

We do not agree with the view of Phillips, J., that once the money is deposited and a reasonable time given to the mortgagee to take it out, interest

(6) [1889] 14 A. C. 273=58 L. J. P. C. 82=60 L. T. 467=38 W. R. 465.

thereafter cannot be allowed in any circumstances. Nor do we agree with the view apparently adopted in *Krishnaswami Chettiar* v. *Ramaswami Chettiar* (1) that if after depositing the money in Court, the mortgagor withdraws it, his original deposit is to be treated as nullity; in other words, that he is to be regarded as never having tendered at all.

In our opinion the deposit operated as a tender, and the only question properly arising was whether the mortgagor, notwithstanding his withdrawal, remained ready and willing to pay throughout. The better opinion seems to be that the fact of the tender raises the presumption that the debtor continued ready and willing to pay, and that the burden is cast upon the creditor to show that he was either not willing or not able to pay because he had utlized the moneys for other purposes. And it may be that the fact of withdrawal might, in certain circumstances, in itself be some evidence of unwillingness to pay. But, however that may be, here there was an allegation in para. 6 of the written statement that the defendants had always been ready and willing to pay. On that no issue was raised and in our view that is sufficient to conclude the matter in the defendants' favour, and to preclude the plaintiffs (who have no merits) from claiming interest after the date of the deposit in Court.

The decree will be drawn up accordingly and must give credit for the sum of Rs. 865 with costs and interest referred to by Odgers, J. Defendants will have the costs of the appeal.

Appeal allowed.

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* A. I. R. 1926 Madras 605

WALLACE AND MADHAVAN NAIR, JJ.

(Thoppai) Venkataramier—1st Defendant—Appellant.

v.

A. Govindarayalier — Plaintiff— Respondent.

Appeal No. 200 of 1923, Decided on 18th November 1925, from the order of the Dist. J., Madura, in O. S. No. 1 of 1922, D/- 12th December 1922.

* *Probate and Administration Act, S. 17— Executor challenging genuineness of Will is not incompetent to have probate if Will is found to be genuine.*

It is open to an executor to openly assert outside the Court that he is renouncing his executorship, but it is by his statement in the Court that he will stand or fall : 35 *Cal.* 156, *Ref.* The executor may challenge the genuineness of the Will and at the same time claim probate if it is proved to be genuine : 47 *Cal.* 838, *Foll.* [P. 605, C. 2]

(b) *Probate and Administration Act, S. 13 — Minority or unsoundness of mind are the only grounds for unfitness.*

A Court cannot refuse an executor probate because it considers him unfit to be executor, unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind. [P. 606, C. 1]

K. Rajah Aiyar—for Appellant.

K. S. Jayarama Aiyar — for Respondent.

Wallace, J.—This is an appeal against the order of the District Judge of Madura refusing to grant to the appellant probate of a Will. The testator named two executors of whom the appellant is one. The other, the respondent, applied for probate and the ordinary notice went to the appellant who appeared and challenged the genuineness of the Will. The District Judge found the Will genuine, granted probate to the respondent, but refused it to the appellant, on the ground that by his action in denying the genuineness of the Will he had to all intents and purposes, renounced his position as executor.

Now, although prior to the probate proceedings, the appellant had indulged in wild statements that the Will was a forgery, that he was never appointed executor, that the testator had never signed it, that his own attestation which appears on the Will was obtained by fraud, the statement he put into the probate Court when the proceedings came on was of a milder tenor, and it is that statement alone that the probate Court was, in our view, entitled to consider. It is open, for example, to an executor to openly assert outside the Court that he is renouncing his executorship, but it is by his statement in the Court that he will stand or fall : see *Manick Lal Seal, in the goods of* (1).

Now, in his statement to the Court the appellant merely said that he did not admit the execution and validity of the Will ; that it was a spurious document brought about by the exercise of undue influence : that, so far as he (appellant)

(1) [1908] 35 Cal. 156.

knew, the testator never put his signature to the Will, and that his own attestation was due to his having been deceived by the respondent as to the nature of the document. And he ended up by saying that if the Court considers the Will genuine, and is prepared to grant probate, he is willing to act as executor. We do not find that this statement is an assertion that the Will is a pure concoction. Whether such a statement would amount to a renunciation we need not here consider. We do not think that the statement amounts to more than this. "I have the gravest reasons for doubting if the Will was a voluntary act of the testator, while in a sound disposing state of mind ; and, before I accept or renounce I will wait until the Court decides on its genuineness." It is quite open to an executor to take up such a position. There is direct authority for it in a case of application for letters of administration: see *Sarojini Dasi* v *Rajalakshmi Dasi* (2). We are not prepared, therefore, to hold that in this case there was a renunciation.

It is of course well-settled law that a Court cannot refuse an executor probate because it considers him unfit to be executor, see *Hara Coomar Sircar* v. *Doorgamoni Dasi* (3) and *Pran Nath Ghose* v. *Jadu Nath Bhattacharji* (4), unless the unfitness is of the nature of legal incapacity, that is, minority or unsoundness of mind. The District Judge is therefore wrong. The testator's wishes must be carried out.

The District Judge's order is, therefore, reversed and probate will be given to the appellant jointly with the respondent; costs may come out of the estate.

Madhavan Nair, J.—I agree.

Appeal allowed.

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(2) [1920] 47 Cal. 838.
(3) [1894] 21 Cal. 195.
(4) [1898] 20 All. 189=(1898) A. W. N. 14.

A. I. R. 1926 Madras 606

WALLACE AND MADHAVAN NAIR, JJ.

Arunachalam Chettiar—Appellant.

v.

Naganna Naicker and *others*—Respondents.

Appeals Nos. 234 of 1923, and 2 of 1924 Decided on 6th November 1925, against the order of the Dist. J.. Coimbatore, D/- 31 January 1923, in I. A. No. 560 of 1922, and that of the 6th September 1923, by the 2nd Addl. Sub-J., Coimbatore, in Civil Appeal No. 31 of 1923.

Provincial Insolvency Act, S. 52—Application to deliver property to Receiver can be valid only if Receiver is authorized to take possession of insolvent's property.

An application under S. 52 to the executing Court to deliver property to the Receiver can only be a valid application if the receiver has been clothed by the insolvency Court with powers to take possession of the insolvent's property.

[P 606, C 2, P 607 C 2]

T. M. Krishnaswami Aiyar—for Appellant.

V. Balasundaram Aiyar—for Respondents.

Judgment.—*Appeal against Order No.*234 *of* 1923. The application to the District Munsif in the case was by the insolvent and was presumably under S. 52 of the Provincial Insolvency Act V of 1920. The District Munsif dismissed it on the short ground that it was not an application by the Official Receiver. The insolvent went up to the District Judge, who, purporting to exercise the power of an insolvency Court, and presumably with the view of ensuring that the executing Court acted properly under S. 52, set aside the execution sale. Neither before the District Munsif nor before the District Judge was there any prayer by the applicant to hand over the property to the Receiver. It it difficult to see how the case could come under S. 52 at all.

Further whether the term " Receiver " used in S. 52 is restricted to Receiver appointed after the adjudication, or will apply to an interim Receiver appointed under S. 20, and whether the application under that section is restricted to one by the Receiver or may be made by the insolvent or anyone else both of which points raise questions of difficulty which it is not necessary to answer in this case, it is perfectly clear to us that an application under S. 52 to the executing Court

to deliver property to the Receiver can only be a valid application if the receiver has been clothed by the insolvency Court with powers to take possession of the insolvent's property. To hold otherwise would open the way e. g., for such a delivery of the insolvent's property to an interim Receiver in the teeth of a refusal by the Court to confer on him powers to take delivery. In the present case the interim receiver was not clothed with powers to take possession of the insolvent's property. In this view the District Munsif's order was correct, the District Judge had no jurisdiction to interfere :(1) because there was no request before him that the property was delivered to the Receiver and (2) because the Receiver was not authorised to take delivery. The order must be set aside and the District Munsif's order restord with costs.

A. A. A. O. No. 2 of 1924 : It follows that the sale should have been confirmed by the District Munsif, as no valid application to stop it had been put in before him within 30 days of the sale.

We allow the appeal. The appellant will get his costs in the lower Courts and not in this Court.

Appeal allowed.

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* A. I. R. 1926 Madras 607

REILLY, J.

(*Koduri*) *Venkataramayya*—Defendant—Appellant.

v.

(*Thumulluri*) *Punnayya* — Plaintiff—Respondent.

Second Appeal No. 209 of 1923, Decided on 4th September 1925, from the decree of the Sub-J., Masulipatam, in Appeal Suit No. 163 of 1921.

* *Evidence Act, S.* 115—*Minor selling his property intentionally representing to be major—He is not estopped from denying that he was a major—If he claims back property Specific Relief Act, S.* 41, *applies.*

Where a minor selling his property dishonestly represents to the vendee that he is a major and that vendee believes that representation and acts on it in taking the sale deed from the minor as a major, the minor is not estopped under S. 115 from denying that he was a major at that date : [*Leslie* v. *Shiell* (1914) 3 *K. B.* 607 *Dist*; *A. S. No.* 89 of 1920, *Foll.*] But if he claims a declaration that the sale is void under S. 41 of the Specific Relief Act that relief may be granted to him on the condition that he makes such compensation to defendant as justice may require. 7 *L. W.* 124, *Ref.* [P 607 C 2, P 608 C 1, 2]

B. Satyanarayana—for Appellant.

B. Somayya—for Respondent.

Judgment.—Plaintiff and his elder brother sold certain property to defendant under Ex. 1 in 1915. He has sued for a declaration that Ex. 1 is void so far as it relates to his 1/2 share of the property on the ground that he was a minor when he joined his brother in executing it and for the partition and recovery of his half share. The District Munsif dismissed the suit ; but on appeal the Subordinate Judge has made the declaration prayed for and has decreed that the property be divided and plaintiff's half share be delivered to him but he has made all this conditional on plaintiff depositing in Court within 3 months Rs. 1,250, that is half the amount of the purchase money paid by defendant, failing which the suit will be dismissed. Defendant appeals to this Court.

It has been found by both the lower Courts that plaintiff was a minor when he executed Ex. 1 but that he dishonestly represented to defendant at that time that he was a major and that defendant believed that representation and acted on it in taking the sale deed from plaintiff as a major, that is the plaintiff intentionally caused defendant to believe, that he was a major and to act on that belief. Both the lower Courts are of opinion that plaintiff is not estopped in this case from pleading minority. Defendant alleged in his written statement that plaintiff was a major at the date of Ex. 1. . It is urged for defendant that as that was defendant's case and as it was found that plaintiff intentionally caused defendant to believe that he was a major and to act on that belief, the lower Courts were not at liberty to find that plaintiff was a minor at the date of Ex 1. Plaintiff was estopped under S. 115 of the Evidence Act from denying that he was a major at that date and therefore we have no knowledge and must carefully guard ourselves against acquiring any knowledge that he was not then a major. That appears to be the logical result of applying S. 115 of the Evidence Act to the facts found in this case, there being nothing in the section itself to confine it to persons other than

minors or to preclude it from affecting a minor who in fact has intentionally caused another party to believe a thing to be true and to act upon that belief. But that is the very position taken up in *Dadasaheb Dasrathrao* v. *Bai Nahani* (1) which was expressly dissented from by Coutts Trotter, J. (now C. J.) in *Raghavayya* v. *Subbayya* (2). In that case, in which the prayers were similar to those in this case it was proved that at the time of the sale deed the plaintiff was a minor but not that he had represented that at that time he was a major. It is not therefore as accepted by the lower Courts an authority that plaintiff is not estopped in the present case from pleading his minority. But it has been brought to my notice that in A. S. No. 89 of 1920 on the file of this High Court (unreported), in which the original Court had found that a defendant who had executed a mortgage deed when a minor, fraudulently representing to the mortgagee that he was a major and causing the mortgagee so to believe, was liable to refund the mortgage money and eventually made a preliminary decree for sale as on a valid mortgage. Wallis, C.J., and Krishnan, J. laid down that the defendant was not estopped from pleading his minority and dismissed the suit. In doing so they quoted as authorities *Guruswamy Pantulu* v. *Budhkarn Khajanchee* (3) from the very brief report of which it appears that a defendant who when a minor had executed a mortgage deed, was held by Wallis, C. J., and Sadasiva Aiyar, J. not to be estopped from proving that he was a minor at the date of execution even if he had so misrepresented himself as a major and *Leslie* v. *Shiell* (4). It was *Leslie (R.), Ltd.* v. *Shiell* (4) which Coutts Trotter, J. regarded as sufficient to destroy the value of the Bombay decision in *Dadha Saheb Dasratha Rao* v. *Bai Nahani* (1) and was also treated as the leading authority in *Guruswamy Pantulu* v. *Lall Khajanchee* (3). As Coutts Trotter J, pointed out *Leslie (R.), Ltd.* v. *Shiell* (4) has been mentioned with approval by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (5). But with great respect I may perhaps point out that *Leslie (R.), Ltd.* v. *Shiell* (4) has little to do with estoppel. There it was part of the plaintiff's case that the defendant was a minor at the time of the transaction concerned—indeed he was still a minor when the writ was issued—and the decision was that the plaintiffs had not any of the remedies claimed against the defendant, who had obtained a loan from them by misrepresenting himself as a major. The approval of *Leslie (R.), Ltd.* v. *Shiell* (4) expressed by the Privy Council in *Mahomed Syedol Ariffin* v. *Yeoh Ooi Gark* (5) appears to have had no reference to any question of estoppel and in that case it was not found that the mortgagee plaintiff actually believed that the minor concerned was a major. Several other cases of this and other Courts have been quoted before me ; but I do not think it necessary to discuss them now. I think I am clearly bound by the the decision of a Bench of this Court in A. S. No. 89 of 1920 to find that plaintiff was not estopped from proving that he was a minor at the date of Ex. 1. The appeal on that point fails.

Plaintiff has filed a memorandum of objections appealing against the Subordinate Judge's order that he must deposit half the purchase money. I do not think that *Leslie (R.), Ltd.* v. *Shiell* (4) and *Guruswamy Pantulu* v. *Lall Khajanchee* (3), on which Mr. Somayya has relied to show that a defendant who when a minor has obtained money on loan or mortgage by representing himself as a major cannot be compelled to refund it. are of much interest in connexion with this aspect of the present case. Here plaintiff comes to Court and asked for relief by way of a declaration that Ex. 1 is void so far as it relates to his share of the property, and under S. 41 of the Specific Relief Act that relief may be granted to him on the condition that he makes such compensation to defendant as justice may require. *Mallacheruvu Raghavayya* v. *Mallacheruvu Subbayya* (2) is authority for that if any is required. Nor is it necessary in my opinion to attempt to trace in any detail where the purchase money for plaintiff's share of the property went or to attempt in such a case as this to distinguish between restitution and repay-

(1) [1917] 41 Bom. 480=19 Bom. L. R. 561.
(2) [1918] 7 L. W. 124.
(3) [1919] 10 L. W. 225.
(4) [1914] 3 K. B. 607=83 L. J. K. B. 1145=111 L. T. 106=58 S. J. 453=30 T. L. R. 460.
(5) [1916] 2 A. C. 575 = 43 I. A. 256. (P. C.)

ment. The Subordinate Judge has found that except an advance payment of Rs. 100 made to plaintiff's brother the whole of the purchase money was paid to plaintiff and his brother jointly and that plaintiff derived full benefit from the purchase money. In the circumstances the fact that the disposal of Rs. 400 out of the total purchase money Rs. 2,500 has not been shown by the evidence does not affect the propriety of the latter finding. An attempt has been made on plaintiff's behalf to question this finding at the hearing in other respects ; but as plaintiff has not had the evidence printed he cannot succeed in that attempt. Since the date of Ex. 1 plaintiff and his brother have become divided and plaintiff is in possession of his share of the family property. In the circumstances the Subordinate Judge's decision to make plaintiff's success in the case conditional on his payment of the Rs. 1,250 appears just and proper. The objection in regard to mesne profits which has been raised in plaintiff's memorandum, has not been argued before me.

An additional ground of appeal has been filed subseqently by defendant to the effect that plaintiff should have been directed also to pay him Rs. 150, half the amount spent by defendant in improving the land while in his possession since the date of Ex. 1. About this there is only the vague evidence of defendant himself, unsupported by any accounts. The point does not appear to have been urged before the Subordinate Judge. I see no sufficient reason to interfere with the Subordinate Judge's decision in this respect.

Both the appeal and the memorandum of objections are dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 609

PHILLIPS AND RAMESAM, JJ.

Rama Aiyar and *others*—Plaintiffs—Appellants.

v.

Narayanasami Aiyar and *others*—Defendants—Respondents.

Appeal No. 368 of 1921, Decided on 15th October 1925, from the decrees of the Sub-J., Mayavaram, in O. S. No. 54 of 1918.

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(a) *Hindu Law—Reversioners—Bona fide compromise by widow in the interests of the estate is binding.*

A bona fide compromise of a litigation, by a Hindu widow representing the reversioners, in the exercise of her discretion and in the belief that it would be in the best interests of the estate, is binding on the reversioners. [P 610 C 2]

* (b) *Family arrangement—Settlement of doubtful rights is binding on all parties—Spes successionis cannot be dealt with—Contingent right may be dealt with by turning it into vested right by means of surrender.*

A bona fide family settlement of disputes or doubtful rights is binding on all the parties to the settlement, but where the object of the settlement is to affect a contingent reversionary interest in the nature of a spes successionis, the only way of doing it is by means of a surrender, accelerating the reversion and converting its contingent nature into a vested interest and thus destroying its character as a spes successionis, as a spes successionis cannot be dealt with in anticipation. 42 *Mad.* 523, *Foll.* (*Stapleton* v. *Stapleton* 21 *L. J. Ch.* 434). [P 611 C 1]

(c) *T. P. Act, S.* 3—*Attestation—Knowledge of contents cannot be presumed from attestation.*

Mere attestation of the sale deed cannot amount to a knowledge of the contents. [P 612 C 1]

(d) *Hindu Law—Widow—Gift of whole interest of the widow is good until questioned after reversion falls in.*

The gift by widow of the whole interest in the property is good against all the world until the reversion falls in, and even then it is liable to be questioned by the actual reversioners. Only when so questioned, if the attack is successful, the interest terminates. [P 612 C 1]

(e) *Hindu Law—Widow—Surrender is complete effacement and must be of whole property to all existing reversioners.*

As surrender is an effacement which opens the estate of the deceased husband to his next heirs at that date, the renunciation should be in favour of all the then reversioners and of all the properties. [P 612 C 2, P 613 C 1]

* (f) *Transfer of Property Act, S.* 51—*Bona fides is compatible with ignorance of law and to some extent with negligence.*

Bona fides is not incompatible with ignorance of law, nor is it incompatible with a certain degree of negligence. The degree of negligence is, of course, a matter to be determined according to the circumstances of each case ; 30 *Mad.* 197 *Ref.* [P 613 C 2]

T. R. Venkatarama Sastriar and *M. S. Venkatarama Aiyar*—for Appellants.

T. R. Ramachandra Aiyar, N. A. Krishna Aiyar and *P. J. Kuppanna Rao*—for Respondents.

Ramesam, J.—This appeal arises out of a suit by the reversioners of one Ananthakrishna Aiyar for possession of his properties after the death of last intermediate female in 1918. The

Subordinate Judge dismissed the suit. The plaintiffs appeal.

Ananthakrishna Aiyar died in 1858 leaving a widow and two daughters. The widow died about 1868-70. Her first daughter died in 1902. She had three sons, all of whom died before 1918 leaving no issue. The second daughter died in 1918 leaving the five plaintiffs surviving her. They are, therefore, reversioners to the estate of Ananthakrishna Aiyar and are prima facie entitled to his properties. (Then the pedigree of the family was given.) The facts on which the defendants resist the suit are as follows:

On 22-7-1867 the widow executed four documents (Exs. III, IV, V and VI). By Ex. III she purported to sell her house to her eldest grandson Ramaswami Aiyar for Rs. 400. The object of this sale was ostensibly to pay off Rs. 300 promised to Lakshmi Ammal at the time of her marriage and Rs. 100 similarly to Thailammal. By Ex. V she conveyed lands in Radhanallur worth Rs. 380 and moveables of the value of Rs. 20 to the same Ramaswami Aiyar in consideration of his having performed the funerals of Ananthakrishna Aiyar and of his undertaking to perform also her funerals. In Anathandapuram she had 1/2 pangu of lands. She gave away 1/4th pangu to Ramaswami Aiyar by Ex. VI and the other 1/4th pangu to Ramu Aiyar (the eldest son of the second daughter) by Ex. IV. The defendants contend that these documents amount to a surrender by Thayammal accelerating the reversion; they also amount to a bona fide family settlement and that no reversion devolved on plaintiffs in 1918. The plaintiffs are also said to be estopped. The Subordinate Judge upheld these contentions.

In 1902, after the death of Thailammal, Lakshmi Ammal filed a suit to recover the properties conveyed to Ramasami Aiyar by Exs. III, V and VI and afterwards alienated by him and his brother Vaidyanatha Aiyar to the predecessors-in-title of the present defendants under Exs. XIV and XV in 1884, on allegations which were obviously untenable (O. S. No. 12 of 1902). She withdrew it (Ex. I. E. dated 9-9-1903). The present suit is filed to recover the same properties, the plaintiffs being in possession of the properties conveyed by Ex. IV. The defendants also contended that the present suit is barred by the said withdrawal. The Subordinate Judge upheld this contention relying on 12 *L. W.* short notes, page 25. He seems to have been misled by the short note which does not state the facts fully. The case is reported in *Kadakkarai Nadan* v. *Nadakkannu Nadan* (1). What was held was that a bonafide compromise of a litigation by a Hindu widow (suit on behalf of the estate and therefore representing the reversioners) in the exercise of her discretion and in the belief that it would be in the best interests of the estate is binding on the reversioners, a principle impliedly recognized in 1863 by the decision in *Katama Natchiar* v. *Rajah of Shivagunga* (2). In the present case, Lakshmi Ammal was not acting for the estate and on behalf of the reversioners. She was suing to recover possession of her limited estate of a daughter. There was no compromise but a withdrawal of the suit. The decision relied on by the Subordinate Judge does not apply. On principle, it it very difficult to understand how the present suit in 1918 by the plaintiffs' on correct allegations of fact, can be barred by the withdrawal of a suit in 1903 by their mother on false allegations of fact made to avoid the obvious bar by limitation. The plaintiffs' suit in 1918 not being so barred Lakshmi Ammal's succession opened on Thayammal's death in 1868-70, and if she chose to question Exs. III, V and VI she ought to have done so within twelve years after her mother's death. But plaintiffs' right opened in 1918 and her withdrawal of her claim can have no bearing on plaintiffs' suit. Mr. Ramaswami Aiyar, the learned vakil for the respondents, who argued the rest of the case most strenuously, while not abandoning this point, could urge no argument to support it. The cases of *Ramalinga Mudali* v. *Arumuga Mudali* (3) and *Surja Reddi* v. *Subba Reddi* (4) (where the earlier suit was by the reversioner himself) are against the contention.

I now go to the merits of the case. As I have already said the Subordinate Judge upheld the contentions of the

(1) [1921] 13 L. W. 533=(1921) M. W. N. 342.
(2) [1861-64] 9 M. I. A. 539=2 W. R. 31 (P. C.).
(3) [1917] 33 M. L. J. 471.
(4) [1916] 39 Mad. 987=31 M. L. J. 48=(1916) 2 M. W. N. 1=4 L. W. 1 (F. B.).

defendants, that the transactions of 1867 amount to a surrender by Thayammal, also constitute a bona fide family arrangement binding on all the parties, and also estop the plaintiffs.

It will be convenient to dispose of the last two contentions first, as it seems to me that they are obviously untenable. In discussing these questions I assume that the transactions of 1867 do not amount to a surrender, For, if they amount to a surrender, the defendants are entitled to succeed on that ground. We have to see at present, whether any ground of defence other than that the transactions operate as a surrender is available to the defendants.

It is well established that a bona fide family settlement of disputes or doubtful rights is binding on all the parties to the settlement [the rule in *Stapleton* v. *Stapleton* (5) and *Williams* v. *Williams* (6)] has always been applied in India, but where the object of the settlement is to affect a contingent reversionary interest in the nature of a spes successionis, the only way of doing it is by means of a surrender, accelerating the reversion and converting its contingent nature into a vested interest and thus destroying its character as a spes successionis. That a spes successionis cannot be dealt with in anticipation was laid down so early as in *Bahadur Singh* v. *Mohar Singh* (7). The following sentences of Lord Davey have become classic.

According to Indian law, the claimants of 1847 were but expectant heirs with a spes successionis. The appellants claim in their own right as heirs of Mohar when the succession opened, and it would be a novel proposition to hold that a person so claiming is bound by a contract made by every person through whom he traces his descent.

This law has been faithfully applied in India till 1908 when some confusion was caused in Indian Courts by the supposed dictum, to the contrary in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh* (8) of Sir Andrews Scoble. At page 16 of the *Indian Appeals* (at page 21 of *I. L. R.*, 30 *All.*) he said :

The appellants who claim throuh Natadin Sing and Baignath Singh must be held bound by the consent of their fathers.

It gave rise to the Full Bench decision in *Rangappa Naik* v. *Kamti Naik* (9) and various other conflicting decisions in other Courts till all doubts were set at rest by the decision of the Judicial Committee in *Rangasami Goundan* v. *Nachiappa Goundan* (10). The principle that an interest in the nature of a spes successionis cannot be affected has been meanwhile re-affirmed by the Judicial Committee in *Amrit Narayan Singh* v. *Gaya Singh* (11). In that case, the appellants' father expressly purported to act for his wife and son in the reference to arbitration and the compromise that followed. The Judicial Committee held that the appellant was not bound by the proceedings. In *Rangasami Goundan* v. *Nachiappa* (10) Lord Dunedin said at page 82 :

But that is impossible unless the reversioner has a vested interest, whereas it is settled that he has only a spes successionis.

Mr. Ramachandra Aiyar relied on the cases in *Sureshwar Misser* v. *Maheshrani Misrain* (12) ; *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) ; and *Sartaji* v. *Ramjas* (14). The first case does not help the respondent as it was held that the compromise effected a surrender. So also *Sartaji* v. *Ramjas* (14) was a case of a surrender. In *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) it was held that a reversioner who actually consented to an alienation by a widow is himself estopped though it may not bind his co-reversioners. It is not a case of a reversioner tracing his descent through a consenting party. In *Bajrangi Singh* v. *Manokarnika Baksh Singh* (8) the point was not decided. In *Rangasami Goundan* v. *Nachiappa Goundan* (10) at page 87 Lord Dunedin said : " of course something might be done before that time which amounted to an actual election to hold the deed good."

Mr. Ramachandra Aiyar relied on the following facts in the present case to attract the application of *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13).

1. The 1st plaintiff Ramu Aiyar attested the sale deeds Exs. XIV and XV in 1884.

(5) 21 L. J. Ch. 434=2 Sim. (N. S.) 212.
(6) 20 L. J. Ch. 280.
(7) [1902] 24 All. 94=29 I. A. 1=6 C. W. N. 169=4 Bom. L. R. 233=12 M. L. J. 56=8 Sar. 152 (P. C.).
(8) [1908] 30 All. 1=35 I. A. 1=12 C. W. N. 74=9 Bom. L. R. 1348=6 C. L. J. 766=5 A. L. J. 1=17 M. L. J. 605=11 O. C. 78 (P. C.).
(9) [1908] 31 Mad. 366=18 M. L. J. 369 (F. B.).
(10) [1919] 42 Mad. 523=46 I. A. 72 (P. C.).
(11) [1918] 45 Cal. 590=45 I. A. 35 (P. C.).
(12) [1921] 48. Cal. 100=47 I. A. 233 (P. C.).
(13) A. I. R. 1923 All. 387 (F. B.).
(14) A. I. R. 1924 All. 166.

2. He asserted his right to the lands covered by Ex, IV in a claim petition in 1905 in execution of the decree in his mother's suit (O. S. No. 12 of 1902 Ex. I-f).

3. There was a partition of the properties, given by Ex. IV between the plaintiffs (Ex. XXII.)

I do not see how the attestation of Exs. XIV and XV can affect the plaintiffs. In the first place, mere attestation of the sale deeds cannot amount to a knowledge of the contents: *Parsotam Gir* v. *Dat Gir* (15) nor to concurrence; *Raj Lukhee Debea* v. *Gokool Chandra Choudhry* (16). In any event, it cannot amount to such an affirmation of the conveyances by the widow in 1867 as to "amount to an actual election to hold the deed good." As to the claim petition (Ex. I-f) and the partition (Ex. XXII), I am unable to see how they can help the respondent. Under Ex. IV Ramu Aiyar had some interest. It did not deal with a mere life interest: see *Modhu Sudan Singh* v. *Rooke* (17) and *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (18). The gift of the whole interest in the property is good against all the world until the reversion falls in and even then it is liable to be questioned by the actual reversioners. Only when so questioned, if the attack is successful, the interest terminates. A person who asserts in 1905 such interest as he had or divides it with his brothers in 1907 cannot be precluded by such assertion or partition from asserting his claim as a reversioner in 1918. The plaintiffs had some interest between 1867 and 1918 and dealt with it for what it was worth. In 1867, the 1st plaintiff was a minor and could not consent to a family arrangement so as to make *Fateh Singh* v. *Thakur Rukmini Ramanji Maharaj* (13) applicable. The plaintiffs 2 to 4 were not born in 1867 nor were they parties to Ex. I-f in 1906; neither did they attest any sale deeds and the argument cannot possibly apply to them. *Jiwan Singh* v. *Misri Lal* (19) *Nurul Hossein* v. *Sheosahai* (20); *Lala Rup Narain* v. *Gopal Devi* (21) are cases where the reversioners were held not to be estopped by having had some connexion with the sales by the widow. I think that the present case is stronger than they and than *Rangasami Goundan* v. *Nachiappa Goundan* (10) where Lord Dunedin said at page 87 of the *Indian Appeals*:

> Now at the time of the mortgage the plaintiff did not know whether he would ever be such a reversioner in fact as would give him a practical interest to quarrel with the deed of gift. Why should he not take all the mortgagers could give or propose to give? To hold that by so doing he barred himself from asserting his own title to part of what was mortgaged seems to their Lordships quite unwarrantable proposition.

The decision in *Joga Yerrayya* v. *Salleyya Patrudu* (22) supports the appellant. I am therefore of opinion that, unless the deeds of 1867 can amount to a surrender, there is no defence available in the suit.

This leads me to the discussion of what is the most important point, viz., whether Exs. III, IV, V and VI or some of them amount to a surrender. The requirements of a surrender are now well established by various decisions of the Privy Council. It is unnecessary to refer to them in detail. The leading case is *Behari Lal* v. *Madho Lal* (23). In *Rangasami Goundan* v. *Nachiappa Goundan* (10) Lord Dunedin describes it as an effacement which opens the estate of the deceased husband to his next heirs at that date. In the present case, as the intermediate heirs consist of not only the widow but also the daughters, in order to effectuate a surrender in favour of daughters' sons there must be an effacement of the widow and the daughters. The renunciation must be of all the properties. In *Basangavada* v. *Basangavada* (24) Beaman, J., describes it as the obliteration of a bar. The Subordinate Judge has stated the requirements of a surrender correctly, but I regret I am not able to agree with his conclusion.

Let us look at the situation in 1867. There were then 5 daughters' sons, three of the elder daughter and two of the younger daughter, Rama Aiyar, the 1st plaintiff, and another, Krishna Aiyar, since deceased. There is no surrender in favour

(15) [1903] 25 All. 296=1903 A. W. N. 50.
(16) [1869] 13 M. I. A. 209=12 W. R. 47=3 B. L. R. 57=2 Suther. 275=2 Sar. 518 (P. C.).
(17) [1898] 25 Cal. 1=22 I. A. 164=1 C. W. N. 433=7 M. L. J. 127=7 Sar. 194 (P. C.).
(18) [1907] 34 Cal. 329=34 I. A. 87=11 C. W. N. 424=5 C. L. J. 334=9 Bom. L. R. 602 =17 M. L. J. 154=4 A. L. J. 329 (P. C.).
(19) [1896] 18 All. 146=23 I. A. 1=6 M. L. J. 47=6 Sar. 675 (P. C.).
(20) [1893] 20 Cal. 1=19 I. A. 221=6 Sar. 205 (P. C.).
(21) [1909] 36 Cal. 780=36 I. A. 103 (P. C.).
(22) A. I. R. 1923 Mad. 168.
(23) [1892] 19 Cal. 236=19 I. A. 30=6 Sar. 88 (P. C.).
(24) [1915] 39 Bom. 87=16 Bom. L. R. 699.

of all the five daughters' sons. It is said for the respondent that the intention of the widow was to give the property to all the five and the later enjoyment is relied on for this purpose. It does not appear that the properties covered by Exs. III, V and VI were shared by Ramaswami Aiyar and his two brothers. Only one of them joined in the reconveyance of these properties under Exs. XIV and XV. As to the properties covered by Ex. IV the later partition under Ex. XXII was between the plaintiffs and their brother Krishna Aiyar, four of whom were unborn in 1867. I do not see how this supports a renunciation in favour of the 1st plaintiff and Krishna Aiyar only. A more insuperable objection seems to me that the renunciation should be in favour of all the then reversioners and of all the properties. (His Lordship then, while dicussing the evidence, proceeded.) Again, the surrender must be of all the husband's properties. Perhaps the properties covered by Exs. III, IV, V and VI were all she then had, but there is no evidence to prove this. It is unnecessary to further discuss this point in view of the other difficulties pointed out by me. The truth seems to be that the idea of a surrender was then not known, otherwise there is no reason why the parties should disguise the real nature of the transaction (a surrender and partition according to the respondent) and carry it out in some other form which does not effectuate the intention of the parties.

Of the cases relied on by the respondents *Surea Rao* v. *Suryanarayana Jagapathi* (25) is a case in which the surrender (which was effected by the document of 1890) was in favour of both the daughters' sons under a single document. The case in *Manugarra Satyalakshmi Narayana* v. *Jagannatham* (26) came up on second appeal with a finding that there was an oral surrender. In *Bhagawat Koer* v. *Dhanukdhari Prashad Singh* (27) the only difficulty was that the documents were drawn up on the footing of an acknowledgment of right and their Lordships held that this does not matter. There was only one reversioner, Mahabir, and a complete self-effacement of the widow in his favour. Here we have a transfer of one set of properties to one group of reversioners (at the best) and of another set to another group and we have to introduce a fictitious partition to read the transaction as a surrender. The cases do not help the respondents. I have therefore to disagree with the conclusion of the Subordinate Judge.

The hardship is only apparent. The transactions of 1867 were given complete effect up to 1918 when the reversion falls in and the Hindu law takes its course. It is just in such a case that one has to guard oneself against sympathy with the respondents arising out of a vague feeling, that an old transaction should not be cancelled. The truth is there is no unsettling of an old transaction. The old transaction has had its full legal effect and new rights arose in 1918. The appeal will have to be allowed. But before doing so, a finding has to be called for on the 14th, 15th, 17th, 19th, 20th and 21st issues. Time : one month, 10 days for objections.

Reilly, J.—I agree.

In compliance with the order in the above judgment the Subordinate Judge of Mayavaram submitted findings called for and the Court delivered the following

Judgment

The main question for consideration is whether Defendants 1, 3 and 4 are entitled to compensation for the building that they have erected on the land covered by the sale-deed, Ex. III. The Subordinate Judge has found that their father, who actually effected the improvements, did not bona fide believe that he was the owner of the property. This question of bona fides is a somewhat difficult question and it must depend upon the circumstances of each case. It has been held that bona fides is not incompatible with ignorance of law, *Durgozi Rao* v. *Fakeer Sahib* (28) nor is it incompatible with a certain degree of negligence, as is clear from the definition in the General Clauses Act, S. 3, Cl. 20. The degree of negligence is, of course, a matter to be determined according to the circumstances of each case. In this case, it is as well to set out what are the actual facts.

In 1867 one Tayammal sold this property to her daughter's son under Ex. III and the only evidence available shows that money was paid. At the same time she executed another sale deed and two

(25) [1921] 14 L.W. 29=41 M.L.J. 208=(1921) M.W.N. 431.

(26) [1917] 34 M.L.J. 229=6 L.W. 765=(1917) M.W.N. 854.

(27) [1920] 47 Cal. 466=46 I.A. 259 (P.C.).

(28) [1907] 30 Mad. 197=17 M.L.J. 9.

gift deeds which disposed of the whole of the rest of her property in favour of the same grandson and another grandson by her younger daughter. In 1884 the purchaser, under Ex. III, and his younger brother executed Ex. XIV in favour of the 1st defendant's father, and it is noticeable that this document is attested by the 1st plaintiff in this suit. In 1898 the improvement was effected to an extent of Rs. 4,000 by the defendant's father, and he subsequently made an addition to the building at a cost of Rs. 1500 in 1903. We see thus that for 30 years the alienation was not questioned by anybody ; not even by the daughters nor by their sons. It was only in 1902 that one of the daughters brought a suit. It is contended that inasmuch as the defendants' father in 1902 raised no real defence to the suit by the reversioners, it must be deemed that he had no bona fide belief in his title, but it must be remembered that this statement was filed after consultation with a legal adviser who probably told him that his case was bad as has now been found to be the case, but it does not follow that in 1898 he did not believe that his case was good. The whole of the circumstances attending the original alienation by the widow are somewhat peculiar and they were acquiesced by practically all the members of the family then alive ; and possession having been undisturbed for 30 years, we think that it is quite reasonable to suppose that the defendants' father believed that he had a good title, otherwise he is hardly likely to have squandered such a large sum of money on property which he knew was likely to pass out of his possession. As regards the improvement made in 1898, therefore, we must hold that the defendants' father bona fide believed that he was the owner of the property, but the improvement made in 1903 stands on a very different footing. Then suits had been filed by Tayammal's daughter and by her grandsons for the recovery of the property and for declaration respectively. In defence of the latter suit, after taking legal advice, the defendants' father had nothing to say. Notwithstanding this, a month or two before the suit was actually disposed of with findings against his title, he proceeded to spend Rs. 1,500 on the building. At that time it certainly has not been shown that he still believed that he was the owner of the property. As regards this latter sum the defendants are not entitled to compensation.

There remains then the question of the value of the improvements. The whole house, as it now stands, has been valued by the Commissioner at Rs. 10,000, and in coming to this estimate, he has adopted the rates in building materials prevalent in the neighbouring town of Mayavaram. These rates are apparently excessive for building a house in a village, and when we remember that the money actually spent on the building in 1898 and 1903 was only Rs. 4,000 and Rs. 1,500, it is difficult to believe that in a country village the value has now risen to very nearly double that amount. If we take it that the value has increased by about 50 per cent. we shall be nearer the correct value and we accordingly adopt the figure of Rs. 8,000 as the value of the whole structure. Defendants, who are entitled to compensation in respect of Rs. 4,000, out of Rs. 5,500 spent by their father, are entitled to 8/11th of Rs. 8,000 or roughly Rs. 5,800. We accordingly fix the compensation due to them at Rs. 5,800.

The question of election by the transferee was raised and it was contended that the choice lay with the transferee under the provision of S. 51, Transfer of Property Act ; but we are satisfied that under S. 51, the choice is with the person evicting. He can either pay the value of the improvement and take the land or sell the land to the purchaser. If the portion that was built in 1903 can be definitely ascertained, Defendants 1, 3 and 4 will be allowed to remove the materials thereof in the presence of an Officer of the Court and of the plaintiff or his son, so as not to cause any diminution in the value of the remainder of the building. This removal must be carried out within one month of ascertainment by the Court whether this part of the building can be satisfactorily identified.

We accept the findings on the other issues. The future mesne profits will have to be ascertained by the lower Court before passing a final decree.

The respondents will pay the appellant's costs of the appeal in the lower Court.

Decree modified.

* * A. I. R. 1926 Madras 615

Full Bench

COUTTS-TROTTER, C. J., AND KRISHNAN AND BEASLEY, JJ.

Addepalli Venkata Gurunadha Rama Seshayya—Plaintiff—Appellant.

v.

Sri Tripurasundari Cotton Press, Bezwada—2nd Defendant—Respondent.

Letters Patent Appeal No. 35 of 1924, Decided on 28th October 1925, from the judgment of Wallace, J., in Second Appeal No. 593 of 1921, reported in *A. I. R.* 1924, *Mad.* 721.

* * (a) *Limitation Act, Art.* 116—*Deposit of Memorandum and Articles of Association is not registration within the Article.* 42 *Mad.* 33 *Overruled.*

The deposit of the memorandum and articles of Association of a limited Company with the Registrar of Joint Stock Companies under the direction of the Act is not registration as contemplated by Art. 116 ; 42 *Mad.* 33 *Overruled.* [P 620 C 2]

* * (b) *Limitation Act, Arts.* 115 *and* 116—*Declaration of dividend by a Limited Company—No contractual relation is created between shareholder and Company:* 42 *M.* 33 *Overruled.*

The relation constituted between the shareholder and the Company on a declaration of a dividend by the Company is not a contractual relation in the sense contemplated by Arts. 115 and 116 in respect of the dividend. 42 *Mad.* 33 ; *Overruled.* [P 620 C 2]

* * (c) *Limitation Act, Arts.* 120, 115, 116 *and* 62 — *Suit to recover dividend from a Limited Company* — *Art.* 120 *applies.* 42 *Mad.* 33, *Overruled.*

A suit by a shareholder of a Limited Company for recovery of arrears of dividend is a claim for debt and is governed by Art. 120. It is not a claim arising out of contract within the meaning of Art. 115. 42 *Mad.* 33, *Overruled.* [P 620 C 1]

K. N. Rajagopala Sastri—for Appellant.

P. Satyanarayana Rao — for Respondent.

Order of Reference.

Venkatasubba Rao, J.—This is a Letters Patent appeal from the judgment of Wallace, J. One Subba Rao was a shareholder of the second defendant Company. A money decree was passed against him and in execution of it certain shares belonging to him together with the dividends that had accrued were attached and sold. The plaintiff who became the purchaser at the Court-sale has instituted the present suit for the recovery of the dividends. The short question to be decided is : What is the article of of the Limitation Act that is applicable to the case ? The defendant Company contends that the period of limitation is three years, whereas the plaintiff urges that the period is six years. Wallace, J., was of the opinion that the suit would have been in time had the plaintiff been a shareholder but that the plaintiff would not fall under that article.

The ground of his decision is that *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), which lays down that a suit for return of deposit is governed by Art. 116 is inapapplicable, if the suit is brought not by a shareholder between whom and the Company there is a contractual relation but by a transferee from such a shareholder. With great respect, I am unable to agree. Art, 116 applies to a suit " for compensation for the breach of a contract in writing registered." The article does not say that the suit must necessarily be by the promisee against the promisor ; if, for instance, the claim is founded upon a registered bond, can it be said that a suit by a transferee from the payee under the bond does not come under this article? The suit being for a dividend that has accrued, is in the nature of a claim for money due and the position of the transferee for this purpose cannot be different from that of the shareholder himself. The case cannot therefore be distinguished as has been done by Wallace, J., from *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1).

In my opinion the real question that arises is : Does Art. 116 apply at all ? In other words, does *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1) correctly state the law ?

Sir John Wallis C. J., and Seshagiri Aiyar, J., held in it that a suit by a shareholder against a Company is governed by Art. 116. With the utmost respect for the learned Judges I feel bound to say that this decision is based on a fallacy. Art. 116 applies to contracts in writing registered. Is the contract between the shareholder and the Company a contract of this description ? The learned Judges having held that the Memorandum and the Articles of Associa-

(1) [1918] 42 Mad. 33 = 35 M. L. J. 253 = 8 L. W. 354.

tion constitute the contract between the shareholder and the Company took the view that these two documents must be deemed to be registered within the meaning of Art. 116. Is this construction correct? The word "registered" has not been defined in the Limitation Act but its definition is to be found in the General Clauses Act of 1897. S. 3, Cl. 45, of that Act says:

'Registered' used with reference to a document shall mean registered in British India under the law for the time being in force for the registration of documents.

Can it be said that the Indian Companies Act embodies any portion of "the law for the time being in force for the registration of documents?" The Act deals with the registration of Companies and not registration of documents. Section after section refers to the registering of a Company. S. 2, Cl. 2, defines a Company as one registered under the Act. S. 2, Cl. (15) defines the "Registrar" as a Registrar performing under the Act the duty of registration of Companies. S. 4 prohibits certain partnership unless they are registered as Companies. S. 11 aims against the registration of Companies by names identical with those of Companies already in existence. S. 248 provides for the establishment of registration offices and deals with the offices where Companies shall be registered. It is unnecessary to refer to further sections, but it is clear beyond doubt that it is the registration of Companies and not of documents that is within the purview of the Indian Companies Act.

It is no doubt true that in a few sections the word "registered" is used with reference to the Memorandum and the Articles of Association. After dealing with the registration of these documents (Ss. 17, 18, 22 and 23), the Act proceeds to enact in S. 24 that a certificate of incorporation shall be conclusive evidence that the Association is a Company registered under the Act. But registration of the Articles and Memorandum is merely incidental and the object to be achieved is the registration of the Company. It is not sufficient to say that in the Indian Companies Act there are some stray provisions that deal with the registration of certain documents. The real question is: Does the Indian Companies Act contain any portion of "the law" as contemplated by the General Clauses Act "for the time being in force for the registration of documents?"

I have so far applied a negative test. Where is this law then contained? If we now turn to the Registration Act of 1908 we find the preamble running thus:

Whereas it is expedient to consolidate the enactments relating to the registration of documents, it is hereby enacted as follows.

It is the Indian Registration Act therefore that contains "the law for the time being in force for the registration of documents." It is needless to point out that this Act does not deal with the registration of Memoranda or Articles of Association.

The view I have taken derives some support from Art. 112 of the Limitation Act which gives the period of limitation as three years for a suit to enforce a call by a registered Company. If in the opinion of the Legislature, enforcing a call is enforcing an obligation arising under a registered contract, a period of three years would not have been prescribed; for, under Art. 116, when any contract (whatever its nature may be) is in writing registered, the period of limitation is six years. See *Tricomdas Cooverji Bhoja* v. *Gopinath Jiu Thakur* (2). The general policy of the Act is to prescribe the longer period in the case of obligations arising under a registered contract. If, therefore, Art. 112 in truth refers to such an obligation, the position will be this: Art. 112 will stand apart and be inconsistent with the general scheme and policy of the Act. From this it is a fair inference that the idea underlying Art. 112 is that the obligation in respect of a call does not arise under a registered contract. This article also incidentally shows by its wording that what is registered is the Company and not the Articles or Memoranda.

Section 116, therefore, of the Limitation Act cannot apply to a suit by a shareholder against a registered Company. The learned Judges who decided *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1) came to the opposite conclusion as they felt that a narrow interpretation should not be put upon the words in the General Clauses Act. When two interpretations are possible, one narrow and the other a liberal one, I should certainly not have the slightest hesitation in adopting that

(2) [1916] 44 Cal. 759=44 I. A. 65 (P. C.).

interpretation which accords with justice. But I cannot help feeling in the present case that the construction suggested on behalf of the plaintiff is utterly unsound. It is with the greatest reluctance that I feel compelled, departing from the authority cited, to adopt a view which gives the shorter period of limitation.

The plaintiff's learned vakil suggests that if Art. 116 does not apply, Art. 120, the residuary article governs the case. I cannot accept this contention. Art. 115 applies to suits for compensation for the breach of a contract not in writing registered. It is contended that the Memoranda and Articles do not constitute a contract between the Company and its members. In *Ripon Press and Sugar Mill Co., Ltd.* v. *Nama Venkatarama Chetty* (1), it was held that the obligation to pay a dividend arises from the contract evidenced by these documents. I am prepared to follow this decision in this respect. S. 21 of the Indian Companies Act runs thus :

> The Memorandum and Articles shall, when registered, bind the Company and the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each member, his heirs and legal representatives to observe all the provisions of the Memorandum and of the Articles subject to the provisions of this Act.

This section is almost identical with S. 14 of the English Act. The Companies (Consolidation) Act, 1908. The contention is that although the section says that there shall be deemed to be a covenant on the part of each member, it does not say that the Company is bound by reason of a contract entered into by it. There has been a good deal of conflict of opinion in England on this point and Palmer in his "Company Law" deals in Chap. IV with this subject.

In *Welton* v. *Saffery* (3), Lord Herschell observed :

> It is quite true that the Articles constitute a contract between each member and the Company.

Sterling, J., in *Wood* v. *Odessa Waterworks Company* (4) said :

> The Articles of Association constitute a contract not merely between the shareholders of the Company but between each individual shareholder and every other.

James, L. J., in *Johnson* v. *Lyttle's Iron Agency* (5), referred to the Articles as a contract between the Company and the shareholders. It is unnecessary to multiply references and it is sufficient to refer to the following passage in Buckley's Companies Acts, 1924 Edition, page 28,

> All the authorities as to whether the articles constitute a contract as between the company and its members were reviewed by Astbury, J., in the recent case of *Hickman* v. *Kent Sheepbreeders' Association* (6) who decided that the result of the apparently conflicting decisions and dicta referred to above was that though the articles can neither constitute a contract between the company and an outsider nor give any individual member of the company special contractual rights beyond those of the members (or, quaere, any particular class of members) generally, they do in fact constitute a contract between a company and its members in respect of their ordinary rights as members.

If the articles and memoranda constitute therefore a contract binding on the company as well as on each member, Art. 115 clearly applies to the case and a suit for the recovery of the dividend must be brought in three years from the date when payment becomes due.

As the view I am taking is opposed to that adopted by a Bench of this Court in *Ripon Press and Sugar Mill Company, Ltd* v. *Nama Venkatarama Chetty* (1) and as the point, I understand, is likely to frequently arise in connexion with a company which is now under liquidation, I would refer the following question to a Full Bench :

Is a suit by a share holder against a company for recovery of a dividend governed by Art. 115 or 116 of the Limitation Act ?

If neither article applies, which is the article applicable ?

Madhavan Nair, J.—For deciding this Letters Patent appeal, it has become necessary to consider the question, what article of the Limitation Act governs a suit by a shareholder against a company. *In Ripon Press and Sugar Mill Co. Ltd.* v. *Nama Venkatarama Chetty* (1), it was held by Sir John Wallis, C. J., and Seshagiri Aiyar, J., that Art. 116 applies to such a case. Under this article a period of six years is fixed for suits "for compensation for the breach of a contract in writing registered." The learned Judges in *Ripon Press and*

(3) [1897] A. C. 299 = 66 L. J. Ch. 362 = 45 W. R. 508=76 L. T. 505.

(4) [1889] 42 Ch. D. 636=58 L. J. Ch. 628=37 W. R. 733=1 Meg. 265.

(5) [1877] 5 Ch. D. 687=46 L. J. Ch. 786=36 L. T. 528=25 W. R. 548.

(6) [1915] 1 Ch. 881=84 L. J. Ch. 688=113 L. T. 159=59 S. J. 478.

Sugar Mill Co, Ltd. v. *Nama Venkatarama Chetty* (1), took the view : (1) that the Memorandum and Articles of Association constituted the contract between the share-holders and the company ; and (2) that these two documents must be deemed to be registered within the meaning of Art. 116. Accepting the soundness of the view that the two documents constitute the contract, the learned vakil for the respondent has argued that these two documents cannot be considered to be registered within the meaning of Art. 116. "Registered" according to the General Clauses Act, S. 3, Cl. 45, when used with reference to a document, means "registered in British India according to the law for the time being in force for the registration of documents." According to its preamble, the Indian Registration Act contains the law for the time being in force for the registration of documents. That Act does not contain any special provision for the registration of "Memorandum and Articles of Association." Ss. 17 and 18 of the Indian Companies Act refer to the registration of these documents and S. 22 says that the Registrar of the province in which the registered office of the company is situate shall retain and register them. The Registrar means a Registrar or Assistant Registrar performing under the Indian Companies Act the duty of registration of companies : see S. 2, Cl. (15). S. 23 refers to the effect of registration and S. 24 says that a certificate of incorporation given by the Registrar should be conclusive evidence that the association is a company registered under the Act. As pointed out by my learned brother, S. 2, Cls. (2) and (15), Ss. 4, 5, 11 and 248 indicate that the Indian Companies Act embodies only the law for the "registration of companies, and not any portion of the law for the "registration of documents" for which provision is made in the Indian Registration Act. The wording of Art. 112 of the Indian Limitation Act suggests that what is registered is the "company" and not the "Memorandum" or "Articles of Association." No doubt, there are sections, as already mentioned, in the Indian Companies Act relating to the registration of these two documents, but on the strength of those sections, which deal only with what may be described as matters incidental to the registration of companies, I do not think it can be said that any portion of the law for the registration of documents for the time being in force is contained in the Indian Companies Act.

If this view is accepted, then Art. 115 of the Indian Limitation Act would be the article applicable to a suit by a shareholder against a company ; but the learned vakil for the appellant argues that that article is inapplicable because the Memoranda and the Articles of Association do not constitute a contract between the company and its members and that, therefore, the proper article which would govern the case is Art. 120. As regards the question whether the Memoranda and the Articles of Association constitute a contract, there has been some conflict of opinion in England, but the weight of authority is decidedly against the view put forward on behalf of the appellant. I think it has been rightly held in *Ripon Press and Sugar Mill Co. Ltd.* v. *Nama Venkatarama Chetty* (1), that the right to receive a dividend arises out of the contract evidenced by the Memorandum and the Articles of Association.

In the circumstances pointed out by my learned brother, I agree that the opinion of the Full Bench may be invited on the questions proposed by him.

Opinion

Coutts-Trotter, C. J.—In this case the appellant bought up at a Court auction sale the rights of the judgment-debtor to receive dividends accrued in a limited company of which he was a share-holder. The question that we have to determine, now that the auction purchaser is seeking to enforce his right against the company, is what period of limitation is applicable to such a claim. The Indian Limitation Act is one of those unfortunate pieces of Indian legislation which by trying to provide for everything conceivable very often ends by leaving out cases of the most glaring description. I might take this as a very good instance, for there is no article which provides simpliciter for a debt due, such a debt as would have been the subject of the old common law action in debt, although oddly enough, provision is made by Art. 63 "for money payable for interest upon money due from the defendant to the plaintiff" ; so that a special article is enacted for the interest and nothing is said whatever about the principal debt.

It was suggested that to such cases as this Art. 62 might apply which is "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use." The fact is that the money out of which the dividend has to come is received by the company for its own use and put into its own coffers. Then at a later stage, in accordance with the articles, a dividend is declared by the company in a general meeting on the advice and recommendation of the directors. The very ingenious argument put forward was that as soon as the declaration was made there must be taken to be a notional second receipt by the company, as it were from its right hand and to its left, the second receipt to be deemed to be for the use of the share-holders who will be entitled to the dividend. It is sufficient to say that that is a line of argument which seems quite in conflict with the enactment of the statute as to when the time begins to run, and that is when the money is received, the clear implication being—and it is not inconsistent with the frame of the English cause of action for money had and received—that the money must at the time it came into the hands of the defendant have been there and then put into his hands for the use of the plaintiff. It is quite true that in cases where the party aggrieved is ignorant of the facts the time will only begin to run, not when the money was in fact received by the defendant, but when the plaintiff first became aware of it; but that is a matter of procedure which really does not, except, for a special purpose, fix the time when the money is to be deemed to be received. I think we are constrained to hold that the original receipt by the company is the only receipt upon which Art. 62 would operate and that as that receipt is not for the use of the plaintiff he cannot be brought within Art. 62.

I now pass to the next suggested alternative which is Art. 115, and that is worded as follows:

> For compensation for the breach of any contract, express or implied, not in writing registered and not herein specially provided for;

and if the defendant company can bring itself within the four walls of that article, that carries them home in this case and this action is statute barred. Were the matter res integra, I should myself be strongly inclined to say that an action such as this was not an action for compensation for the breach of any contract. The English and the Irish Courts have quite clearly laid it down that upon the declaration of a dividend a debt immediately becomes payable by the company to each share-holder in respect of the amount of dividend represented by the amount of his holding in shares, and I should have thought therefore that it was not correct to describe the obligation to pay a debt as being compensation for the breach of a contract. But that matter is not res integra because it has been dealt with in a decision under the following Art. 116 of the Limitation Act, by the Privy Council. That is the case of *Tricomdas Coverji Bhoja* v. *Gopinath Jiu Thakur* (2) and the judgment of the Board was delivered by Lord Sumner. Now the words of Art. 116 are as follows: "For compensation for the breach of a contract in writing registered." In *Tricomdas's* case (2) the sum of money in issue was arrears of rent due under a registered lease, and the argument that was put forward, and which the Board refused to accept, was that Art. 110 of the Act specifically provided a period of limitation for arrears of rent, and, that being so, it was immaterial whether the rent was due under a registered or an unregistered lease. The Board rejected that argument on the ground that the words of Art. 116 were not incapable of covering a case of rent due and that a long cursus curiae of Indian decisions and the decisions of the Board had construed every possible section that they could with a view to giving favour to registered instruments and prolonging the period of limitation. That appears to us to be a method of approaching the case which is binding on us, and I think we have to say in the case of a debt such as the debt created between company and share-holder on the declaration of a dividend that, if it is a contract at all, the remedy sought is aptly described as compensation for the breach of a contract, express or implied.

The matter does not rest there, however, because a very learned argument has been put forward before us, the effect of which is to show that although the declaration of a dividend creates a debt, yet the relation between share-holder

and company is not a relationship which could be described as a contractual one. On that point there has been a very great conflict of opinion and divergent views in the English and Irish Courts. I am not a company lawyer and I do not propose to do more than refer briefly to the main views that have been expressed. The whole matter is summed up in the judgment of Astbury, J., in the case of *Hickman* v. *Kent or Romney Mars Sheep-breeder's Association* (6), where he comes to the conclusion that although the articles cannot be held to constitute a contract between the company of the one part and an outsider in his capacity of outsider on the other part, yet as between share-holder and share-holder and share-holder and the company, a contract is in fact constituted. There were many weighty expressions of opinions to the contrary. We have come to the conclusion that the safest course to adopt here is to take the view that the declaration creates a debt. Byrne, J., in *In re Artisan's Land and Mortgage Corporation* (7), after reviewing the very weighty pronouncements in Irish cases which he refers to, holds that it not merely creates a debt but by virtue of the share certificates and the memorandum of articles it creates a specialty debt. Although the Irish Courts, not, I think, Byrne, J., do use language which seems to imply that it is not merely a specialty debt but it is a debt arising out of a specialty contract, we are not really bound to go so far as that. We think that this debt, created by the declaration, whether in certain circumstances and for certain purposes it might be regarded as a contract, is not a contract such as was contemplated and envisaged by Art. 115 of the Limitation Act. It is difficult enough to regard that form of words as applicable to a claim for rent. It seems to me clumsy beyond anything that is legitimate to allow the claims of a shareholder for his dividend to be regarded as aptly described "compensation for breach of contract, express or implied." In our opinion, it is merely a claim for debt and as, unfortunately, the Limitation Act does not contain a section applicable to debts, all we can do is to fall back on the omnibus Art. 120 and treat this case as one for which no article specifically applicable is prescribed under the schedule.

There is only one other matter that we have to deal with which, in essence, was the start of this whole business. We were referred to a decision of this Court reported in *Ripon Press and Sugar Mill Co., Ltd.*, v. *Nama Venkatarama Chetty* (1), a decision of Wallis, C. J., and Seshagiri Aiyar, J. That was a suit for dividend and it was decided that the suit fell within Art. 116. Art. 116 of course speaks of registered contracts and there is no doubt that the learned Judges held not merely that registration of a contract, in the ordinary sense, was covered by the article, but the deposit of the Memorandum and Articles of association of a limited company with the Registrar of Joint Stock Companies under the direction of the Act. That seems to us to be putting an intolerable strain upon the word 'registered' and one which the draftsman of this statute could not possibly be thought to have contemplated. Of course the decision amounts to this, and we find ourselves uufortunately in disagreement with it even on the minor point, that the relation constituted between the shareholder and the company is a contractual relation. We do not even go so far as that, as we wish to limit ourselves carefully, if 'contractual' is taken to mean, contractual in the sense contemplated by Arts. 115 and 116 of the Limitation Act. We therefore are of opinion that *Ripon Press and Sugar Mills Co., Ltd.* v. *Nama Venkatarama Chetty* (1) is incorrectly decided and we think we ought to say so.

The reply to the question submitted to us is that in our opinion Art. 120 is the article that applies.

Krishnan, J.—I agree.

Beasley, J.—I agree.

Reference answered.

A. I. R. 1926 Madras 620

WALLER, J.

Chakrapani Padhi and *others*—Appellants.

v.

Krushno Naiko—Respondent.

Appeal No. 64 of 1924, Decided on 4th December 1925, against the appellate order of the Dist. J., Ganjam, D/- 12th October 1923.

(7) [1904] 1 Ch. 796=73 L. J. Ch. 581=52 W. R. 330=12 Manson 98.

Civil P. C., O. 21 R. 89—Lodgment schedule is not an application under R. 89.

A lodgment schedule is not an application of the nature contemplated by O. 21, R. 89. There must be something more than a deposit.

[P. 621, C. 1]

B. Jagnnadha Dass—for Appellant.

K. Sanjiva Kamath—for Responnent.

Judgment.—Assuming that second appeal lies, which is more than doubtful vide *Asimuddi Sheik* v. *Sundari Bibi* (1) and *Kachu* v. *Trimbak Khemchand* (2), no ground has been made out for interference. It is impossible to treat the lodgment schedule as an application of the nature contemplated by O. 21, R. 89, Code of Civil Procedure, 1908. There must be something more than a deposit.

Appeal dismissed.

(1) [1911] 38 Cal. 339=15 C. W. N. 844=14 C. L. J. 224.
(2) [1920] 44 Bom. 472=22 Bom. L. R. 383.

A. I. R. 1926 Madras 621

PHILLIPS, J.

Goddam Chowdanna — Defendant—Appellant.

v.

K. T. Venkatapathinayamvaru—Plaintiff—Respondent.

Second Appeal No. 12 of 1923, Decided on 7th August 1924, from a decree of the Dist. J., North Arcot, in A. S. No. 123 of 1920.

(a) *Grant—Service grant for daily attendance on zamindar is resumable at zamindar's pleasure.*

A post-settlement grant for a service to attend daily on the zamindar as he performs devotions, etc. is a grant in lieu of wages, and the zamindar is entitled to put an end to such service at his pleasure and resume the grant. [1911] 2 *M.W.N.* 406 and [1914] *M.W.N.* 179, *Foll.* [P. 621, C. 2]

(b) *Grant—No evidence as to grant being of whole land or only of melwaram—Ordinary presumption of occupancy rights must be made.*

Where it is not in evidence whether the grant was of the whole land or only of the melwaram the usual presumption of occupancy right must be raised in favour of grantee and on resumption of grant he must pay rent as occupancy ryot.

[P. 621, C, 2, P. 622, C, 1]

B. Somayya—for Appellant.

K. V. Krishnaswami Aiyar—for Respondent.

Judgment.—In this case the appellant-defendant was the holder of a certain inam grant given by the Zamindar of Kangudi whose representative is now the plaintiff-respondent in 1806. Both the lower Courts have found that this estate was settled in 1797, and consequently this grant to the defendant's predecessor was a post-settlement grant. The only evidence of the nature of the grant is contained in Ex. A which says that it was for a service to attend daily on the zamindar as he performs devotions, etc. This is undoubtely a personal service to the zamindar, and the question arises as to whether it is resumable or not. It does not appear to be a grant burdened with service, but rather a grant in lieu of wages; for there is no evidence that there was any reason for the grant except that the grantee should perform in the future the service enumerated. That being so, it has always been held in this Court that the zamindar is entitled to put an end to such service at his pleasure and resume the grant and I need only refer to the case in *Vadisapu Appandora* v. *Vyricherla Veerabhadrarazu* (1) and *Karupamaya Ananga Bheema* v. *Sondi Prahaladha Bissoyi Ratno* (2). I agree, therefore, with the lower Courts that the zamindar was justified in resuming the grant.

A further contention is then raised that the zamindar is not entitled to claim rent from the defendant because he is not a ryot within the meaning of the Estates Land Act. This plea was not taken specifically in the written statement, apparently because, if successful, it involved the result that the defendant being a mere trespasser would be liable to eviction. Now the point is pressed, apparently because an ejectment suit would be barred by limitation. However the point has been raised now and must be decided as it was raised in the trial Court at a late stage. The contention here is that the defendant was originally a land-holder and that when the grant was resumed he must be deemed to have continued as a trespasser; for he had never been a ryot. This, however, ignores the condition of affairs at the time of the grant. It is not in evidence whether the grant was of the whole land or only of the melwaram but it has been held in this Court in *Karupamaya Ananga Bheema* v. *Sondi Prahaladha Bissoyi Ratno* (2), a decision which was followed in *Idubilly Siyyaddi Garu* v. *Visweswara*

(1) [1911] 2 M.W.N. 406.
(2) [1914] M.W.N. 179.

Nissanka (3) that a zamindar is not entitled to eject grantees from the lands as a result of such resumption and that the usual presumption of occupancy right must be raised in their favour. If that is done in this case, it must be presumed that the defendant who is in occupation of the land has a right of permanent occupancy.

I think also the same result would be obtained by the ordinary presumption that a person's possession must be ascribed to legal origin rather than to an illegal one. Here the defendant continued in possession even after the Court had held that he was not entitled to resist resumption of the inam. If we apply these ordinary presumptions it follows then that the defendant must be deemed to have retained possession not as a trespasser but as an occupancy ryot. In whichever way the question is viewed the result is the same, namely, that the defendant was in occupation as an occupancy ryot. As such, he is bound to pay rent for the land in his holding. The question of what is the right amount of rent has not been discussed in this suit; for the defendant has not pleaded that what is demanded is wrong and, therefore, that does not arise for determination here.

The second appeal is accordingly dismissed with costs.

Appeal dismissed.

(3) [1915] 18 M.L.T. 142.

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* A. I. R. 1926 Madras 622

WALLACE AND MADHAVAN NAIR, JJ.

Mikkili Ankaya—1st Defendant—Appellant.

v.

Alaparti Rattamma—Plaintiff—Respondent.

Appeal No. 444 of 1923, Decided on 6th November 1925, against an order of the Dist. J., Guntur, D/- 1st August 1923, in A. S. No. 13 of 1923.

(a) *Provincial Insolvency Act, Art. 31—Suit for damages for use and occupation is small cause.*

A claim founded on an allegation of permissive occupation is a claim for damages for use and occupation and is a suit of a small cause nature. [P. 622, C. 2]

* (b) *Provincial Small Cause Courts Act, S. 23—Suit transferred under S. 23, S. C. C. Act, to the original side—Nature of suit is not changed—First appeal lies, but second appeal does not lie—Civil P. C., S. 102, and O. 43, R. 1 (v).*

The transfer of a suit under S. 23 does not and cannot change its nature and it is the nature of the suit which is the test under S. 102, Civil P. C. and O. 43, R. 1 (v), Civil P. C. A first appeal is, therefore, valid, but under S. 102, Civil P. C. a second appeal is barred. [P. 622, C. 2]

P. Satyanarayana Rao—for Appellant.

Ch. Raghava Rao—for Respondent.

Judgment.—The first point for decision is whether on the plaint as laid this appeal against order lies. We think the claim is founded on an allegation of permissive occupation and is a claim for damages for use and occupation. We do not think the suit comes under Art. 31 of the Schedule of the Provincial Small Cause Courts Act, and, therefore, it is a suit of a small cause nature.

The next point taken by the appellant is that the transfer of the suit to the original side under S. 23 of the Act constituted it an original suit, and that, therefore, a second appeal lies as if the suit, was an ordinary original suit. The answer to that is that the transfer under S. 23 does not and cannot change the nature of the suit and it is the nature of the suit which is the test under S. 102, Civil P. C., and O. 43, R. 1 (v). The last point urged is that if the suit though transferred, remains a small cause suit, no first appeal lies. The answer to that is that the suit does not remain a small cause suit though it remains of a small cause nature.

A first appeal is, therefore, valid; but under S. 102 a second appeal is barred. In *Kollipara Seetapathy* v. *Kankipatti Subbayya* (1) and *Abdul Majid* v. *Bedyadha Saran Das* (2) the suit had not been transferred under S. 23. It was from the beginning a small cause suit tried on the original side. The decision of the District Munsif was, therefore, the decision of a Court of Small Causes and final under S. 27, and no appeal lay. We hold that no second appeal lies and dismiss the appeal with costs.

Appeal dismissed.

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(1) [1910] 33 Mad. 323 =20 M. L. J. 718 (F. B.).

(2) [1917] 39 All. 101=14 A. L. J. 984.

* A. I. R. 1926 Madras 623

DEVADOSS AND WALLER, JJ.

Chidambara Thevar—Appellant.

v.

Subbarayar—Respondent.

Appeal No. 91 of 1924, Decided on 13th November 1925, from the appellate order of the Dist. J., East Tanjore in A. S. No. 396 of 1923.

* *Civil P. C., O. 21, R. 16, Proviso 2—Mortgage decree is not a decree for money.*

Till a personal decree is given it cannot be said that the decree is one for the payment of money. Hence a mortgage decree is a decree for the payment of money within the meaning of the second proviso to R. 16 of O. 21: 14 *C. L. J.* 639, *Foll.*; *A. I. R.* 1922 *Mad.* 510, *Dist.*

[P 623, C 2, P 624, C 2]

A. V. Viswanatha Sastri—for Appellant.

C. Padmanabha Aiyangar—for Respondent.

Devadoss, J.—The only question in this appeal is whether a mortgage-decree "is a decree for payment of money" within the meaning of that expression in O. 21, R. 16 Civil Procedure Code. The appellant is the 6th defendant in O. S. No. 248 of 1917, a suit brought on a mortgage. The 6th defendant brought a portion of the hypotheca and the rest of the property was purchased by one Arunachalam Chetti. One Subbarayar obtained a transfer of the mortgage-decree and applied to the Court to be recognized as a transferee decree-holder and for execution of the decree. The 6th Defendant opposed the application on the ground that Subbarayar was a benamidar for Arunachalam Chetti and that under the second proviso to O. 21, R. 16, he was not entitled to execute the decree. The District Munsif held that it was not proved that Subbarayar was a benamidar for Arunachalam Chetti. The appeal of the 6th defendant was dismissed by the District Judge. He has preferred this appeal and the contention of Mr. Viswanatha Sastri for the appellant is that inasmuch as Arunachalam Chetti, purchased a portion of the hypotheca subject to the mortgage, he is a judgment-debtor and the assignment in favour of Subbarayar being benami for him he is not entitled to execute the decree against a co-defendant. Granting for argument's sake that Subbarayar is a benamidar for Arunachalam Chetti the question is: Is Arunachalam Chetti prevented from executing the decree against the 6th defendant? The question is a simple one. Is a mortgage decree a decree for payment of money within the meaning of the second proviso to O. 21, R. 16? According to the proviso:

> Where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others.

We are unable to uphold the contention that a mortgage decree is a decree for the payment of money within the meaning of the proviso. A good deal of argument of Mr. Viswanatha Sastri was based upon *Abdulla Sahib* v. *Doctor Oosman Sahib* (1) and other cases which were decided before the passing of the present Civil Procedure Code. Under the present Procedure Code a preliminary decree is drawn up and time is given for redemption and if within the given time, money is not paid, a final decree, or a decree absolute is passed and the mortgaged property is brought to sale and if the proceeds of the sale are not sufficient to pay up the amount of the decree and if the personal remedy is outstanding a decree is given personally against the mortgagor. Till a personal decree is given, it cannot be said that the decree is one for the payment of money.

Under the old Civil Procedure Code a mortgage decree directed the payment of money and in default of payment that the property was to be sold. According to Form No. 129, time was given to the defendant to pay the principal and interest and costs within six months and in default of the defendant paying into Court such principal, etc., by the time given it was ordered that the mortgaged premises should be sold and it was further provided that in case the sale proceeds of the mortgaged property did not cover the decree amount the judgment-creditor could recover the amount personally or from the other property of the mortgagor. Under the old Code therefore, a mortgage-decree could be considered as a decree primarily for the payment of money. *Abdulla Sahib* v. *Doctor Ooman Sahib* (1) and the other cases which were decided under the old Code have no application to a mortgage-decree passed under the present Code. Even when the old Code was in force, the Calcutta High Court consistently held the view that a mortgage-decree was not

(1) [1905] 28 Mad. 224.

a decree for money. In *Luldhari Singh* v. *Manager, Court of Wards, Bhabatpura Estate* (2), Mr. Justice Mookerjee after an exhaustive examination of the cases on the point held that a decree for sale of the mortgaged property could not be deemed as a decree for money within the meaning of S. 232 of the Code of 1882. A decree for redemption though it contains a provision for payment of money cannot be said to be a decree for money nor can a foreclosure decree in which a provision is made for the payment of money within the time fixed be a decree for payment of money. Where a decree is passed for the delivery of a specific moveable property, and in default, to pay a certain sum of money it is not primarily a decree for money.

In a mortgage decree the property is to be proceeded against in the first instance and the decree is therefore primarily against the property mortgaged. If a personal remedy is not outstanding the only remedy of the mortgagee decree-holder is to proceed against the property and the mere fact that a personal remedy is outstanding will not convert the mortgage-decree into a decree for payment of money within the meaning of the proviso to R. 16 of O. 21. The case *Sadagopa Ayyangar* v. *Sellammal* (3) does not help the appellant. In that case Mr. Justice Spencer and Mr. Justice Venkatasubba Rao held :

> The expression "decree for money against several persons" in O. 21, R. 16 is not restricted to a personal decree for money against two or more defendants.

The decree directed the defendant to pay the amount out of his family properties, and the learned Judges held :

> That the fact that the defendant was directed by the decree to pay the amount out of his family properties does not make the decree any the less a decree for payment of money against him. If a trustee is directed to pay money or an executor is directed to pay money, though he is not personally liable to pay the amount it is still a decree for the payment of money.

But that is quite a different thing from a mortgage decree which directs that the mortgaged properties should be sold to discharge the debt. In S. 232 of the Code of 1882 the expression was a "decree for money." In the present O. 21, R. 16 the expression is "decree for the payment of money." The words "the payment of" were evidently introduced to make the meaning clear.

We have no hesitation in holding that a mortgage decree is not a decree for the payment of money within the meaning of the second proviso to R. 16 of O. 21. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(2) [1911] 14 C. L. J. 639=16 C. W. N. 132.
(3) A. I. R. 1922 Mad. 510.

A. I. R. 1926 Madras 624

SPENCER, J.

Kasturi Chetty and *another*—Appellants.

v.

Chinnasami Pillai and *others*—Respondents.

Second Appeal Nos. 443 and 1480 of 1923, Decided on 5th January 1926, against the decree of the Sub-J., Dindigul in A. S. No. 11 of 1921.

Equity—Suit for possession—Mala fide purchaser cannot plead equity.

There can be no equity in favour of a purchaser in fraud of creditors who acts without bona fides. The vendee from the purchaser has no right to be paid what his vendor paid under a speculative and fraudulent purchase. [P 624, C 2, P 625, C 2]

T. V. Muthukrishna Iyer—for Appellants.

T. Nallaswami Pillai—for Respondents.

Judgment.—The plaintiff's suit was dismissed in the Court of first instance on the District Munsiff's finding that the sale deeds Exhibits D, E and F, were brought about to defraud 1st defendant's creditors, viz., 4th defendant. The Subordinate Judge also found as a conclusion of fact that these transactions were not bona fide.

He, however, gave the plaintiff, who was a purchaser under Exhibit F, a charge for Rs. 450 on the suit properties, on the ground that his vendor, Maruthanayagam Pillai, had Rs. 400 in discharging a prior mortgage (Ex. C.) on 1st defendant's house in Dindigul. The learned Judge did not rely on the doctrine of subrogation, but he gave this relief out of equitable considerations. In so doing, he overlooked the law that there can be no equity in favour of a purchaser in fraud of creditors who acts without bona

fides: vide *Karappan Ambalagaram* v. *Sakkik Levvai* (1).

Even assuming that some consideration passed for the sale under Exhibit F to plaintiff, which the District Munsif found against and the Subordinate Judge has not clearly found to be established, the plaintiff has no right to be paid what his vendor paid under a speculative and fraudulent purchase.

The appeal is allowed and the decree of the lower appellate Court is reversed and the decree of the District Munsif dismissing the suit is restored with costs in this Court.

On the findings of the Courts below, and in view of the result of the connected Second Appeal No. 443 of 1923, this Second Appeal is dismissed with costs.

Appeal allowed.

(1) [1914] 26 M. L. J. 74=(1914) M. W. N. 131.

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* A. I. R. 1926 Madras 625

PHILLIPS AND ODGERS, JJ.

A. S. Pakkir Mahamud Rowthen and *another*—Defendants 1 and 2—Appellants.

v.

Pichai Thevan and *others*—Plaintiffs 2, 4, 5 and 6—Respondents.

Second Appeal No. 266 of 1921, Decided on 28th October 1924, from a decree of the Addl. Sub-J., Ramnad, in Appeal Suit No. 19 of 1920.

(a) *Easements Act, S. 4—User under claim of ownership which is negatived cannot be a basis for an easement.*

To create an easement there must be a dominant and a servient heritage and the right acquired must be for the beneficial enjoyment of a dominant heritage. User under a claim of ownership of a tank, in and over which such user is had, and which is negatived, cannot operate to found a right of easement over the tank; 16 *Bom.* 592, *Ref.* [P. 626, C.2, P. 627, C.1]

*(b) *Easements Act, S. 15—Easement can be acquired only by a definite person or persons—A fluctuating and uncertain body of persons cannot acquire one.*

The acquisition by prescription must be by a definite person or persons either natural or juristic; a fluctuating and uncertain body like the inhabitants of a village cannot acquire one: *Lord Rivers* v. *Adams*, (1878) 3 *Ex. D.* 361, *Foll.*; 14 *Bom.* 213, *Dist.* [P. 627, C. 1]

(c) *Easements Act, S. 15—Tank—Right of easement—Finding as to whether the tank is private or Government property is necessary.*

In the absence of a finding that the tank is either private property or the property of the Government, a right of easement by prescription cannot be established. [P. 627, C. 1]

(d) *Custom—Definite custom established—It is doubtful whether it can be modified by Court.*

Odgers, J.: It is doubtful, if a custom for doing a definite thing being established, it is open to Court to decree a modification of it or something else. [P. 627, C. 2]

(e) *Custom—User of public property amounting to nuisance—No right by user can be acquired.*

No right to the user of a public property can be acquired by custom if such user amounts to a public nuisance, such a custom being unreasonable; 7 *B. L. R.* 499, *Ref.* [P. 627, C. 2]

A. Krishnaswami Iyer and *M. Patanjali Sastri*—for Appellants.

N. K. Mohanarangam Pillai—for Respondents.

Odgers, J.—This was a representative suit brought by the plaintiffs on behalf of themselves and the other Hindu inhabitants of the village of Perungulam, Ramnad taluk, against the defendants who are Muhammadans and settlers in that village. The plaintiffs are Maravars and they allege a right to throw seedlings into the tank adjoining the Ayyankoil at the Mulaikottu festival held every year. These seedlings are raised in the houses of the Maravars. Eight days after sowing they are thrown into the tank. The seedlings are watered with the water of the tank and are grown in mud pots and manured with dung. One of the plaintiffs' witnesses (P. W. No. 3) says that all kinds of animal excreta are used as manure.

The plaintiffs put their right on two grounds: (1) Prescriptive title or easement by prescription as found by the lower Courts; and (2) custom. They ask for a declaration that the tank belongs to the Hindu community and for an injunction restraining the Muhammadans from obstructing the performance of the Mulaikottu ceremony. The defence traverses the plaint allegations and alleges that the right claimed cannot be acquired as the throwing of seedlings into the water pollutes it and renders it unfit for drinking purposes. The District Munsif finds against plaintiffs on the question of ownership, but declared that the Hindus were entitled to throw the seedings "after washing them so as to remove the dung manure sticking to it" and restrained the Muhammadans from interfering. The District Munsif decided that the Hindus had acquired an easement by prescription and that if the

Judgment—We accept the Subordinate Judge's finding that the custom is unreasonable and in allowance of the second appeal dismiss plaintiff's suit with costs throughout.

Appeal allowed.

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* A. I. R. 1926 Madras 628

DEVADOSS AND WALLER, JJ.

Sethu and *others*—Defendants Nos. 1 to 4—Appellants.

v.

Palani—Plaintiff—Respondent.

Letters Patent Appeal No. 27 of 1924, Decided on 20th October 1925, from the judgment of Krishnan, J., D/- 7th March 1924, in S. A. No. 1115 of 1921, Printed in *A. I. R.* 1924 *Mad.* 677.

* (a) *Evidence Act, S.* 112—*S.* 112 *is not opposed to the personal law of such parties who are allowed to remarry and divorce according to their personal law.*

When the remarriage of a widow or a divorced widow is valid according to the law of the parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of the husband is opposed to their personal law. [P 629 C 2]

* (b) *Evidence Act, S.* 112—*Woman divorced by first husband marrying second husband—Child born within three months of the second marriage—Child is the son of second husband.*

Where a woman is divorced by her first husband and she marries a second husband and a child is born during the subsistence of the second marriage, the child is the legitimate son of the second husband, although he might have been conceived during the first marriage, unless it is shown that the second husband had no access to the woman at the time when the child could have been begotten. The English Law and the Hindu Law do not differ in such matters. The date of birth and not that of conception is the test: 24 *Cal.* 216, *Dist.* [P 630 C 2, P 631 C 1]

L. A. Govindaraghava Iyer—for Appellants.

K. A. Krishnaswami Iyer—for Respondent.

Devadoss, J.—This appeal raises a novel question. The plaintiff's mother, Pechiammal was first married to one Subramania Thevan in September or October 1903, who divorced her in May or June 1904. She married again one Thirumani Thevan in June or July 1904. The plaintiff was born to her in September 1904. The plaintiff sues for partition of his one-third share in the property of Thirumani Thevan. The District Munsif held that the plaintiff was the son of Thirumani Thevan and passed a preliminary decree in his favour. The Subordinate Judge reversed the decree of the District Munsif holding that the plaintiff was not the legitimate son of Thirumani Thevan. Mr. Justice Krishnan set aside the decree of the Subordinate Judge and restored that of the District Munsif holding that the plaintiff was the son of Thirumani Thevan. There is evidence in the case to show that Pechiammal did not live with her first husband for any length of time, but carried on an intrigue with Thirumani Thevan in consequence of which there were criminal proceedings and Subramania Thevan divorced her on account of her conduct. There is also evidence that Thirumani Thevan treated the plaintiff as his son and that at the time the plaintiff could have been conceived, his mother was having criminal intimacy with Thirumani Thevan.

The question in this case turns upon the construction of S. 112 of the Indian Evidence Act. Under S. 112, if a person is born during the continuance of a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, he shall be considered to be the son of his mother's husband unless it could be shown that the husband had no access to his mother at any time when he could have been begotten. If a person is born during wedlock, the law says it is conclusive proof that he is the legitimate son of the husband of his mother, and the onus of proving that the husband had no access to the mother at any time he could have been begotten is upon the husband. In this case, complication is introduced by the mother marrying again. If the plaintiff's mother had not married Thirumani Thevan, the plaintiff would be considered to be the son of Subramania Thevan, and the onus would be upon Subramania Thevan or any other who challenges his paternity to prove that he was not begotten by Subramania Thevan. But the plaintiff's mother married Thirumani Thevan when she was en tiente and the plaintiff was born during the subsistence of a valid marriage between his mother and Thirumani Thevan. According to S. 112, plaintiff is the son of Thirumani Thevan and unless and until it is proved that Thiru-

mani Thevan had no access to Pechiammal, the plaintiff's mother, at any time he could have been begotten, the onus is on those who challenge his paternity. There is no proof in this case that Thirumani Thevan had not access to the plaintiff's mother at the time he could have been begotten. On the other hand, the evidence shows that Thirumani Thevan was carrying on an intrigue with Pechiammal at the time when the plaintiff could have been begotten.

The argument of Mr. Govindaraghava Iyer is that, according to Hindu Law, there are only two classes of sons, aurasa and dattaka sons, and to import S. 112 of the Evidence Act into the region of Hindu Law would be giving S. 112 the force of substantive law overriding the principles of Hindu Law. The Evidence Act was enacted for the purpose of enabling the Courts to act upon relevant evidence and to come to a conclusion on such evidence. In order to enable the Court to decide matters satisfactorily, the law of evidence requires the Court to raise certain presumptions, and S. 112 raises one of those presumptions, and the presumption is a rebuttable one, and until it is rebutted it should be considered conclusive proof. Before considering whether S. 112 has made an inroad into the Hindu Law or not, it is necessary to consider whether the parties to this case are persons who are governed by the Code of Manu. No doubt the Courts have acted on the general presumption that the Hindu Law applies to all persons who are not Christians, Muhammadans or persons professing any distinctive faith. Hindu Law, strictly so-called, cannot be applied to some of the castes in this presidency. According to Hindu Law there can be no divorce and there can be no re-marriage of widows. But according to the custom prevailing among the Maravars in Southern India, a man can divorce his wife at any time he likes and a divorced woman as well as a widow could validly remarry; and the children of such remarriage are legitimate and inherit to their parents. It is, therefore, difficult to see how S. 112 can be said to militate against or override any of the principles of the Hindu Law. Even according to Manu's Code, the plaintiff would be considered the legitimate son of Thirumani Thevan.

S. 173 of Ch. IX is in these terms: If one marries a pregnant young woman, whether pregnancy be known or unknown, the male child in her womb belongs to the bridegroom and is called the son received with the bride. It might be said that this rule applies only to virgins. But whether it applies to divorced women or to widows, Manu did recognize the fact that pregnant women could be validly married and the child who was *enventre samere* at the time of the marriage was the child of the husband. In Manu's time the levirate was prevalent: vide Ch. IX, S. 167. In Manu's time remarriage of widows was prevalent though many condemned it. When the remarriage of a widow or a divorced woman is valid according to the law of the parties, it cannot be said that the rule which says that a person born during the subsistence of a valid marriage shall be considered to be the son of the husband is opposed to the Hindu Law. Mr. Govindaraghava Iyer for the appellant relied upon several English cases: *Birtwhistle* v. *Vardill* (1), and *R.* v. *Luffe* (2). These cases have no application to the question to be decided in this case. According to the law of Scotland, the marriage between a man and a woman legitimises their issue born before marriage. But the Law of England does not recognize any person as legitimate who is not born during lawful wedlock or within 280 days of the dissolution of marriage either by death or by a decree of Court. The Hindu Law is the same in this respect as the English Law: *Collector of Trichinopoly* v. *Lekkamani* (3). On grounds of public policy under the English Law a person born during the lawful wedlock is held to be legitimate, and the onus of proving that he is illegitimate is on the person who asserts it.

The question as it has arisen in this case has not arisen in any English case. Sir James Stephen in his Book on Evidence says that he is not aware of any decided case on the point. Taylor, in his Treatise on Evidence, page 349, refers to an American case. Mr. Govindaraghava Iyer relied upon the rule in French Code and also upon the Roman Law on the point. I think it is unnecessary to consider what

(1) [1826] 2 Cl. and F. 571=6 E.R. 1270=108 E.R. 163.
(2) [1807] 8 East 193=103 E.R. 316.
(3) [1873] 1 I.A. 282=21 W.R. 358=14 B.L.R. 115=3 Sar. 318 (P.C.).

the rule is in other systems of law about the legitimacy of a person.

According to the Indian Evidence Act, all that is necessary to show that a person is legitimate is that he was born either during wedlock or within 280 days of the dissolution of the marriage. In this case there is no question of illegitimacy at all. If Thirumani Thevan had not married Pechiammal the plaintiff would be the legitimate son of Subramania Thevan. Thirumani Thevan having married her he becomes the legitimate son of Thirumani Thevan. The law, no doubt, leaves it to Thirumani Thevan or any other person who challenges his paternity to prove that Thirumani Thevan had not access to the plaintiff's mother at any time he could have been begotten. In the case of *Ingestre* v. *Attorney-General* (4) this question arose :

In that case the petitioner's mother was twice married. She had left her first husband in 1881, and on May 16, 1882, he presented a petition for divorce; a decree nisi was pronounced on December 10, 1881 and was made absolute on June 20, 1882. A day or two afterwards she married her second husband with whom she had co-habited since she left her first husband, and the petitioner was born on September 8, 1882. The evidence satisfied the Court that he was the son of the second husband, and the question of law then arose whether he was the legitimate son of his father; for although he was born in wedlock he was conceived at a time when his parents could not lawfully have been married.

Sir Samuel Evans, President of the Probate Division, answered the question in the affirmative. We have not been able to get at the report of this case ; but the case is discussed in 30 Law Quarterly at pages 153 to 157. The facts in that case are very similar to the present, and though the judgment in the case is not before us, the conclusion arrived at by the learned President of the Probate Division is in conformity with S. 112 of the Indian Evidence Act.

The decision in *Rahi* v. *Govinda* (5) has no application to the present case. In that case, the question was whether a person was the illegitimate son of his father when his mother was not kept continuously by the father. As I have already observed, there is no question of illegitimacy in this case. Either the plaintiff is the legitimate son of Subramania Thevan or the legitimate son of Thirumani Thevan. If his mother had not married Thirumani Thevan, the plaintiff would be considered the legitimate son of Subramania Thevan.

The words of the section have to be given their proper meaning. The Legislature intended that if the mother married again, the child born during the subsistence of a second marriage would be considered to be the child of the man whom the mother married again. Without going into the public policy of the law enacted in S. 112 it is sufficient to say that, if a person is born during lawful wedlock, he is the son of the husband of his mother. It is open to those who say that the plaintiff is not the son of Thirumani Thevan to prove that Thirumani Thevan could not have had access to Pechiammal at any time when the plaintiff could have been begotten. If a man marries a woman not knowing that she is pregnant, he could, by showing that he could not have had access to the woman when the pregnancy commenced, make out that the child is not his. But if a person knowing that a woman is pregnant marries her, the child of the woman, though immediately born after the marriage becomes in law his child unless the man proves that he had no access to the woman when he could have been begotten. The plaintiff, therefore, is the son of Thirumani Thevan and is entitled to a share of his properties. In the result the appeal is dismissed with costs.

Waller, J.—This appeal raises a question under S. 112 of the Indian Evidence Act. The facts found are these : Plaintiff's mother was married to one Subramania Thevan in October 1903. She was divorced in June 1904 and married Thirumani Thevan a month later. In September plaintiff was born to her. The question is whether, on these facts, plaintiff is to be regarded as the legitimate son of Thirumani Thevan. The District Munsif thought that he should be so regarded. The Subordinate Judge held that he was the legitimate son of the first husband. Krishnan, J., agreed with the District Munsif.

On the language of S. 112, I think Krishnan, J., is right. Plaintiff was born during the continuance of a valid marriage between the mother and Thirumani Thevan and there is no proof of non-access during the material period. The argument contra is that a child conceived during adulterous intercourse can never become legitimate even though the

(4) [1913] Times, Oct. 14.
(5) [1875-77] 1 Bom. 97.

parents have been validly married before its birth. That was at one time the view of English lawyers and it appears to be still the law in France. In English Law, where, as a concession, a child conceived before marriage as the result of a non-adulterous connexion was regarded as legitimate if born after the marriage of its parents. The concession was based on a fiction which dated back the marriage to the conception. The fiction now, of course, is not applicable to the fruit of an adulterous connexion; for the parents could not lawfully have married at the time of conception. That, however, is not the law of India as stated in S. 112 of the Indian Evidence Act. Nor is it the present law of England vide *Ingestre* v. *Attorney-General* (4) a case of which we have got no report, but which is commented on by an article in 30 Law Quarterly. Mr. Govindaraghava Iyer argues that it is opposed to Hindu Law but the Privy Council in *Collector of Trichinopoly* v. *Lekkamani* (3) decided that the English and Hindu Law do not differ in such matters. An Indian case has been referred to, *Nicholas* v. *Asphar* (6). There the first husband died in November 1841. The widow married again in December 1841 and gave birth to a daughter in April 1842. The learned Judge found that the daughter was the legitimate daughter of the first husband. No doubt, she was born within 280 days after the first husband's death, but the section requires that the widow should not have married. If she does, the presumption is that the child is the legitimate child of the second husband. No doubt, that presumption can be rebutted by proof of his non-access during the material period. If such proof be forthcoming another presumption would arise that the child was the legitimate offspring of the first husband. But with great respect, I do not think that the learned Judge stated the law correctly when he said that

> the presumption of legitimacy arising from conception during a valid subsisting marriage is conclusive.

The date of birth and not that of conception is the test. In the case of a dissolution, not only must the birth be within 280 days, but the widow should further not have remarried. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(6) [1807] 24 Cal. 216.

A. I. R. 1926 Madras 631

DEVADOSS, J.

(*Vonnakota*) *Viraju* — Plaintiff—Appellant.

v.

(*Vatsvaya*) *Bangaraju* and *another*—Defendants—Respondents.

Second Appeal No. 805 of 1922, Decided on 14th October 1924, from a decree of the Addl. Sub-J., Rajahmundry in A.S. No. 76 of 1921.

(a) *Fraud—Intention to cheat two persons—Successfully cheating one is sufficient for Court to refuse help to recover property.*

When a person's object was to cheat two people and he has successfully cheated one, that is quite a sufficient ground for the Court to refuse to help him to recover the property. [P. 632, C. 1]

(b) *Civil P. C., S. 151—Court trying subsequent suit cannot pass order regarding previous suit which is not before it.*

It is difficult to see how S. 151 can give power to a Court to pass an order in respect of a suit which is not pending before it. A Court which tries a subsequent suit cannot pass an order with reference to a previous suit.

[P. 632, C. 2, P. 632. C. 1]

(c) *Jurisdiction—Subordinate Court—Improper order by Sub-Court can be set right by appellate Court.*

When the Subordinate Court passes an improper order and the matter is taken up on appeal to a Court which is empowered to hear appeals from the orders of such Subordinate Court the Appellate Court has jurisdiction to set matters right.

[P. 633 C. 1]

T. V. Subba Rao—for Appellant.

K. Venkataramu Raju—for Respondents.

Judgment.—The first point argued in this second appeal is that no fraud was perpetrated by the plaintiff putting the property in the name of the first defendant and that, therefore, he is entitled to get back the property which was conveyed benami for him to the first defendant. Both the Courts have found that the plaintiff was able to defraud both the Government of the legitimate Court-fee payable on the plaint in O. S. No. 36 of 1906 and the widow of Veerraju with whom he had contracted to give half the property in case he succeeded in O. S. No. 36 of 1906. The second defendant after filing O.S. No. 36 of 1906, compromised with the defendants his claim against them and got a sale of some items of property in the name of the first defendant for his benefit and then withdrew the suit in consequence of which the Government was not able to get the

Court-fee payable by the second defendant on his pauper plaint. Both the Courts held that by reason of the property being put in the name of the first defendant, the suit by the widow of Veeraraju (O. S. No. 529 of 1909) on the agreement entered into by the second defendant with her husband was not decreed in the terms of her plaint, but she was only given damages.

On looking into the judgments of that suit, Exs. III and IV, it appears that the widow of Veerraju was not given a share in the plaint property not on the ground that it was put benami in the name of the first defendant but on the ground that the agreement with him by the second defendant was an unconscionable agreement and that, therefore, damages were an adequate remedy. No doubt in the judgment of the appellate Court Ex. IV, there are observations to the effect that the first defendant had a good title to the property and the plaintiff in that suit could not ask for a share in the property. Mr. Subba Rao's contention is that the widow of Veeraraju was not defrauded by the property being put in the name of the first defendant and, therefore no fraud was effectuated. No doubt there is something in this contention. The other fact, namely, that the Government was not able to get the Court-fee payable by the second defendant in respect of the property which he got by virtue of the litigation in O. S. No. 36 of 1906 is a circumstance which has to be considered in this case. If the property had not been put in the name of the first defendant, naturally the Court would have given a decree for payment of the Court-fee against the second defendant. This was obviated by the second defendant putting the property which he got by filing O. S. No. 36 of 1906 in the name of the first defendant. I think the object of the second defendant was palpably to cheat both the Government of its Court-fee and Veeraraju of the share to which he was entitled in case of success in that suit. When the second defendant's object was to cheat two people and he has successfully cheated one, that is a quite sufficient ground for the Court to refuse to help the second defendant to get the property from the first defendant.

Mr. Subba Rao contends that the plaintiff is a vendee from the second defendant and that the original agreement with Veeraraju was for his benefit and that he should be given a decree for the plaint property. In this case the plaintiff cannot be said to be a bona fide purchaser for value because he must have known that the title of the property stood in the name of the first defendant. There is absolutely no ground for saying that he was not aware of the circumstances under which the property was put in the name of the first defendant. Therefore, he is not a bona fide purchaser for value and he cannot claim the help of the Court in getting the property from the first defendant.

It was also urged for the appellant that the Court should take into consideration the subsequent conduct of the parties and give relief to the plaintiff. Exhibits M and N only show that the first defendant dealt with the property as the property of the second defendant. The documents only show that the real owner was the second defendant. These documents do not help the plaintiff to contend that the second defendant was either in possession of the property or dealt with the property as his. If the second defendant was in possession of the property, it is not necessary for him to come to Court and seek its aid to recover possession of the property from the first defendant. The plaintiff has to show that he was not aware of the circumstances under which the property was put in the name of the first defendant before he could ask for relief. He must come into Court with clean hands. I do not think the plaintiff was not aware of the circumstances of the case. That being so, he cannot ask for any relief. Both Courts have found against the plaintiff's contention. I agree with them in holding that the plaintiff is not entitled to any relief. The second appeal fails and is dismissed with costs.

The Memorndum of Objections.

The District Munsif has directed the first defendant to pay the Court-fee payable on the plaint in O. S. No. 36 of 1906 and relies upon S. 151 of the Civil P. C., as enabling him to pass such an order. It is difficult to see how S. 151 can give a power to a Court to pass an order in respect of a suit which is not pending before it. That suit, O. S. No. 36 of 1906 was disposed of long before this suit was filed. Whatever may be said of the conduct of the first defendant the

Court has no jurisdiction to pass an order of this kind in a suit brought by the plaintiff for recovery of the property from the first defendant on the ground that the first defendant is a benamidar. The person primarily responsible for all the fraud is the second defendant and the Court cannot now saddle the first defendant with the Court-fee payable by the second defendant in an action to which the first defendant was a party to the previous suit. I do not see how a Court which tries a subsequent suit can pass an order with reference to a previous suit. It may be that the motive of the District Munsif was a laudable one, but I cannot but hold that the order was passed entirely without jurisdiction. I think the Subordinate Judge would have done well to have set aside that order instead of suggesting that the first defendant should prefer a civil revision petition to the High Court. When the Subordinate Court passes an improper order and the matter is taken up on appeal to a Court which is empowered to hear appeals from the orders of such Subordinate Court, the appellate Court has jurisdiction to set matters right. I direct that this order of the District Munsif be vacated.

I allow the memorandum of objections so far as this point is concerned and dismiss the rest without costs.

Appeal dismissed.

A. I. R. 1926 Madras 633

DEVADOSS, J.

Thondiyil Puthalatha Ukkaran Nayar—Petitioner.

v.

Thondiyil Ponnigari Ukkaran Nayar—Respondent.

Civil Revision Petition No. 331 of 1924, Decided on 5th February 1926, from the decree of the Dist. Munsiff, Payoli, in Small Cause Suit No. 171 of 1925.

(a) *Madras Revenue Recovery Act, S. 5—Sale of land—Plaintiff selling land to defendant and defendant agreeing to pay revenue on the land—Revenue paid by plaintiff on defendant's behalf—Personal decree against defendant can be given for revenue paid by plaintiff—Provincial Small Cause Courts Act, Arts. 9, and 39.*

Where plaintiff sold land to defendant and there was a special agreement between the parties that the revenue payable on the plaint property was to be paid by the tarwad of the defendant, and from the previous conduct of the parties it was clear that the plaintiff paid the revenue on the land on behalf the defendant.

Held: that it was not open to the defendant to contend that the plaintiff was not entitled to obtain a personal decree against him.

Held: further that Small Cause Court had jurisdiction to try the suit. [P 634 C 1]

(b) *Limitation Act, Arts. 61 and 116—Scope.*

Where a registered sale deed provided that the purchaser should pay the revenue on the land sold, but the vendor paid the revenue on behalf of the purchaser, and sued him for revenue paid.

Held: that Art. 61 should apply and not Art. 116. [P 634 C 1]

T. S. Visvanatha Iyer—for Petitioner.

S. Venkatachella Sastri—for Respondent.

Judgment.—The first point raised in this petition is that the District Munsiff had no jurisdiction to try the case as the relief which could be granted to the plaintiff is not a relief which a Small Cause Court is empowered to give, viz., mortgage decree. The argument is that the defendant who is in possession of property is liable to pay the tax on the property and when the pattadar pays the tax he can only have a remedy against the land in the same way as the Government would be entitled to proceed against it, and the defendant not being a pattadar, S. 5 of the Revenue Recovery Act (Madras) II of 1864 has no application to him. This point was not raised before the District Munsif. His contention there was that the suit was not maintainable not on the ground that the Small Cause Court could not give a mortgage decree against the defendant, but on the ground that patta had not been transferred to the defendant and therefore he was not liable to pay the revenue. The point not having been raised in the first Court, I do not think the defendant should be allowed to raise it in this Court. The suit as framed was a small cause suit and the relief prayed for also was one within the competency of the Small Cause Court to grant, and the relief granted was only for payment of money. That being so, the frame of the suit and the relief claimed were all within the cognizance of the Small Cause Court and the defendant could have pleaded that the suit as framed was improper and that a suit

should have been differently framed and such suit would not be within the cognizance of the Small Cause Court. He not having taken the point before the District Munsiff is not entitled to take the point now.

The next contention is that the plaintiff cannot obtain a personal decree against the defendant ; and he relies on *Subramania Chetty* v. *Mahalingaswami Sivan* (1) and *Boja Sellappa Reddi* v. *Vridhachala Reddi* (2). In 40 *Mad.* 35 it was found that the payment was a voluntary payment and in 33 *Mad.* 41 it was found that the mortgagee paid the cist on the property not in his capacity of pattadar but in his capacity of a mortgagee. In a recent case, C. R. P. No. 489 of 23, Mr. Justice Krishnan held that the remedy which is open to a pattadar who pays kist against the owner of the land who is bound to pay it is not by a personal decree but by a decree against the property. These cases have no application to the present case as the District Munsif finds that there was a special agreement between the parties that the revenue payable on the plaint property was to be paid by the tarwad of the defendant, and from the previous conduct of the parties it is clear that the plaintiff paid the revenue on the land on behalf of the defendant. That being the course of conduct between the parties it is not now open to the defendant to contend that the plaintiff is not entitled to obtain a personal decree against him. The District Munsif has given a decree for the revenue for four years on the ground that Ex. I, which is a registered sale deed provides for the payment of kist by the defendant. Under that document the endee, i. e., the defendant, was asked to pay assessment.

That would not enable the plaintiff land holder, to claim cist for more than three years prior to the date of the suit. The decree will, therefore, be modified by giving the plaintiff a decree only as regards the three years' kist. Each party to bear his own costs.

Decree modified.

(1) [1910] 33 Mad. 41
(2) [1906] 30 Mad. 35=16 M. L. J. 569.

* A. I. R. 1926 Madras 634

SPENCER AND ODGERS, JJ.

Subramania Ayyar—Appellant.

v.

Nalla Kayandan and *others*—Respondents.

Second Appeal No. 981 of 1923, Decided on 19th January 1926, against the decree of the 2nd Addl. Sub-J., Coimbatore, in A. S. No. 62 of 1922.

* *Hindu Law—Inheritance—Property got by Will from maternal grandfather is not ancestral —Widow has preferential right over father.*

Property got by Will of his maternal grandfather is not ancestral property of tha devisee. Hence his widow has a preferential right of inheritance over his father. [P 634 C 2]

A. Venkatrayaliah and *L. Venkatanarasiah*—for Appellant.

T. R. Vijiaragavachari and *H. S. Rajah Aiyengar*—for Respondents.

Judgment.—The property in suit came into the possession of Venkataramana Iyer by the Will of his maternal grandfather. It never assumed the character of ancestral property if we understand that expression in the technical sense of property in which a son on birth becomes an equal owner with his father. It follows that Venkataramana Iyer's widow had, when he died issueless, a preferential right of inheritance over his father.

The cases of *Muthayan Chetti* v. *Sivagiri Zamindar* (1); *Sivaganga Zamindar* v. *Lakshmana* (2) and *Muthuvaduguri-natha Tevar* v. *Periasami* (3) cited by appellant's vakil are all cases of impartible estates as to which there are rights of primogeniture. It would be unsafe to take any statements as to the law out of the judgments in those cases and apply them to different circumstances. In *Venkayamma Garu* v. *Venkata Ramanayamma Bahadur Garu* (4) the property devolved upon maternal grandsons not by Will but by the ordinary law of inheritance. The lower Courts are right upon the point of law. The Second Appeal is dismissed with costs.

Appeal dismissed.

(1) [1881] 3 Mad. 370.
(2) [1886] 9 Mad. 188.
(3) [1893] 16 Mad. 11=2 M. L. J. 265.
(4) [1902] 25 Mad. 678=29 I. A. 156=7 C. W. N. 1=12 M. L. J. 299=4 Bom. L. R. 657=8 Sar. 286 (P. C.).

A. I. R. 1926 Madras 635

RAMESAM, J.

R. Bhunjanga Rao—Defendant—Appellant.

v.

Periyathambi Goundan and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 84 to 96 and 474 of 1924, Decided on 22nd July 1925, from a decree of the Dist. J., North Arcot, in A. S. Nos. 122 to 134 and 121 of 1922.

(a) *Madras Estates Land Act—Applicability to inam—That a person is owner of both varams is material only where the land is a whole village.*

The consideration that a person is the owner of both the varams is material in determining the applicability of the Estates Land Act, only where the land is a whole village and an enfranchised inam. [P. 636, C. 2]

(b) *Madras Estates Land Act, S. 3 (2) (e)—Applicability to post settlement inam.*

Where an inam subsequent to the settlement is held on a permanent under-tenure, the case falls under S. 3 (2) (e). [P. 637, C. 1]

(c) *Civil P. C., S. 100—New case cannot be made out.*

A tenant brought a suit claiming to be a ryot under the Madras Estates Land Act to set aside an alleged sale of his holding against an inamdar, both in the trial Court as well as in first appellate Court.

Held; that it was not open to the defendant in second appeal to contend that he was a ryot and that the plaintiff was an under-tenant under him and that the Madras Estates Land Act was not applicable as between them. [P. 437, C. 1]

Advocate-General and *M. S. Vaidyanatha Iyer*—for Appellant.

Subrahmanya Iyer—for Respondents.

Judgment.—The first point argued by the learned Advocate-General before me in this batch of second appeals is that the Estates Land Act does not apply to the case. To understand this point it is necessary to set forth the history of the suit village. Exhibit D is a statement dated the 15th January 1873 initialled by Mr. Whiteside, the then Collector of North Arcot. It is headed:

Statement showing the particulars of shortriem mokasa sarvamaniam villagers in the minor estate of Arni Jaghir, Noth Arcot District.

It shows that the suit village of Rajammarpuram was granted by the then jaghirdar Thirumala Rao Saheb in Fasli 1211 to the ancestor of the defendant's vendor K. Krishna Rao. The grantee seems to have applied that certain lands may be given to him on cowle tenure for constructing a tank and building a village. The suit village was granted to him and for the first two years after the grant, no assessment was fixed. It was said that the assessment will be fixed after two years. In Fasli 1215 he submitted accounts and requested that 50 pagodas may be fixed on it as mutka (rent) and it was accordingly fixed. Afterwards a document was issued to his son Madhava Rao in Fasli 1233 which states that the beriz was reduced to 10 pagodas. So far the statements in Cl. 19 of Ex. D suggest that the village was granted to a ryot for rent. The document then proceeds to say:

The inam appears to have been granted subsequent to paimash. In 1223 the grantee represented that the ryots were very poor and the rent should be reduced. Accordingly 40 pagodas were permanently remitted. It will be safe to continue the grant which evidently falls within the scope of S. 15 of Regulation 30 of 1802.

From the reference to S. 15 of Regulation 30 of 1802, the Advocate-General argues that the whole transaction was one of leasing to a ryot, that the so-called grantee, Krishna Rao, and his son Madhava Rao were merely ryots under the Arni Jaghirdar and the defendant, who is the descendant of the original grantee, is a ryot under the Arni Jaghirdar and the plaintiffs are under-tenants to whom the Estates Land Act does not apply. If the defendant is not a ryot under the jaghirdar of Arni, but is himself regarded as a land-holder, his position would then be that of one who is generally and loosely described as a subsequent inamdar. If he is a subsequent inamdar, the matter is not open to me for discussion though I confess I am inclined to agree with the view of Wallis, C. J., in *Gadadhara Das* v. *Suryanarayan Putnaik* (1) and of Schwabe, C. J., and Devadoss, J., in *Brahmayya* v. *Achiraju* (2). So far as this High Court is concerned, the matter is now settled by the majority of the Full Bench against an inamdar and I am bound by it. Where a grantee pays some kind of rent to the zamindar whether he should be regarded as a subsequent inamdar and, therefore, a land-holder to whom the Estates Land Act should apply as between him and his tenant or whether he should be regarded as a ryot under the zemindar paying rent to him, the Estates Land Act

(1) [1921] 44 Mad. 677=41 M. L. J. 27=14 L. W. 453=(1921) M. W. N. 418.

(2) A. I. R. 1922 Mad. 373 (F. B.).

applying to his relations with the zamindar but not as between him and his under-tenats (S. 19 of the Act) must always be a difficult question to decide in the application of the Full Bench decision.

In this state of the authorities. if there is nothing else in the case, the matter would no doubt be a somewhat difficult point to decide, but the pleadings in the case make my task lighter and the position of the appellant more difficult. The suit was brought under S. 112 of the Estates Land Act. The defendant was described as a shrotriemdar. Even mokasa Ex. D purports to be a list of shrotriem sarvamaniam villagers and a mere cultivating ryot cannot get into such a document. Para. 4 of the plaint says:

> The plaintiffs and others have been paying to the defendant's predecessors kist at the said rate from time out of memory and the lands comprised in Pattah No. 34 as ryoti lands.

This is not denied in the written statement; on the other hand para. 5 of the written statement refers to the plaintiff and other ryots of the village. So also para. 7. In para. 10 of his written statement defendant pleads that he is entitled to levy the premium under the Estates Land Act. Paragraph 11 refers to plaintiffs and other ryots of the village. Paragraph 12 says that the suit is barred by limitation under Schedule A Serial No. 5, under S. 55 of the Madras Estates Land Act. No plea is taken in the written statement; no issue raised as to the maintainability of the suits. In the course of the arguments before the Deputy Collector, the defendant seems to have argued that he possessed occupancy right over the lands of the shrotriem. The Deputy Collector meets his argument by referring to the judgment in Summary Suits Nos. 53 to 97 of 1915 on the file of the Divisional Officer, Vellore, (Ex. I) which held that the ryots of the village held occupancy rights and which also shows that the District Munsif before whom the suits were originally filed returned them for presentation before the Revenue Divisional Officer on the ground that the shrotriem was an estate under the Estates Land Act. Those suits were by a mortgagee of the defendant, the defendant himself not being a party to them. It may be that the Deputy Collector was not quite correct in regarding Ex. I as conclusive between the parties. The Deputy Collector then says:

> When this position is arrived at there is no more argument necessary to show that the defendant was not acting under S. 53 of the Estates Land Act and that he was not allowed by the provisions of S. 46 of the Act to collect premium from the plaintiff.

Up to this stage no question about the applicability of the Act seems to have been raised by the defendant and even then the point raised by him was that he was the owner of both the varams and that the plaintiff had no occupancy right. There seems to have been a confusion of thought on the part of the defendant and of his legal advisers. The consideration that a person is the owner of both the varams is material in determining the applicability of the Estates Land Act, only where the land is a whole village and an enfranchised inam: vide S. 2, Cl. (3) (d) of the Act. We have nothing to do with an enfranchised inam in this case. The suit land is part of the Arni estate. The only question is whether the defendant is himself a landholder or whether he is a ryot under the jaghirdar, and it is immaterial whether he was the owner of both melvaram and kudivaram prior to the suit. If he is a subsequent inamdar, even if he was at one time owner of both melwaram and kudivaram, that fact does not make the act inapplicable as in the case of an enfranchised inam. But the defendant seems to have thought up to the arrangement in 1919 under Ex. C he was the owner of both varams and, therefore, he had a right to take premium or charge enhanced rents though he is a subsequent inamdar and that somehow some provisions of the Estates Land Act will not touch him. Still he seems to have thought that he was a land-holder under the Estates Land Act. In appeal also no question as to the applicability of the Estates Land Act seems to have been raised.

In second appeal the point was, no doubt, expressly raised in Grounds Nos. 2 to 8. The Advocate-General suggests that the defendant never meant to admit that the act was applicable to him up to the execution of Ex. C in 1919 and that the arrangement under Ex. C itself was effected in consideration of the defendant admitting plaintiff's occupancy rights, and it may be that the defendant thought

that after the conferring of the occupancy rights on the tenants under Ex. C, the village became an estate, but the District Judge points out in para. 3 of his judgment that the suggestion put forward by the defendant, namely, that Ex. C was executed in consideration of defendant admitting occupancy rights of the tenant differed materially from the plea in the written statement. Anyhow the written statement does not deny the allegation in para 4 of the plaint that the plaintiffs and others were enjoying the lands as ryoti lands and were paying kist to the defendant's predecessors from time out of memory. It is impossible to make out from defendant's written statement that they ever meant to deny that the suit land was an estate prior to 1919 and to allege that it became an estate only after 1919. Thus, with reference to the pleadings, I must hold it is not open to the defendant now to contend that the Estates Land Act is not applicable as between him and the plaintiffs. I think there is also another ground on which this point must be decided against the appellant though this was not suggested by the respondent's vakil at the time of argument and there was no discussion on it at the Bar. The view taken by Wallis, C. J., in *Gadadhara Das* v. *Suryanarayana Patnaik* (1) and by Schawabe, C. J., and Devadoss, J., in *Brahmayya* v. *Achiraju* (2) can only apply to minor subsequent inams, that is, the so-called subsequent inams which are not whole villages. Where the subsequent inam is a whole village held on a permanent under-tenure, the case must really fall under S. 3 (2) (e) and there is no scope for a difference of opinion. In the present case though the suit village was carved out of another larger village, ever since 1801 it was regarded as a distinct and separate village. That being so, Cl. (e) of S. 2 (3) will apply. The first contention of the appellant must, therefore, be disallowed and the conclusion of the Courts below that the higher rent sought to be charged on the plaintiffs and other tenants under Ex. C is not binding on the ryots must stand.

The second point argued by the Advocate-General may now be stated. In 1919 the defendant and his ryots entered into an arrangement described in Ex. C by which from Fasli 1329 onwards, a rate of rent higher than the rate prevailing up to then was to be paid for the lands in the village and a lump sum of one year's rent according to the old rate was to be paid to the defendant. The sum was accordingly paid. In para. 6 of the plaint it was suggested that the payment was towards the rent for Fasli 1329. This was denied by the defendant who alleged it was in pursuance of Ex. C. The plaintiff took no issue on the point. The whole oral evidence set forth by the Divisional Officer shows it was in pursuance of Ex. C and his contention was that it was paid as a premium. Nor was any suggestion made before the District Judge that the payment was for rent for Fasli 1329. This payment was, therefore, obviously a premium and was so regarded by the Divisional Officer, though its purpose seems to have been to enable the defendant to make certain improvements to the village tank. Whatever the purpose might have been, the defendant was not entitled to collect it under S. 46 of the Act. The plaintiff and the other ryots were entitled to recover it from him if they filed a suit within six months from the date of the collection : Schedule, A, Part II, item No. 15. In this suit, there is no prayer for the recovery of that amount. Even if there is a prayer, it would have been barred.

But the plaintiff alleged in para. 7 of the plaint that the defendant is liable to have the amount credited from the rent for Fasli 1329, but there is no prayer asking for such a credit in para. 11 of the plaint. In the view I take, the absence of a prayer is immaterial. If the suit had been filed within six months after payment, the plaintiffs might be granted a declaration that the amount paid by the ryots might be credited towards the rent for Fasli 1329. But the suits were not filed within six months after payment. To compel the defendant to credit it towards the rent of Fasli 1329 is the same as taking back the amount from him on the ground of an illegal collection and then re-paying it to him under the heading of rent. This process is not permissible as it cannot be recovered from him on account of the bar of six months. The Deputy Collector did not discuss the point. It is a point which arose only on the fourth issue after his findings on the first and

second issues are known. Accepting his finding on the first and second issues that the pattahs for enhanced rents are not valid, the question arises whether the pattahs should not be held to be valid for the rents properly payable according to plaintiff's contentions, and, if so, whether the sale notices should be held valid to that extent: [Vide S. 53, Cl. (2)]. The point was raised before the District Judge by the defendant and the District Judge disallowed it on grounds which are not intelligible to me. The Judge says:

The payments cannot be regarded as illegal exactions in addition to the rents lawfully payable. They were made by plaintiffs in ignorance of their legal rights.

I am not able to understand how, because the plaintiffs made the payments in ignorance of their legal rights and the defendant obtained the payment taking advantage of the ignorance, the payment is other than an illegal payment falling under S. 144 of the Act. It was not paid as rent. It was paid as something else. Defendant was not entitled to it; it was, therefore, an illegal exaction. The plaintiffs ought to have sued for it within six months. Their right to recover it is barred. They are, therefore, bound to pay the rents for Fasli 1329 and the sale notices to set aside which the suits are filed under S. 112 of the Act are partly valid and partly invalid: see S. 52 (3) of the Estates Land Act.

I, therefore, modify the decrees of the Courts below by declaring that the sale notices issued by the defendant are invalid in so far as the excess rent charged under Ex. X is concerned, but are valid in so far as they cover the rent previously payable by the ryots.

The parties will bear their own costs throughout.

Decree modified.

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* A. I. R. 1926 Madras 638

SPENCER, O. C. J.

In re. Sogiamuthu Padayachi and *another*—Petitioners 1 and 2.

Referred Trial No. 1 of 1925 and Criminal Appeal No. 681 of 1924, Decided on 28th July 1925, from the judgment of the S. J., East Tanjore, in Case No. 11 of 1924.

(a) *Evidence Act, S. 27—Accused admitting possession of property—Property produced by accused himself—Statement of accused is admissible.*

The statement of an accused that he had in possession certain stolen property is admissible in evidence even though he himself produced the property: (14 *L. W.* 418, *Foll.*) It makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him some one else digs up the ground and produces the property. 26 *M. L. J.* 352, *Appr.* [P. 639, C. 2]

* (b) *Evidence Act, S. 27—Statement leading to discovery of property should be admitted as a whole.*

If an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he had hidden the properties. [P. 639, C. 2]

(c) *Criminal trial—Murder—Principal offenders allowed to remain untried and trial against accused playing minor part proceeded with—Procedure should be condemned.*

The improper procedure of the Sessions Court of allowing the principal accused to remain untried while a charge of murder is proceeded with against those who are supposed to have played a minor part in the crime should be condemned. There is no reason why all the accused should not be tried together at one trial. Even if some of them are principal offenders and the others accomplices, S. 239, Cl. (b), Criminal P.C., permits them all to be tried together in one trial. [P. 640, C. 1]

(d) *Evidence Act, S. 114—Charge of murder and theft—Possession of stolen property not explained by accused—Accused cannot be presumed to have committed murder.*

When the charge is that the accused committed murder or theft in a building or both, it is not legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property, and when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused they cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. [P. 640, C.1, 2]

(e) *Criminal trial — Re-trial—Probability of conviction on available evidence should be considered.*

Re-trial should not be ordered unless there is a reasonable probability of the accused being convicted on the evidence known to be available against them. [P. 641, C 1]

K. S. Jayaram Aiyar and *Nagaraja Iyer*—for Accused.

Public Prosecutor—for the Crown.

Judgment.—The two accused in this case have been convicted of the murder

of the Pandara Sannadhi at Dharmapuram on the night of October 28th, 1923 and have been sentenced to death by the Sessions Judge of East Tanjore. My learned brothers, Devadoss and Wallace, JJ., have differed on the question whether the conviction for murder should be confirmed or not and it is for me to decide now which of their views should prevail. The fact that the deceased was murdered at the time and place stated in the charge has not been questioned before me. The complicity of these accused in the murder is alone in question. They were palanquin bearers employed in the mutt. There is no evidence as to their movements on the night of the murder. The only evidence appearing against them consists of (1) the fact that they produced certain properties alleged to have been stolen from the mutt and from the deceased and (2) the fact that they made certain statements at the time of producing those properties which are admissible under S. 27 of the Evidence Act.

In *Queen-Empress* v. *Sami* (1), in which there was reason for concluding that murder and robbery were committed as parts of the same transaction, the presumption was drawn that any one who took part in the robbery also took part in the murder and evidence as to the disposal of the property belonging to the murdered person was taken into consideration against the accused on the charge of murder. In that case there was other evidence besides the evidence as to the production of stolen property, to connect the accused with the crime, namely, evidence that the first accused assisted in disposing of the corpse and that he and the second accused acted in concert together and evidence that the second accused was seen in the neighbourhood of the crime at the time when the deceased disappeared.

In *Moyila Kurmiah* v. *Emperor* (2), there was evidence that the accused was seen in the company of the murdered woman shortly before her disappearance. My learned brothers have differed mainly in the question whether the murder of the Pandara Sannadhi and the theft of property from the mutt have been shown to be parts of the same transaction, and secondly, as to the significance to be drawn from the fact that the accused showed places where certain property was buried and at the same time made statements.

I adhere to the view that I expressed in *In re Nainamalai Konan* (3) that the statement of an accused that he had in possession certain stolen property is admissible in evidence even though he himself produced the property. I agree with the opinion of Sadasiva Aiyar, J., expressed in *Manjunathaya* v. *Emperor* (4) that it makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him someone else digs up the ground and produces the property. Upon this point Devadoss, J.'s opinion is undoubtedly sound and is supported not only by authority but also by commonsense. I also agree with the opinion of the learned Judges who heard the appeal that, if an accused makes a statement which is admissible under S. 27, the whole of the statement which leads to the discovery of the stolen property is admissible and that sentences should not be cut up so as to reduce the statements only to the actual words which the accused may use to express the fact that he had hidden the properties. I think that the Sessions Judge was wrong in ruling out the statement of the first accused that the properties produced by him were stolen on *the night of the occurrence*. Wallace, J., is not satisfied that the accused used these words. If there is no proof that he used the words, of course no reliance should be placed on the use of them for convicting the accused but if the accused did use the words then they are parts of the sentence in which he gave information which led to the discovery of stolen property, and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible.

Mr. Devadoss, J., held that the murder and the theft were parts of the same transaction because the thieves seem to have removed the properties belonging to the mutt. If that is clearly made out, it might tell against the first accused in the charge Rathanasabapathy Thambiran, who claimed to be the rightful successor to the deceasd Pandara Sannadhi and in that capacity was responsible for the mutt

(1) [1890] 13 Mad. 426.
(2) [1913] M. W. N. 145.
(3) [1921] 14 L. W. 418.
(4) [1914] 26 M. L. J. 852.

properties. But for some reason or other the prosecution reserved the case of Ratnasabapathy Thambiran and Ayyadurai Pillai and proceeded against these accused, who at the worst were only minor accomplices in the crime of murder.

I cannot too strongly condemn the improper procedure of the Sessions Court in allowing the principal accused to remain untried while a charge of murder was proceeded with against certain other persons who are supposed to have played a minor part in the crime. There is no reason why all the accused should not have been tried together at one trial. Even if some of them were principal offenders and the others accomplices, S. 239, Cl. (b), Criminal P. C., permits them all to be tried together in one trial. The Sessions Judge has committed several other irregularities such as marking as exhibits statements made at the inquest by the several persons who were not witnesses at the trial and statements of witnesses made on previous occasions without drawing their attention to the statements and without any apparent reason that they were required for contradicting or for corroborating the witnesses; but about that we shall have something to say later.

I am unable to agree with Devadoss, J., that the circumstances that most of the properties found missing belonged to the accused rather than to the mutt or the temple for which he was trustee, sufficiently establishes as against these accused that the murder and the theft were part of the same transactions. (The judgment then dealt with the evidence and proceeded.) For the prosecution, the point is sought to be made that the accused have not attempted to explain their possession of property stolen from the mutt, that the burden is on them under S. 106, Evidence Act of proving facts specially within their knowledge and under S. 114, ill. (h) if they decline to answer a question which they are not compellable to answer by law, the Court may presume that the answer, if given, would be unfavourable to their innocence of the crime. When the charge is that the accused committed murder or theft in a building or both, is it legitimate to presume that the accused are guilty of the more serious offence of murder because they are unable or unwilling to explain their possession of stolen property. I think the answer must be that if there is other evidence to connect the accused with the death of the murdered man, a jury, or in this country a Judge, may find upon circumstantial evidence that he is the murderer. But when the unexplained possession of stolen property is the only circumstance appearing in the evidence against an accused charged with murder and theft, the accused cannot be convicted of murder unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. Wallace, J., obverves:

> Neither law nor justice justifies the hanging of a man simply because he does not plead guilty to being a thief or a receiver of stolen goods.

I agree with that observation. In the present case there is evidence that the first accused made a statement prior to the discovery of the stolen properties that he buried the cloth bundle while others were burying cash, currency-notes and jewels in the same place, and there is evidence that the second accused said that he buried the gandi and other jewels not yet recovered in the yard behind his house. These statements are admissible under S. 27, Evidence Act, as they led to the discovery of property concerned in the crime, but the prosecution has been put to a disadvantage because the Sessions Judge failed to record in direct narration what the accused said, so far as the witnesses who deposed to the fact recollected it, in the actual words of the accused, and because the search lists Exs. TT and 22 prepared at the time also do not contain the statements of the accused as they made them and lastly because neither the committing Magistrate nor the Sessions Judge made use of their powers under S.342, Criminal P. C., of asking the accused to explain the circumstances appearing against them, namely, that they had told the witnesses to the search that they had buried certain material objects which were stolen at or about the time of the murder. In the Magistrate's Court, the explanation offered by both accused for the production of the property bears out that they were beaten and compelled to dig in places shown to them by the police. They were never asked to ex-

plain the other circumstance appearing against them, viz, that they admitted having buried the property in the places where it was found.

The Public Prosecutor suggests that, as the trial has been defective in these and other respects and as evidence has yet to be recorded against other accused whose trial has been reserved, I should order a re-trial of these accused. I am of opinion that that step should not be taken unless there is a reasonable probability of their being convicted on the evidence known to be available against them. I do not find upon the materials in the record any probability of these accused being convicted of murder if they are re-tried. I agree with Wallace, J., that upon the evidence now before the Court the conviction for murder cannot stand against either of them. They are, therefore, both acquitted so far as this charge is concerned and the death sentences are quashed

Accused acquitted.

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* A. I. R. 1926 Madras 641

SPENCER, J.

(*Suryadevara*) *Mahalakshmamma* — Plaintiff—Appellant.

v.

(*Suryadevara*) *Ramasamy* and *others* —Defendants—Respondents.

Second Appeal No. 983 of 1923, Decided on 8th January 1926, from the decree of the Dist. J., Guntur, in Appeal Suit No. 157 of 1922.

* *Hindu Law—Alienation—Widow alienating property to purchase new property—Estate improved—Reversioner cannot set aside sale.*

If the parties who have to support an alienation made by a widow can show that the estate has been improved by selling immovable property and buying other lands of equal or greater value and more convenient for cultivation and management, Courts will not set aside such transaction : (1912) *M. W. N.* 167 and 41 *M. L. J.* 459, *Appr.* ; 32 *Bom.* 577, *Dist.* [P 642 C 1]

G. Lakshmana —for Appellant.

Ch. Raghava Row—for Respondent.

Judgment.—This is an idle suit and an idle appeal. The plaintiff, who was the daughter of the last male holder, brought this suit to set aside an alienation made by her mother on the 24th February 1900 of immovable property which belonged to her deceased father and to recover the same. At the trial it came out that the land in question was sold because it was situated far away from Kollur, which was the plaintiff's mother's residence, in order to buy better land in Kollur itself. Both the District Munsif and the District Judge found that the sale was valid and binding on the plaintiff, because the lands sold were situated in an out-of-the-way village and yielded very little and because the object of the sale was, with the aid of the proceeds of the sale and some other money contributed by the plaintiff's mother, to purchase in plaintiff's name better land which was more convenient for cultivation. The suit was therefore dismissed.

Now it is argued in second appeal that the defendants failed to prove necessity for the sale. Reliance is placed on a decision in *Ganesa Iyer* v. *Amirthasamy Odayar* (1) in which Kumaraswamy Sastry, J., observed :

> Families often own lands at some distance from their village and I do not think the mere fact that the lands are a few miles away would justify a Hindu father in alienating the lands.

In that case the lands that were sold were within 10 miles of the 1st defendant's village. The substantial reason for the Court setting aside the alienation in that case appears from the words at page 895 :

> The family was not a trading family or one carrying on money-lending business and the starting of prospective money-lending transactions is no ground for alienating family properties.

The starting of money-lending transactions was one of the objects with which the family property had been sold.

Then in *Ganapa* v. *Sulu* (2) there is this observation of Justice Batchelor :

> A widow can alienate in order to preserve the estate, but we do not think that she is entitled to alienate merely in order to improve it.

In *Subramanian Chetty* v. *Chidambara Mudaly* (3), Sadasiva Aiyar, J., called attention to the opinion of Sundara Aiyar, J. *Re Krishnaswamy Dass Reddi* (4) the manifest benefit was sufficient and it was not necessary to prove necessity for an alienation made by a manager of a Hindu family for it to have a binding effect on the junior member's share. What Sundara Iyer, J., said was :

(1) [1918] M. W. N. 892.
(2) [1908] 32 Bom. 577=10 Bom. L. R. 927.
(3) [1921] 14 L. W. 495=11 M. L. J. 450=(1921) M. W. N. 740.
(4) [1912] M. W. N. 167.

It must certainly be shown that the family would not lose by parting with ancestral lands and purchasing new land. This would necessitate the giving of evidence to show that the new lands are at least not inferior in quality and value to the old lands. It may be open to an alienee to establish reasonableness by showing that though the new lands are not superior in value to the old lands the family would otherwise gain by the changes.

The learned Judge was inclined to substitute the question of whether the sale was a proper and reasonable act for the question whether it was necessary, in cases of alienation. This view finds support in the case decided by the Privy Council: *Ramsumran Prasad* v. *Shyam Kumari* (5) Their Lordships point out that word "necessity" when used in this connexion has a somewhat special, almost technical, meaning. They say that if an act of alienation of a widow is reasonable and prudent and for the interest of the estate in matters of compromise, it will fall within the power of the holder of a Hindu woman's estate, either as being an alienation which is deemed to be induced by necessity or as being in a parallel position to an alienation induced by necessity. I am of opinion that the view taken in 32 *Bom.* as to the meaning of "necessity and benefit" is too narrow. If the parties who have to support an alienation made by a widow can show that the estate has been improved by selling immovable property and buying other lands of equal or greater value and more convenient for cultivation and management, Courts will not set aside such transactions. In *Subramanya Chetty* v. *Ramakrishnamma* (6), a case came before Devadoss, J., and myself in which a widow borrowed money and improved her husband's estate by completing an unfinished house. We held that the reversioner who had taken the benefit of the improvements made by the widow was not entitled to impeach the act of alienation by which the estate had been improved. The present case is a stronger one, because there has been no loss or encumbrance upon the estate caused by the alienation, seeing that the plaintiff's mother left the estate in possession of better lands in place of those sold away and more conveniently situated for cultivation. There are no merits in this second appeal. It is dismissed with costs.

Appeal dismissed.

(5) A. I. R. 1922 P. C. 356 (P. C.).
(6) A. I. R. 1 [illegible] Mad 403.

* A. I. R. 1926 Madras 642

COUTTS-TROTTER, C. J., AND VISWANATHA SASTRI, J.

Umamaheswara Mudaly and *others*—Defendants—Appellants.

v.

Muniswami Mudali and *others*—Respondents.

Appeal No. 185 of 1923, Decided on 25th August 1925, from the decree of the Sub-J., Chingleput, in Original Suit No. 28 of 1919.

* (a) *Partnership—Dissolution—Interest on moneys drawn by partner and interest on advances after preliminary decree should not be allowed.*

Interest on moneys drawn by a partner from the partnership funds—be it capital or interest—cannot be allowed unless it is so provided in the deed; *Meymott* v. *Meymott*, (1862) 32 *L. J. Ch.* 218, *Foll.* Also interest on advances up to the date not of the dissolution which had been effected by the preliminary decree but right up to the date of final decree, cannot be allowed: *Barfield* v. *Lough Borough*, (1872) 8 *Ch*, 1, *Foll.* [P. 642, C. 2]

* (b) *Practice—Court's duty—Costs—Omission to point out correct law—Costs should not be allowed—Civil P. C.*, 35.

It is clearly the party's business to direct the mind of the Court to the authorities which show him the right practice, and if a party has failed to do this he should not be allowed costs although case is decided in his favour. [P. 643, C.1]

T. R. Ramchandra Aiyar and *N. S. Rangaswami Aiyangar*—for Appellants.

K. S. Krishnaswami Aiyangar — for Respondents.

Judgment.—In this case the learned Judge in making his final decree in a suit for dissolution of partnership has made two errors in taking the accounts. In the first place he has allowed interest on moneys drawn by a partner from the partnership funds—be it capital or interest, it does not matter—a thing which it is not the practice to allow unless it is so provided in the deed. There is clear authority in the case of *Meymott* v. *Meymott* (1). The other thing he has allowed is interest on certain advances up to the date not of the dissolution which had been effected by the preliminary decree but right up to the date of final decree. For that again there is clear English authority, *Barfield* v. *Lough Borough* (2), that such allowances cannot be made. The decree will be

(1) [1862] 31 Beav. 445=32 L. J. Ch. 218=9 Jur. (N. S.) 426.
(2) [1872] 8 Ch. 1=42 L. J. Ch. 179=27 L. T. 499=21 W. R. 86.

amended by disallowing those two items, interest at 9 per cent. being allowed up to the date of the preliminary decree. After that date the usual rate of 6 per cent. interest will be allowed.

With regard to the costs of this appeal the conduct of the defendants has been extremely foolish and it is probably owing to their foolishness in not coming to Court, and not being ready when they ought to have go neon with this case, and asking for an adjournment, they are responsible in part for the learned Judge going wrong ; because, if the two cases cited above had been pointed out to him undoubtedly he would have directed himself right with regard to this. I do not expect the Subordinate Judge, any more than I expect myself, to know the exact principles on which such matters are dealt with in a dissolution of partnership and it was clearly the defendants' business to direct the mind of the Court to the authorities which would have shown him the right practice. In these circumstances the appeal will be allowed without costs and the decree will be amended in the way I have indicated.

Appeal allowed.

A. I. R, 1926 Madras 643

PHILLIPS AND RAMESAM, JJ.

Sooppiadath Ahmad — Plaintiff — Appellant.

v.

Irimbantakath Manha Mammad Kunhi and *others*—Defendants—Respondents.

Appeal No. 242 of 1922, Decided on 13th October 1925, from the decree of the Sub-J., Tellicherry, in O. S. No. 44 of 1919.

Malabar Law—Tarwad—Property in the name of karnavan—Presumption is that property belongs to tarwad—No such presumption exists in case of an anandravan.

There is a very strong presumption that property standing in the name of a karnavan belongs to the tarwad. But a similar presumption does not arise in the case of an anandravan. Ordinarily an anandravan has no private property, but is only a member of the tarwad which owns properties, but when there is property standing in the name of an anandravan and it is not shown that he has been in possession of tarwad funds, the presumption in favour of the property being tarwad property is very slight, and it is open to the anandravan to show he had private money out of which he could acquire the property. [P 644 C 1]

T. R. Ramchandra Aiyar and *A. S. Srinivasa Aiyar*—for Appellant.

S. Doraiswami Aiyar and *V. P. Karunakara Nambiar*—for Respondents.

Judgment.—The plaintiff-appellant brings this suit for the recovery of an elephant and also certain documents in the possession of the defendants. The defendants are the children and the wives of one Moossankutty, the deceased younger brother of the plaintiff. The plaintiff bases his claim as karnavan of the tavazhi consisting of the children of one Asya, the mother of the plaintiff and Moossankutty and it is alleged that Moossankutty bought this elephant out of tavazhi property and consequently the karnavan is now entitled to possession. As regards the documents it is said that they relate to tavazhi property and that the plaintiff is the proper custodian.

The first argument advanced in appeal is with reference to the procedure adopted in the lower Court. The Subordinate Judge stated that the nature of certain properties situated in Chandranalloor was not in issue in the suit and he would not allow any further questions to be asked as to whether they were tavazhi properties or not. It is now stated that not only was oral evidence excluded but also documentary evidence. The plaintiff has filed a list of documents which he said were so excluded. When the Subordinate Judge gave this ruling, the case was proceeding and P. W. 2 was being examined. The documents now put forward by the plaintiff (with one exception) were not included in the list of documents filed by him, and at the time the order was made, those documents were in the District Munsif's Court and no application had been made by the plaintiff to secure their production. It was therefore too late for him to claim to exhibit these documents in the suit. So far as the oral evidence is concerned it can be of very little importance in determining the nature of these properties, and we do find that notwithstanding the Subordinate Judge's prohibition many questions were put to the witnesses on this very point and the answers have been recorded. We do not, therefore, think it

necessary to give plaintiff any further opportunity of adducing evidence which he was not prepared to do in the lower Court.

Coming to the merits of the case, it is argued that there is a very strong presumption that property standing in the name of a member of a Malabar tarwad belonged to that tarwad. The presumption has been laid down in *Chathu Nambiar* v. *Sekharan Nambiar* (1) and *Mari Veetil Chathu Niar* v. *Mari Veetil Mulamparol Sekaran Nair* (2) with regard to karnavans, and undoubtedly, with regard to karnavans, the presumption is very strong ; for they are in possession of the whole of the property of the tarwad and can deal with it as they like. A similar presumption is sought to be established with regard to anandravans. Ordinarily an anandravan has no private property, but is only a member of the tarwad which owns properties ; but when we find that there is property in the name of anandravan and it is not shown that he has been in possession of tarwad funds, the presumption in favour of the property being tarwad property is very slight, and it is open to the anandravan to show he had private money out of which he could acquire the property. (The judgment then discussed the evidence and came to the conclusion that the evidence that the elephant was purchased by Moossankutty for himself was very strong and found that it was purchased by him out of his own funds. (As regards documents it to was found that the question whether they were tavazhi properties was in issue in another suit and therefore no order was passed with regard to them. The appeal was dismissed.)

Appeal dismissed.

(1) A. I. R. 1925 Mad. 430.
(2) [1910] 33 Mad. 250=20 M. L. J. 86.

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* A. I. R. 1926 Madras 644

VENKATASUBBA RAO, J.

Manicka Chetti—Appellant.

v.

Kuppusami Asari and *others*—Respondents.

Appeal No. 34 of 1924, Decided on 25th January 1926, from the order of the Sub-J., Vellore, D/- 18th July 1923, in A. S. No. 50 of 1923.

(*a*) *Compromise decree—Construction—Court fixing time according to wishes of parties—Time is not essence of the contract.*

In a suit for redemption of a property mortgaged by consent of parties a decree was passed which fixed a date for the payment of the mortgage amount.

Held : that in the circumstances there is nothing justifying the inference that the parties intended that the time should be of the essence of the contract. [P 644, C. 2]

* (*b*) *Civil P. C., O. 34, R. 7—Preliminary decree need not necessarily be passed in every mortgage suit.*

It is not absolutely necessary that in every mortgage suit there should be a preliminary decere before a final decree is passed. If the terms of the compromise arrived at in a mortgage suit are that a decree should be forthwith passed, a decree which is capable of execution, it is perfectly competent to a Court to give effect to the compromise and pass such a decree. [P 644, C. 2, P 645, C. 1]

N. Chandrasekhara Iyer and *Venkatasubba Mudaliar*—for Appellant.

K. Rajah Iyer—for Respondents.

Judgment.—The learned Subordinate Judge has held that time is not of the essence of the contract. This is apparently also the view taken by the District Munsif. The suit was instituted for redemption of a property mortgaged. By consent of parties a decree was passed which fixed a date for the payment of the mortgage amount. In these circumstances there is nothing which will justify the inference that the parties intended that the time should be of the essence of the contract. I agree, therefore, that the decision of the lower Court on this point is correct.

Secondly, it has been contended that the decree passed was a preliminary decree and was therefore not executable. If the decree was really a preliminary decree, it would no doubt be necessary to have a final decree before the application for execution of the decree could be entertained. But in this case I am satisfied that the decree pased is not a preliminary decree. As has been pointed out in *Arunadati Kumari* v. *Ram Niranjan* (1) and *Sivasubramania Pillai* v. *Rakkumuthu Mooppan* (2) it is not absolutely necessary that in every mortgage suit there should be a preliminary decree before a final decree is passed. If the terms of the compromise are that a decree should be forthwith passed, a decree which is capable of execution, it is per-

(1) [1920] 58 I. C. 299.
(2) A. I. R. 1924 Mad. 645.

fectly competent to a Court to give effect to the compromise and pass such a decree. Agreeing with the lower Court I hold that the decree that was passed in this case was an executable decree. 'My decision on both the points is against the petitioner. C. M. S. A. fails and is accordingly dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 645

KUMARASWAMI SASTRI AND VENKATASUBBA RAO, JJ.

O. Ranganatha Mudaliar — Defendant—Appellant.

v.

A. Mohanakrishna Mudaliar and *others*—Plaintiffs—Respondents.

Original Side Appeal No. 31 of 1924, Decided on 3rd November 1925, from the judgment of Masilamani Pillai, J., D/-5th February 1924.

** Will—Construction — Gift 'after the debt has been cleared'—Donee gets vested interest.*

Mere direction by the testator that his legacies or gifts are to be given after the debts are discharged would not make the gifts, which are otherwise vested, contingent, because it is the duty which the law casts upon the executors that they shall discharge the debts before giving effect to the legacies or gifts.

Where testator bequeathed by Will to his daughter a house 'after the debt is cleared'.

Held : that the daughter got a vested interest in the house and that her interest was not contingent on the debt being cleared off.

[P 646 C 1,2]

T. G. Raghavachariar—for Appellant.
K. Rajah Iyer—for Respondents.

Kumaraswami Sastri, J.—The only question argued in this appeal is whether the gift to the daughter of the testator of the house mentioned in the plaint conferred on her a vested interest in the property or merely a contingent interest. The testator had three daughters and two sons. Here we are concerned only with the gift to the eldest daughter Kuppammal. The Will of the testator was probated and marked as Ex. A. The testator appoints certain executors under the Will ; he specifies the property which he has got and makes certain bequests to his daughters. Paragraph 17 of the Will is the paragraph relating to the house in question. In that he states as follows :

Of my three daughters, at the time of the marriage of my eldest daughter, Sowbagiavathi Kuppammal, jewels for about Rs. 2,000 should be given and Rs. 1,000 spent for marriage, and aftei the debt has been cleared, besides giving ar streedhanam, House No. 3, Arunachellam Pillas Lane, Periamet, mentioned in para. 1, woman's cloths costing from Rs. 3-8-0 to Rs. 7 should be purchased and given to all our relatives, who are poor and who have come for the marriage.

At the date of the death of the testator there was a mortgage debt upon this house. Reference has been made by the learned trial Judge to the bequest to the other two daughters and I shall refer to them at once. The bequest to the second daughter is contained in para. 18 and it is as follows :

At the time of the marriage of my second daughter, Radha Ammal, jewels for Rs. 2,000 should be given, a house worth Rs. 2,500 should be purchased and given as streedhanam and Rs. 1,000 spent for marriage and (she) should be given in marrige to my brother-in-law Jayavelu Mudaliar. The aforesaid house should only be purchased and given after my debt has been cleared.

Paragraph 19 refers to a gift in favour of the third daughter and it runs as follows :

To my third daughter Gajalakshmi Ammal also jewels (should be given) and marriage expenses (incurred) as mentioned above, and after the debt has been cleared a house also should be purchased and given as mentioned above.

Now it seems to me that in considering this Will para. 17 is clear and we need not construe it with reference to any other paragraph of the Will. There was a debt upon the house and the testator says that the executors shall discharge the mortgage debt upon the house and give the house to his eldest daughter. If this clause stood alone, it seems to me that there will be little difficulty in construing the clause as a gift which would pass an absolute title to the daughter and which would vest the house immediately in her. The fact the testator wanted the executors to discharge the encumbrance in the property would not by itself make it a contingent gift. I do not think in this case it is necessary that Cls. 18 and 19 should be called in question to construe Cl. 17 of the Will. Clauses 18 and 19 do not refer to any existing property which is bequeathed. In them a direction is given to the executors to purchase houses after the debts are discharged and then give one house to the second daughter and another to the third daughter. That purchase can only be made after the

debts are discharged. Again in Cl. 17 the word is the debt which evidently refers to the mortgage debt while in Cls. 18 and 19 the testator refers to his general debts. It, therefore, seems to me that the circumstances as regards the bequest to the second and third daughters are different from the circumstances which existed with regard to the bequest to the first daughter. The house which was given to her specifically existed on the date of the testator's death. He wants the executors to pay off the debt and give the property to her. The debt can only reasonably mean the debt which existed at the time of the gift upon the house ; whereas in the other two cases the houses were to be purchased only after the discharge of the testator's debts, because they could not purchase houses and give them to the daughters before the debts were discharged. The circumstances as regards three cases being different, I am not prepared to construe Cl. 17 which to me appears to be quite clear and cut down all the gift to the daughters because the other two daughters would get less or get nothing at all unless all the debts were discharged. As the house in Cl. 17 was under mortgage, the executors are bound to discharge that debt first before paying the simple debt and it is not suggested that there were no funds left by the testator to do so. They should discharge the mortgage debt and give the property to the daughter. This clause was a provision for her benefit and otherwise she would have to take an encumbered house and if she could not redeem the mortgagee would sell away the house for the discharge of his mortgage debts and she would be left without any provision. I am also of the opinion that the mere direction by the testator that his legacies or gifts are to be given after the debts are discharged would not make the gifts, which are otherwise vested, contingent, because it is the duty which the law casts upon the executors that they shall discharge the debts before giving effect to the legacies or gifts. A testator gives property to *A* or *B* but adds to that clause that this should be given only after the debts are discharged which clause is merely a repetition of what the law states in so many words in S. 285 of the Succession Act, and this would not by itself make the estate contingent. I am fortified in this opinion by referring to Illustration (*e*) of S. 106 of the Sucession Act which is made applicable to Hindu Wills, and which is as follows :

> *A* bequeaths the whole of his property to *B* upon trust to pay certain debts out of the income and then to make over the fund to *C*. At *A*'s death the gift to *C* becomes vested interest in him.

It seems to me, therefore, to be clear that the direction that the debts should be discharged would not make the estate given, a contingent estate, if the intention of the testator was that the daughter should get the property. This, I think, is sufficient to dispose of this appeal.

I may also state that even assuming that the estate in favour of Kuppammal was contingent it would vest in her immediately the debt has been discharged. The finding of the learned Judge is that on the date of the death of Kuppammal all the debts of the testator have been discharged. Such being the case it is for those who want to maintain that it is contingent to say that although the debts were discharged the executors discharged those debts by borrowing from third persons and that their borrowing must be treated in law as the debts which existed at the date of the testator's death. As to this, the evidence is absolutely insufficient. There is no evidence worth the name to show that at the time of Kuppammal's death, the executors borrowed moneys for the discharge of the testator's debts and that these debts were outstanding. Exhibit G filed in this case does not show that the debts of the testator were discharged by borrowing from third persons.

I think the appeal fails as it is not shown that the estate was a contingent one ; and it is dismissed with the taxed costs of the first respondent.

Venkatasubba Rao, J.—I entirely agree and would add a few words. That portion of the clause in the Will which we are called upon to construe is as follows :

> At the time of the marriage of my eldest daughter Sow. Kuppammal, jewels for about Rs. 2,000 shall be given and Rs. 1,000 spent for marriage and after the debt has been cleared, House No. 3 Arunachellam Pillai Lane, Periamet shall be given as streedhanam.

The appellant's vakil contends that the interest taken by the legatee is a contingent one. As an English lawyer would put it, do the words constitute a present gift independent of the direction

to pay (in this case the direction to give)? The question is essentially, if not solely, one of intention, and on a reading of the whole clause the testator's intention must be found. Is there a present gift or not ? The Will is in Tamil, and it is not suggested and indeed it cannot be, that whoever wrote it was versed in the highly technical rules of English conveyancing. As I read the Tamil Will, there is a present bequest. In the clause the executors are not mentioned. All that it says is that the legatee shall be given the house. The words that she shall be given the house, mean nothing more than that she shall take it. There is a gift independent of any direction to give.

Next, as regards the contingency alleged, I may observe that it is not suggested that the gift is contingent by reason of there being a reference to the marriage of the legatee. The payment of the debts is said to be the contingency upon the happening of which the gift is to take effect. Is the gift contingent because the legatee is to be given the house after the testator's debts are paid ? On a true construction the words import a present gift, the time of the giving alone being postponed.

I should not find the slightest difficulty in construing the clause, but for the fact that my view happens to be different from that of the trial Judge and from also that of Courts-Trotter, J. (as he then was) who, sitting on the original side construed the clause on a previous occasion. With the utmost deference to the learned Judges, I cannot agree that the vesting of the legacy is to be postponed till after the payment of the testator's debts. If this be so, wherever a testator adds by way of caution in making a bequest that his debts shall be paid off, the bequest must be held to be a contingent one. It is true no doubt that if the debts exhaust the estate, the legatee may get nothing ; but that cannot be the test in determining whether the interest is vested or contingent. It is alway implied in law that the debts shall be paid first. An express direction to that effect can and ought to make no difference.

I am clearly of the opinion that on a true construction of the clause there is a present gift and the house vested in the legatee on the testator's death. The result is, that though my reasoning is different from that of the learned trial Judge, his judgment must be affirmed, and I, therefore, agree that the appeal fails and should be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 647

VISWANATHA SASTRI, J.

T. R. Kaliaperumal Naidu—Defendant—Petitioner.

v.

Ponnuswami Chettiar—Plaintiff—Respondent.

Civil Revision Petitions Nos. 23 and 24 of 1924, Decided on 27th October 1925, from the order of the Small Cause Court Judge, Kumbakonam, D/- 17th October 1923.

Provincial Small Cause Courts Act, S. 17—Security for decretal amount given—Order to deposit decretal amount without rejecting security is bad—Provincial Insolvency Act, S. 25.

The Court is not justified in insisting upon the decretal amount being paid, when, as a matter of fact, the petitioner has given security for the amount decreed along with his petition, and when the Court has not passed any order rejecting the security tendered. [P 648, C 1]

Watrap S. Subrahmaniya Aiyar—for Petitioner.

R. Kuppuswami Aiyar—for Respondent.

Judgment. — These petitions are by the defendant against whom an ex-parte decree was passed by the Small Cause Judge of Kumbakonam in S. C. S. No. 2496 of 1922. He applied to set aside the ex-parte decree and, along with this application, he tendered security for the amount due under the decree as required by the proviso to S. 17 of the Provincial Small Cause Courts Act. The Small Cause Judge, without considering whether the security tendered was sufficient or not, and without rejecting the security tendered, passed an order to the effect that the amount should be paid into Court. This was not done, and the petition to set aside the decree was dismissed. C. R. P. No. 23 of 1924 is against the order insisting on the payment of money into Court, and C. R. P. No. 24 of 1924 is against the order refusing to set side the ex-parte decree. The question to be considered in C. R. P.

ants but the intention of the donors was not that they should take the property as free-gift to them but should hold it as members of a tarwad without right of alienation so that their children and their children's children may be benefited. There are cases where bequests were made with conditions superadded with regard to alienation, and it was held that such subsequent conditions would not invalidate the gift. But where the gift itself is hemmed in by limitations and if the limitations are not those sanctioned by law then the gift must fail. The observations of their Lordships of the Privy Council in *Shookmoy Chandra Das* v. *Monoharri Dassi* (2) apply to the provisions of this gift :

It is true it the bequest had been of rents and profits, and it appeared that it was the intention of the testator to pass the estate, those words would be sufficient to do it, but what their Lordships have to do is to find the intention, looking at the whole of the provisions of the Will and they gather from those words that it was not his intention to pass the estate. The provision afterwards against alienation further confirms this. It is not a case where the testator has expressed an intention to pass the estate and has added a clause against alienation in which case the clause against alienation would be void but the provision here against alienation is confirmatory of the other part of the Will.

It has been contended by Mr. K. P. M. Menon for the appellants that the word "tarwad" is not used in the ordinary sense. It is difficult to follow this argument in the light of the recitals in the documents. The word tarwad is not only used in more places than one but the restraint on alienation and the recital that

the Kulichit agreement in respect of the above-mentioned shops should be obtained in the names of the seniormost female members at the respective times

clearly indicate that the donors intended by the word . . . . tarwad an ordinary Marumakkayathayam tarwad.

The donors intended to create by the gift deed a tarwad which a Moplah governed by the ordinary Muhammadan Law is not entitled to do. In this view of the document it is unnecessary to consider whether a custom prevails among the Calicut Muhammadans by which property should be enjoyed by them as tarwad property. The mere fact that they adopt the customs of their neighbours, the Nairs, is no ground for holding that they are governed by a valid custom by which property could be held as tarwad property. The Moplahs of South Malabar are not governed by the Marumakkathayam Law or the Alyasanthana Law of inheritance but are governed by the ordinary Muhammadan Law.

We, therefore, hold that the clause in the deed of gift creates an estate repugnant to the Muhammadan Law and, therefore, invalid. The judgment of the learned Judge is right and the Letters Patent appeal is dismissed with costs.

Appeal dismissed.

(2) [1885] 11 Cal. 684=12 I.A. 103=4 Sar. 639 (P. C.).

A. I. R. 1926 Madras 650

SPENCER, J.

Visvanatha Iyer — Plaintiff—Appellant.

v.

Chimmukutti Amma and *others*—Defendants—Respondents.

Second Appeal No. 892 of 1923, Decided on 7th January 1926, from the decree of the Sub-J., South Malabar, in A. S. No. 141 of 1922.

Malabar Law—Kanom—Mortgage of kanomdar's interest is subject to kanomdar's liability to be redeemed at the end of 12 years—No privity between jenmi and mortgagee without possession of kanomdar's interest exists—Jenmi is not bound to make the mortgagee a party to his redemption suit if he has no notice of the mortgage.

A kanom is an anomalous mortgage being a combination of a usufructuary mortgage and a lease for 12 years. The kanomdar has no right to sell the jenmi property. His only right is to remain in possession until he is repaid the kanom amount plus the value of improvements. A mortgagee of that interest takes his mortgage subject to the liability of the kanomdar to be redeemed at the end of 12 years. As regards the right to have an account of the cost of improvements, the tenant's right is analogous to the right to a chose in action and the landlord is not affected by a transfer of it unless he has notice of it : 23 *Mad.* 86, *Ref.* There is no privity between the jenmi and mortgagee of the kanomdar's interest who is not in possession of the estate. Jenmi is not liable to pay the mortgagee of kanom interest his mortgage amount because jenmi, failed in the redemption suit to make him a party, if he never had any notice of the sub-mortgage. [P 651 C 2, P 652 C 1]

K. P. Ramakrishna Iyer—for Appellant.

K.P. Krishna Menon—for Respondents.

Judgment.—The 5th defendant, who is a Malabar jenmi, gave a kanom of certain property to Defendants 1 and 2

and they on the 6th March 1917, mortgaged the rights of the 1st defendant to Defendants 3 and 4 under Ex. A. The plaintiff who is the appellant is the assignee of the rights of Defendants 3 and 4. The 5th defandant filed a suit for redemption of the kanom, O. S. 52/19, against Defendants 1 and 2 without making Defendants 3 and 4 parties and he got a decree for redemption and paid the money into the hands of Defendants 1 and 2 before the present suit was instituted. The appellant sued on his mortgage in 1921 and the District Munsif gave him a personal decree against his mortgagors, Defendants 1 and 2, and also against their possessory interest in the property for what it might be worth.

It is argued in second appeal that the plaintiff should have been given something more than what he has got. He wants a decree against the 5th defendant for what is due to him under his mortgage and a decree for sale of interest of Defendants 1 and 2 as kanomdars unaffected by the redemption decree to which the appellant was not a party. It is true that the appellant is not bound by the decree for redemption in O. S. 52/19 to which he was not a party, but as he did not give notice to the 5th defendant that he had taken a mortgage of the 1st defendant's kanom right there was no obligation under O. 34, R. 1, Civil P. C., on the part of the 5th defendant to make him a party to that suit.

The question now is, What is the plaintiff entitled to by way of relief in the present suit? He has been given a decree against the Defendants 1 and 2. He cannot be given a decree for sale of the suit property because he never possessed any rights over that seeing that his mortgagor could not give him a right that he had not got himself. What he got under his mortgage was a pledge for the kanomadar's interest. That interest consisted of a right to enjoy the property for 12 years, subject to redemption at the end of the time and to be compensated for tenant's improvements. In Moore's "Malabar Law", page 245, it is stated that the kanomdar cannot create a higher title than he possesses and if he grants a sub-mortgage, the sub-mortgagee can have no higher right than to enjoy the remainder of the mortgagee's term. The author presumably was there referring to a usufructuary sub-mortgage and not to a hypothecation as is the case here. It must be remembered that a kanom is an anomalous mortgage: being a combination of a usufructuary mortgage and a lease for 12 years. The kanomdar has no right to sell the jenmi property. His only right is to remain in possession until he is repaid the kanom amount plus the value of improvements. A mortgagee of that interest takes his mortgage subject to the liability of the kanomdar to be redeemed at the end of 12 years. As regards the right to have an account of the cost of improvements, the tenant's right is analogous to the right to a chose in action and the landlord is not affected by a transfer of it unless he has notice of it: see *Vasudeva Shenoi* v. *Damodaran* (1). There is no privity between the jenmi (or owner of the property) and the mortgagee of kanomdar's interest who is not in possession of the estate. If the kanomdar failed to pay rent to the jenmi the jenmi could not recover it from the mortgagee because there is neither privity of estate nor privity of contract between them: vide *Nochylliyil Eazhuvan* v. *Eralpad Raja* (2). Now that the term of the kanom has come to an end and it has been redeemed the plaintiff who took a pledge of the kanomdar's interest has no subsisting interest. If the interest of the kanomdar be put up to auction, it is worth nothing as noticed by the District Munsiff, because no one will give anything for the rights of a kanom-interest which has been terminated by payment of the kanom amount and the compensation for improvements at the close of the term.

My attention has been drawn to a decision of Madhavan Nair, J., in Second Appeals Nos. 668 and 646 of 1921 in which that learned Judge declined to be guided by the decisions in *Chinnasamy* v. *Venkata Ramakrishnayya* (3) and *Muhammad Haji* v. *Mohidin Kutti* (4) as he was of opinion that they were not quite consistent with the decision of the Privy Council in *Sukhi* v. *Ghulam Sdaarf Khan* (5). The case which my learned

(1) [1881] 23 Mad. 86.
(2) [1917] 40 Mad. 1111=32 M. L. J. 444.
(3) [1917] 4 L. W. 502=(1917) M. W. N. 111.
(4) [1921] 30 M. L. T. 21.
(5) A. I. R. 1922 P. C. 11. (P. C.).

brother had to deal with was one of ordinary sub-mortgage, not of a Malabar Kanom. The decision in 43 *All.* 469 will not help the appellant in the present case. In that case the plaintiff had a charge on the property which had come into the hands of respondents by virtue of their mortgage, and as she was entitled to maintenance and possessed a charge over the properties which were secured for payment of her maintenance, it was ordered that the respondents should pay the amount due to her which had been wrongly taken away by her nephews Jag Ram and Net Ram in consequence of the failure of the respondents to implead her in their foreclosure suit against Jag Ram and Net Ram. The appellant there had a mortgage both over the rights of the original mortgagee and over the equity of redemption. The appellant here has a mortgage over the rights of a mortgagee-lessee under a redeemed mortgage and an expired lease. It cannot be said in the present suit that the 5th defendant is liable to pay the plaintiff's mortgage amount, because he failed in the redemption suit to make him a party seeing that he never had any notice of the sub-mortgage and he had every right to deal directly with his kanomdars. I am unable to accept the contention that the plaintiff was a necessary party in the suit for redemption of the kanom, when he held no charge or encumbrance over the land itself. In this view the lower Court's decision is right and the second appeal must be dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 652

DEVADOSS AND WALLER, JJ.

Velayuda Gurukal—Appellant.

v.

Annammal and *others*—Respondents.

Letters Patent Appeal No. 23 of 1924, Decided on 11th November 1925, from a judgment of Venkatasubba Row, J., D/- 21st January 1924, in S. A. No. 504 of 1921.

* (a) *Civil P. C., S.* 100—*Misconstruction of important documents of evidence, is ground for second appeal.*

High Court will interfere in cases where the lower Courts have misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected themselves as to any question of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof, or where they decided points not raised by the parties, or where they misconstrued important documents. When a Court misconstrues a document it relies upon a construction which it is not capable of bearing and such misconstruction leads not merely to a wrong view of the evidence but to relying upon what it considers to be an inference from the evidence which the evidence is not capable of bearing. The misconstruction of an important document, therefore, is a ground for interference. [P 654 C 1]

* (b) *Civil P. C., S.* 100—*Original grant not produced — Inam register and inam patta are foundation of Inamdar's title—Their misconstruction is ground for second appeal.*

The inam register and the inam patta containing the terms of original grant, though they are not the original grants, in the absence of the original grant, are the foundation of the inamdar's title and their misconstruction is a ground for second appeal: *A. I. R.* 1923 *P. C.* 187, *Ref.* [P 653 C 1]

C. V. Ananthakrishna Aiyar—for Appellant.

T. M. Krishnaswamy Aiyar—for Respondents.

Judgment.—This is an appeal against the jungment of our learned brother, Venkatasubba Row, J., reversing the decrees of the lower Courts and dismissing the plaintiff's suit. The plaintiff brought the suit for possession of property on the ground that it belonged to an Authinam. Both the lower Courts held in plaintiff's favour. But Venkatasubba Row, J., dismissed the plaintiff's suit on the ground that the recitals in the inam documents were against the claim of the plaintiff.

The point raised by the appellant before us is that the misconstruction of a document which is not a title-deed or foundation of title is not a ground for interference by the High Court in second appeal. The argument is that the original deed of grant was not in evidence in the suit and Exs. A, B, C, I and II, were only evidence in the case and the misconstruction of a document which is only a piece of evidence is not a ground for interference in second appeal. Reliance is placed upon a recent decision of the Privy Council in *Midnapur Zemindary* v. *Uma Charan Mandal* (1). In the case Lord Sumner in delivering the judgment of their Lordships observed:

The documents admitted in evidence upon that question are really historical materials, and al-

(1) A.I.R. 1923 P.C. 187 (P. C.).

though they have to be construed, and if possible understood, they are not to be treated as involving issues of law merely because they have to be construed. It is not as though they were being construed as instruments of title, or were contracts or statutes, or otherwise the direct foundation of rights.

In the case the question for decision was what was the date on which a particular holding began as a definite holding; and a number of documents were put in evidence which were of historical character. So far as the report goes, there is nothing to show that any document which directly related to the title of property had to be construed. In the present case the inam register and the inam patta, though they are not the original grants, yet contain the terms of the original grant and in the absence of the original grant, the inam title-deed and the inam register and the statement are the foundation of the inamdar's title. It has been urged that at the time of the inam enquiry the rights of the parties as they existed at the time were acknowledged by the Inam Commissioner and the Inam Commissioner did not confer any title on the inamdar nor did he take away the right from him. In answer to this contention, Mr. T. M. Krishnaswami Iyer, urges that Coimbatore District was a part of the Mysore State and when the East India Co., defeated Hyder and Tippu and took possession of the territory, all the rights of the persons who held under Hyder and Tippu ceased to exist, as the act of conquest did away with all the rights of the inhabitants that existed at the time of the conquest. He relies upon *Secretary of State* v. *Bai Raj Bai* (2), *Arunachellam* v. *Venkatachalapathi Guruswamigal* (3) and *Sethuramaswami* v. *Meruswami* (4). On the other hand the appellant's vakil relies upon *Vangala Dikshatulu* v. *Vengala Gavaramma* (5), *Cherukuri Venkanna* v. *Mantravathi Lakshmi Narayana* (6), *Gannaiyan* v. *Kamakchi Ayyar* (7) and *Narayana* v. *Chengalamma* (8). It is unnecessary for the purpose of this case to decide the interesting question whether the Government made a grant of the inam to the predecessors-in-title of the plaintiff or only recognized a pre-existing title. The policy of the British Government when they acquired territory either by conquest or by cession or by any other Act of State, was not to do away altogether with the rights of the inhabitants in the portion of the territory acquired or ceded, but to try to act equitably in all matters and to preserve the status quo ante. It is unnecessary to discuss the question further as we are satisfied in this case that the inam documents produced in the case are such documents as would bring them within the principle of ruling in *Midnapur Zemindari* v. *Uma Charan Mandal* (1), even if the observation of Lord Sumner is to be literally understood.

The case in *Secretary of State* v. *Srinivasa Chariar* (9) upon which great reliance is placed by the appellant does not help him. In that case, though the original deed of grant was not produced, yet a copy which was accepted as a correct copy of the deed of grant was in evidence. Their Lordships observe at page 429 (44 *Mad.*):

> In the circumstances of this case it is the best evidence of those terms, and it is on the true construction of the terms, so evidenced that the rights of the plaintiffs must depend.

In discussing the probative force of the other documents filed in the case their Lordships observe:

> Had these materials stood alone they might well have been urged as suggesting an inference that the original grant was in terms that supported the plaintiff's claim as to what passed under it. But in the clearer light afforded by Ex. 1 they lose their evidentiary value and leave the terms as shown by that exhibit in no degree obscured.

In this case, as already observed, the deed of grant is not produced. The statements made before the Inam Commissioner and the title-deed issued by him are the foundation of the plaintiff's title. But for the inam title-deed and the inam statement it is difficult to see how the plaintiff could reasonably contend that it was an inam to his predecessor in title. These documents are, therefore, the foundation of the plaintiff's claim and the misconstruction of such documents is certainly a ground upon which the High Court could interfere. In this connexion it may be observed that the inquiry at the time of the inam settlement was as thorough as it could be in the circumstances and the Inam Commissioner

(2) [1915] 39 Bom. 625=42 I.A. 229 (P.C.).
(3) [1919] 43 Mad. 253=46 I.A. 201 (P.C.).
(4) [1918] 41 Mad. 296=45 I.A. 1 (P.C.).
(5) [1905] 28 Mad. 13.
(6) 2 M.H.C. 327.
(7) [1903] 26 Mad. 339.
(8) [1887] 10 Mad. 1.
(9) [1921] 44 Mad. 421=48 I.A. 56 (P.C.).

after such inquiry settled the terms upon which the inams were to be held, and in the absence of the original deed of grant it cannot be said that the inam documents did not embody what the parties at the time considered to be their rights.

This Court has been consistently interfering in cases where the lower Courts have misread evidence or overlooked important evidence or relied for their conclusion upon inadmissible evidence, or where they misdirected themselves as to any questions of importance or where they relied upon personal knowledge or where they took a wrong view as to the onus of proof, or where they decided points not raised by the parties, or where they misconstrued important documents. When a Court misconstrues a document it relies upon a construction which it is not capable of bearing and such misconstruction leads not merely to a wrong view of the evidence but to relying upon what it considers to be an inference from the evidence which the evidence is not capable of bearing. The misconstruction of an important document, therefore, is a ground for interference by the High Court.

In this case we have no hesitation in holding that the inam documents are the basis of the plaintiff's title and the misconstruction of them is a ground for interference in second appeal.

The decision of our learned brother is right and we dismiss the Letters Patent appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 654

WALLER AND MADHAVAN NAIR, JJ.

Salar Beg Saheb—Petitioner.

v.

Karumanchi Kotayya—Respondent.

Civil Revision Petition No. 940 of 1924, Decided on 2nd December 1925. from the order of the Dist. Munsif, Bapatla, in I. A. No. 1711 of 1924.

* *Civil P. C., O. 9, R. 9 — Application, to restore suit dismissed for default, itself dismissed for default—Another application to restore first application lies.*

Where an application under O. 9. R. 9, to restore a suit dismissed for default, is itself dismissed for default, another application to restore the first application dismissed for default is competent under O. 9, R. 9 : *A. I. R.* 1926 *Mad.* 325, *Foll.* [P. 654, C. 2]

Ch. Raghava Rao—for Petitioner.

G. Lakshmana—for Respondent.

Waller, J.— The facts are these: Respondent's suit was dismissed for default. He applied to have it restored under O. 9, Sch. 1, Civil Procedure Code, and that application also was dismissed for default. He then applied again under O. 9 to have the application restored and it was restored. The other party comes up in revision on the ground that the provisions of O. 9 do not govern applications made under the order itself.

Authority on the point is divided. The Calcutta High Court has held one way, *Bipin Behari Shaha* v. *Abdul Barik* (1), the Patna High Court the other, *Ramgulam Singh* v. *Deonarain Singh* (2). Phillips, J., in a case exactly parallel to this case has recently followed the Calcutta view: C. R. P. No. 1014 of 1924: *Venkatanarasimha Rao* v. *Suryanarayana* (3). In C. R. P. No. 679 of 1923 *Kaliakkal* v. *Palani Koundan* (4), Devadoss, J., and I held that O. 9 does not apply to proceedings in execution of decrees. It is now argued that we stated the proposition too widely; in other words, that all that was laid down in *Thakur Prasad* v. *Fakir Ullah* (5) was that O. 9 did not apply to execution petitions. If, however, it does not apply to the petitions themselves, it is difficult to see how it can apply to applications incidental to and arising out of them.

What we are now considering is a different point. No doubt, the Privy Council decision is open to a limited construction, but what obviously was intended to be excluded by the Legislature from the operation of S. 141, Civil Procedure Code, was any proceeding in a suit. This is shown by the explanation added to S. 647 by Act VI of 1892. As pointed out by Phillips, J., the proceeding we are dealing with is not proceeding in a suit; for the suit has been dismissed. I would follow his decision and dismiss the petition with costs.

Madhavan Nair, J.—The decision of Phillips, J., in C. R. P. No. 1014 of 1924 on identical facts covers the present case. I also would follow that decision and dismiss this petition with costs.

Petition dismissed.

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(1) [1917] 44 Cal. 950=21 C. W. N. 30=24 C. L. J. 446.
(2) [1919] 4 P. L. J. 287.
(3) A. I. R. 1926 Mad. 325.
(4) A. I. R. 1926 Mad. 412.
(5) [1895] 17 All. 106=22 I. A. 44=5 M. L. J 3=6 Sar. 526 (P. C.).

A. I. R. 1926 Madras 655

PHILLIPS AND MADHAVAN NAIR, JJ.

(Majeti) Ankayya—Appellant.

v.

Lingambhotla Venkata Ramaya—Respondent.

Civil Revision Petition No. 521 of 1924 and A. A. O. No. 243 of 1924, Decided on 29th January 1926, from the orders of the Sub-J., Bezwada, in C. M. P. No. 966 of 1923.

(a) *Civil P. C., S. 47—Scheme for management.*

Applications in execution of a scheme of management of trust do not come under S. 47: *A.I.R. 1925 P.C., 155, Foll.*

(b) *Civil P. C., S. 92—Scheme suit—Scheme providing for application to Court for proper management—Court has no jurisdiction to order payment of archakas' salaries—Civil P.C. S. 115.*

Where a scheme is framed and under it permission is given to apply to the Court for direction for the proper management of the institution that does not empower the archakas of the temple to apply to the Court for payment of the salaries to which they are entitled under the provisions of the scheme, for there would be no means to execute the order. [P. 655, C. 2]

P. Satyanarayana Row—for Appellant.
B. Somayya—for Respondent.

Judgment.—In this case, a scheme was framed in respect of the suit trust and under the scheme permission was given to apply to the Court for direction for the proper management of the institution. The respondents, who are the archakas of temple, have filed this petition praying for payment of the salaries to which they are entitled under the provisions of the scheme. It has now been finally decided by the Privy Council in *Sevak Jeranchod Bholilal* v. *Dakore Temple Committee* (1) that application of this nature do not come under S. 47 of the Civil Procedure Code. Consequently, no appeal lies and the appeal filed here must be dismissed.

It then remains to be considered what are the rights of the parties under the civil revision petition, which has also been filed, and undoubtedly, that petition raises a question of jurisdiction; for it is contended that the Court had no jurisdiction to order execution of the decree containing the scheme. That this argument has considerable force is clear from the very form of lower Court's order, which purports to order execution. In effect, the lower Court merely repeats in its present order the direction given in the scheme, namely, that the archakas should be paid a certain amount of money. The Court has apparently assumed jurisdiction on the ground that it has power to direct the trustees as an Officer of the Court to make certain payments. No doubt when the receiver appointed by the Court, was performing the duties of trustee he was an officer of the Court but when once his office ended, the duties fell upon the proper trustee, who is in no sense an officer of the Court. That reason therefore for ordering payment cannot be sustained, and if we consider the provision in the scheme, it is clear that it cannot be enforced by this petition; for there is no means of compelling the trustee to pay the money. There is no application for arrest or attachment and it is very doubtful whether such an application could possibly lie in the present case. The point has been considered in *Janakirama Reddi* v. *Tiruvenkata Ramanujachari* (2) and *Krishnaiyangar* v. *Viraraghavathathachariar* (3). In both of which cases, it was held that the decree must be regarded merely as declaratory. No doubt, in both those cases, the application was for compelling the performance of certain ceremonials and it was held that that could not be done. This case, though not so strong, must fall in the same category: for there is no means of enforcing the order of the Court. The petitioners must be left to a separate remedy either by way of suit or possibly by proceeding against the trustee for breach of trust. The lower Court not having jurisdiction to pass this order in execution, the civil revision petition must be allowed and the application dismissed with costs throughout.

A further question was raised that the provision in the scheme for application to the Court for directions was ultra vires, but in the view we take of this case, it is not necessary to consider that question.

Revision allowed; Appeal dismissed.

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(1) A.I.R. 1925 P.C. 155 (P.C.).

(2) [1906] 2 M.L.T. 94.
(3) [1915] 2 L.W. 607.

A. I. R. 1926 Madras 656 (1)

DEVADASS AND WALLER, JJ.

Parvathi Ammal—Appellant.

v.

K. G. Venketeswara Aiyar and *others*—Respondents.

Letters Patent Appeal No. 54 of 1925, Decided on 12th November 1925.

Letters Patent (Madras), Cl. 15—Order rejecting application for leave to appeal in forma pauperis—Order is in the discretion of Judge passing it—No appeal will be entertained—Civil P. C., O. 44.

Whether there may be a right of appeal against an order rejecting an aplication for leave to file a memorandum of objections in forma pauperis or not, the appellate Court should not interfere. The question is one of the exercise of discretion and when the determination complained of is merely the result of the exercise of discretion on the part of the Judge in a matter, which was a proper subject for the exercise of that discretion the appellate Court would rightly decline to interfere : 3 *M. H. C. R.* 384, *Appl.* [P 656 C 2]

C. S. Swaminathan—for Appellant.

P. S. Narayanaswami Aiyar—for Respondent.

Waller, J.—This is an appeal against an order of Krishnan, J., rejecting an application for leave to file a memorandum of objections in forma pauperis. It is argued that no appeal lies against such an order. There are no doubt, some decisions to that effect e. g., *Appasami Pillai* v. *Somasundara Mudaliar* (1) and *Banno Bibi* v. *Mehdi Husain* (2). But the former has since been expressly dissented from in *Tuljaram Row* v. *Alagappa Chettiar* (3) and the latter proceeded on a ratio decidendi which is no longer maintainable. The pronouncemant of Sir John Edge in *Jeronchad Bhogilal* v. *Dakore Temple Committee* (4) is also relied on, Speaking for myself, I should welcome any clear cut definition which would render unnecessary the discussion which is at present, almost inevitable whether a particular order does or does not pass the test laid down in *Tuljaram Row* v. *Alagappa Chettiar* (3). That test is never particularly easy of application and would be extremely difficult to apply in a case like this. I, however, see no reason to consider the very large question raised, by that pronouncement.

Assuming that there is a right of appeal against an order like this, I think that we should not interfere. The question is one of the exercise of discretion. That is, of course , not the test of non-appealability, but,

When the determination complained of is merely the result of the exercise of discretion on the part of the Judge in a matter, which was a proper subject for the exercise of that discretion the appellate Court would rightly decline to interfere : *De Souza* v. *Coles* (5).

Here the Judge had discretion toadmit the application but he thought fit not to exercise it in the appellant's favour. I think that we should decline to interfere with this order. The appeal is dismissed without costs. One month for paying the necessary fees.

Devadoss, J.—I agree.

(1) [1903] 26 Mad. 437.
(2) [1869] 11 All. 375=(1889) A. W. N. 70.
(3) [1911] 35 Mad. 1=(1910) M. W. N. 697= 21 M. L. J. 1 (F. B.).
(4) A. I. R. 1925 P. C. 155.
(5) 3 M. H. C. 384.

A. I. R. 1926 Madras 656 (2)

DEVADOSS AND WALLER, J.

Prayaga Doss Jeevaru—Appellants.

v.

Pachella Doraiswami Iyengar and *another*—Defendants—Respondents.

Letters Patent Appeal No. 112 of 1924, Decided on 7th October 1925.

Provincial Small Cause Courts Act, S. 23—Pleadings raising issue of title—Case is not small cause.

A Small Cause Court is no doubt entitled to decide a question of title if it arises incidentally. But where the plaint and the written statement show that the issue to be found out and decided is one of title, the suit cannot be considered to be one of small cause nature.

T. Kumaraswamiah—for Appellant.

K. S. Chempakesa Iyengar—for Respondents.

Judgment.—The only point urged in this appeal is that the suit is of a small cause nature and no second appeal lay inasmuch as the amount of the claim was less than Rs. 500. It is urged that when the objection was taken before the learned Judge who decided the second appeal he overruled it. We consider the learned Judge is perfectly right in overruling the objection as the main issue in the case related to the question of title. No doubt a Small Cause Court is entitled to decide a question of title if it arises incidentally. But where the plaint and the written statement show that the issue to be fought out and decided is one of title, we think the suit cannot be considered to be one of small cause nature.

There is no other point raised in this appeal. The appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 657

DEVADOSS AND WALLER, JJ.

(Ponttunoda) Ahmedkoya and *others*—Petitioners.

v.

Kilkkakkad Aisamma and *others*—Respondents.

Civil Misc. Petition No. 1832 of 1924, Decided on 21st September 1925, from the order of the Insp. Officer, Laccadives, in Case No. 6 of 1923 of Agathi Island.

Laccadives Islands and Minicoy Regulation (1 of 1912)—Limitation Act does not apply to Laccadive Islands.

The law applicable to the Islands is to be found in Regulation I of 1912. The Limitation Act has not been applied to these Islands and therefore time for filing an appeal cannot be extended under S. 5 of the Lim Act: 13 *Mad.* 353, *Appl.* [P. 658, C 2]

K. P. Padmanabha Pillai—for Petitioners.

B. Pocker—for Respondent.

Government Pleader—for the Crown.

Devadoss, J.—This is an application by the appellant to excuse the delay of 182 days in presenting S. R. No. 1604 of 1924 (Civil Miscellaneous Appeal,) against the order of the Inspecting Officer of the Laccadives in Case No. 6 of 1923 of Agathi Island.

Mr. Padmanabha Pillai for the appellant contends that S. 5 of the Limitation Act applies to the case and the Court is entitled to consider the application on the merits Mr. Pocker for the respondents contends that the Limitation Act has not been extended to the Laccadive Islands.

The history of the Laccadive Islands is an interesting one. We are at present concerned with the four islands which are known as the southern group of islands and the Island of Minicoy which are administered by the Collector of Malabar. It is unnecessary to consider the history previous to the year 1792. A few passages from "A Short Account of the Laccadive Islands and Minicoy" by R. H. Hills, I. C. S. would be quite sufficient for the puposo of this case.

"In 1791 the Southern Islands passed, by the conquest of Cannanore, to the East India Co, along with other possessions of the Bibi; and were further ceded with Tippu's entire possession in Malabar by the peace of Seringapatam, in 1792." It was determined, however, 'as a matter of policy and conciliatory of Mappilas in general' to permit her to retain her possessions, provided she paid a tribute to the Honourable Company."

The East India Company was in possession of the islands from 1792. Owing to the non-payment of the tribute payable by the Bibi, the islands were attached in 1875. This atttchment remained in force until 1908. In 1909 the Bibi ceded the islands to the British and she was given a pension. By the cession of the islands to the British Government in 1909 the islands became British possessions and part of India. The following proclamation was issued in 1912.

In exercise of the power conferred by the Indian Councils Act 1861, (24 and 25 Vict. c. 67), S. 47 the Governor-General in Council is pleased to declare that, for the purposes of the said Act, the Laccadive Islands and Minicoy, which by the Proclamation No. 292 I. A., dated the 5th February 1909 have been declared to be subject to the Government of Madras, shall be included within the limits of the Madras Presidency.

By virtue of this proclamation, the southern group of the Laccadive Islands and Minicoy became parts of the Madras Presidency and the High Court of Madras was invested with jurisdiction over the southern group by a Notification dated the 1st February 1912.

In exercise of the power conferred by the Indian High Courts Acts, 1865, (28 and 29 Vict. c. 15), S. 3 the Governor-General in Council is pleased to authorize and empower the High Court of Judicature at Madras to exercise within the Laccadive Islands and Minicoy, which are not included within the limits of the places for which the said High Court was established, all such jurisdiction and powers as the High Court may, from time to time, exercise in the Scheduled Districts of the Presidency of Madras.

Though the southern group of the Laccadive Islands and Minicoy have become parts of the Madras Presidency and though the High Court has jurisdiction over them, yet all the Acts of the Governor-General of India have not been extended to them. Regulation I of 1912, S. 3, makes the Madras State Prisoners Regulation of 1819, the State Prisoners Act of 1858 and the Scheduled Districts Act of 1874 the only enactments in force in the Islands. S. 21 is as follows:

All questions relating to any rights claimed or set up in the civil Courts of the Islands shall be determined in accordance with any custom not manifestly unjust or immoral governing the parties or property concerned, and in the absence of any such custom, according to justice, equity and good conscience."

Under S. 26 an appeal lies to the High Court from any decision of the Collector in the exercise of his original jurisdiction. Under S. 17 the time for appeal is six months from the date of the judgment or order appealed against provided that the months of June, July

August and September shall be excluded in reckoning such period. It is clear from the Regulation that the ordinary law of British India is not applicable to the Islands, but only such enactments or such portions of such enactments as are specifically mentioned in the Regulation and the Scheduled Districts Act of 1874 are applicable to the islands. Under S.3 of the Scheduled Districts Act of 1874

The Local Government may with the previous sanction of the Governor General in Council from time to time, by notification in the Gazette of India, and also in the Local Gazette (a) declare what enactments are actually in force in any of the Scheduled Districts or in any part of any such Districts" ; and (b) " declare of any enactment that it is not actually in force in any of the said Districts or in any part of any such District."

Under the notification issued by the Government, the Limitation Act has not been extended to the Islands.

Mr. Padmanabha Pillai relies upon the decision in *Queen-Empress* v. *Cheria Koya* (1) as supporting his contention. In that case it was held that the Criminal P.C. was applicable to the southern group of the Laccadive islands. The learned Judges were of opinion that inasmuch as the Scheduled Districts Act did not expressly exclude the operation of the Criminal P. C., and as the Laws Local Extent Act makes all the enactments of the Indian Legislature applicable throughout British India, it should be taken that the Criminal P. C. was in force in the Islands. It was not brought to the notice of the learned Judges that the Laccadive Islands were not part of British India. The sovereignty of the islands before 1909 was vested in the Bibi of Cannanore. Though the islands were in the possession of the British Government, they did not become part of British India for they were taken possession of for arrears of tribute according to the agreement between Government and the Bibi. In the light of the facts placed before the learned Judges they held that the Criminal. P. C. was in force in these islands. The matter has now been placed beyond doubt by the cession of the Islands to the British Government in 1909 and by the proclamation of the Secretary of State above referred to.

It is urged that if the Law of Limitation is not extended to the Laccadive Islands, there will be no limitation for suits and there will be no security of title and no title can be created by prescription and a suit may be brought any time against any person. We are not concerned with the policy of the Government with regard to the administration of these Islands. It may be that practical difficulties will arise in deciding questions of title and claims for money. We are only concerned in this petition to see whether the petitioner can claim the benefit of S. 5 of the Limitation Act. As the Limitation Act has not been extended to the Laccadive Islands, we have no power to consider the application on the merits. We, therefore, dismiss the civil miscellaneous petition with costs.

As the matter is of importance we gave notice to the Government Pleader to help us in deciding this question. We are very much indebted to him for the able way in which he summarized the history of the Islands and brought to our notice the various proclamations and Regulations with reference to the islands.

Waller, J. (His Lordship stated facts & narrated the history of the Islands as stated by Devadoss, J., and continued.) The Law applicable to the islands is to be found in Regulation I of 1912. The Laccadive Islands and the Minicoy Regulation). Section 3 provides that

This Regulation, the Madras State Prisoner's Regulation, 1819, the State Prisoner's Act, 1858 and the Scheduled District Act, 1874 shall be the only enactments in force in the Islands.

The Laws of Local Extent Act (XV of 1874) is not referred to and, therefore, is not in force. Nor has any notification been issued under Act XIV of 1874 applying the Limitation Act to the islands. This being so, the whole basis of Mr. Padmanabha Pillai's argument disappears. It follows that the Limitation Act does not apply to the Laccadive Islands and that the Law of Limitation applicable to them must be looked for in Regulation I of 1912. S. 17 read with S. 27 provides that appeals shall ordinarily be filed within six months, from which the period of the South-west Monsoon (June to September inclusive) is to be excluded. That period we have no power to extend. The application fails and is dismissed with costs.

Petition dismissed.

(1) [1890] 13 Mad. 353.

*A. I. R 1926 Madras 659

VENKATASUBBA RAO AND JACKSON, JJ.

(*Bava C.*) *Vythelinga Mudaliar* and *others*—Petitioners.

v.

R. Mahadeva Iyer and *others*—Respondents.

Appeals Nos. 248 and 286 of 1924 and Civil Revision Petitions Nos. 485, 591 and 645 of 1924, Decided on 27th August 1924, from the order of the Sub-J., Tiruvalur, D/- 31st March 1924, in E. A. No. 116 of 1924.

* (a) *Religious Endowment—Scheme of management—First superintendent to be appointed by Court—Further vacancy to be filled in by the Board—Court cannot order Board to remove a superintendent and appoint another.*

Where a scheme provided that a temple superintendent shall be appointed by the Court and the subsequent vacancies may be filled up by the Board, only high caste Hindus are eligible for this appointment."

Held : that Court had no power to direct the Board to remove a superintendent and appoint another, nor itself appoint one in case the Board failed to do so. [P 659 C 2]

* (b) *Religious endowment—Scheme of management—Treasurer to be removed by Board by majority of votes subject to confirmation by Court—Court cannot cancel suspension by majority of members acting in their individual capacity.*

Where a scheme provided " the Board shall have no power of suspension or dismissal of the treasurer except by a vote of majority of the members subject to confirmation by the Court." but three out of the five members of the Board acting in their individual capacity suspended the treasurer.

Held : that there was no resolution of the Board placed before the Court for confirmation and the order of the Court cancelling what purported to be the suspension of the treasurer was without jurisdiction. [P 660 C 1]

* (c) *Civil P. C., S. 92—Scheme of management framed—No appeal lies in the matter of execution of the scheme—Civil P. C., S. 115.*

Where a scheme has been framed, no appeal lies from the order of Court in the matter of its execution (*A. I. R.* 1924 *Mad.* 369 *Foll.*). But where the order of the Court is without jurisdiction, revision will lie. [P 661 C 1]

T. V. Gopalaswami Mudaliar—for Petitioners.

N. Muthuswawi Iyer, K. Narasimha Aiyangar. K. V. Krishnaswami Iyer and *K. S. Ramachandra Iyer*—for Respondents.

Judgment.—A scheme was framed to regulate the affairs of the temple known as Tiruvalur Tyagarajaswami Koil. A Board of control was constituted consisting of five members. There was a vacancy in the office of the superintendent of the temple and on 9th February 1924, the Board appointed one Swaminatha Mudaly as superintendent. One Mahadeva Iyer presented a petition to the Subordinate Judge of Tiruvalur and the relief he asked for is contained in the following paragraph :

For the above reasons I pray that this Honourable Court will be pleased to cancel the said appointment and either direct the trustees to appoint a new fit and proper person or itself appoint a fit and proper person for the said post.

The Subordinate Judge upon this petition made an order on 31st March 1924 from which we take the following passage :

It is, therefore, desirable not to have him any more as the temple superintendent and I would, therefore, call upon the members of the Board to remove him from that place and see that a proper man who has no such bad antecedents is appointed.

Then again,

The Board will be requested to make the appointment within 15 days from the date of receipt hereof and if no proper person is appointed by that date this Court will make the appointment, in place of the present superintendent whose appointment is not approved at all.

The correctness of this order has been questioned on the ground that it is one made without jurisdiction. It is not disputed that the authority of the Court to deal with matters arising under the scheme is derived from the scheme itself and no general power of the Court outside of or independent of the scheme is relied on. Turning to the provisions of the scheme, we find nothing in them to justify the order of the Judge. Paragraph 5 of the scheme deals with the appointment of a treasurer and superintendent. It runs thus ;

A treasurer shall be appointed in the first instance by the Court and shall receive a monthly salary not exceeding Rs. 150 and if any vacancy arises hereafter his successor shall be appointed by the Court. A temple superintendent shall be appointed by the Court on a salary of Rs. 50 and the subsequent vacancies may be filled up by the board, Only high caste Hindus are eligible for this appointment.

While the clause gives the Court the power to appoint a successor in the case of a treasurer, power of appointment in the case of a vacancy in the office of the superintendent is clearly vested in the Board. Now, turning to the order of the Subordinate Judge, he seems to think that the superintendent being a relation of one of the trustees is not qualified. Another reason given is that it is desir-

able to have a Brahmin as a superintendent. These expressions of view on the part of the learned Subordinate Judge derive no support from the scheme itself. They are indeed opposed to it and we are inclined to think that the Judge is under the impression that he has general power to regulate the affairs of the temple in question, which, of course, he has not and we must, therefore, set aside his order.

The next order which is impeached relates to the cancellation by the sub-Court of what purports to be a dismissal of the treasurer. In May 1924 three out of the five members of the Board seized all the papers and account books in the hands of the treasurer, and suspended him. On 13th May 1924 the matter having been brought to the notice of the Subordinate Judge he cancelled the order of suspension. Clause 6 of the scheme regulates the power of the Court in this respect. It reads thus:

> The Board shall have no power of suspension or dismissal of the treasurer except by a vote of majority of the members subject to confirmation by the Court.

The power of suspension is vested in the Board. The decision of the Board is, no doubt, subject to confirmation by the Court. Now, the three members of the board acting in their individual capacity suspended the treasurer. There was no resolution of the board placed before the Court for confirmation and the order of the Judge cancelling what purports to be the suspension of the treasurer is without jurisdiction.

At a meeting of the Board alleged to have been held on 14th June 1924 the treasurer was dismissed and the resolution was again placed before the Court. On the 24th July 1924 the Judge purported to cancel the order of the Board. Here again he does not appear to have properly appreciated the position. Under the scheme and the rules framed by the Court the treasurer who is the secretary of the Board can convene a meeting or the president may convene it. As a matter to be disposed of at the meeting is the alleged misappropriation by the treasurer and as he refuses to take orders from the three members who are dissatisfied with him, it is said that the latter cannot get the treasurer to convene a meeting. As the president is siding with the treasurer it is alleged that he will not convene a meeting either. In these circumstances, the three members referred to after suspending the treasurer appointed in his place the superintendent of the temple. This course does not find sanction in the scheme. He purported to call for a meeting and it was at that meeting that the treasurer was dismissed. We are inclined to think that there was in law no meeting and no resolution. Thus the condition precedent to the exercise of its power by the Court, namely, a resolution of the Board, was wanting. The learned Judge says:

> Their order cannot be approved under the circumstances and I cancel it and the treasurer will coutinue as the treasurer from that date pending enquiry into the charges which the Board might wish to establish against him.

If this implies a mandate to the Board to meet and vote on the question relating to the dismissal of the treasurer, it is obvious that the Judge has no such power and this part of the order is not justified by either party. And if this part of the order cannot be carried into effect and at the same time the order of dismissal stands cancelled, the result is that a treasurer against whom serious charges are made by a majority will be allowed to continue in office. There will then be a deadlock and this illustrates the danger of the Court intervening without strict regard to the provisions of the scheme. We think that the order of the Subordinate Judge is without jurisdiction and we, therefore, set it aside.

All the parties complain that there are many defects in the scheme as well as the rules, that they need revision and that these deficiencies are responsible for the present state of affairs. If this be so, the parties must be left to their proper remedies.

The appeals filed against the orders of the Subordinate Judge, we have treated as civil revision petitions: where revision petitions were filed it has not been necessary to resort to this procedure. Appeals were justified on the footing that the orders of the Subordinate Judge were made in execution of the scheme decree. This contention is clearly wrong and is opposed to *Ranganatha* v. *Krishnaswami* (1) The orders of the Subordinate Judge however, being without jurisdiction, are liable to be set aside in revision and we

(1) A. I. R. 1924 Mad. 369.

are satisfied that a case has been made out for the exercise of our revisional powers.

Each party will bear his costs and none of the trustees will be permitted to take his costs from the temple funds.

Order accordingly.

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* A. I. R. 1926 Madras 661

Full Bench

PHILLIPS, KRISHNAN AND RAMESAM, JJ.

Jammalamadaka Subbarayudu — Defendant—Petitioner.

v.

Idupuganti Ramaswami and *others*— Plaintiffs—Respondents.

Civil Revision Petition No. 771 of 1923, Decided on 8th February 1926, from the decree of the Sub-J., Guntur, in Appeal Suit No. 44 of 1922.

* (a) *Madras Estates Land Act, S. 8, Excep.— "Acquired" includes surrender.*

The word "acquired" in the exception to S. 8, covers a case of "surrender". [P. 665, C. 1]

* (b) *Madras Estates Land Act, S. 8, Excep— Surrender and abandonment are on same footing.*

The two modes of obtaining the kudivaram right, namely by surrender or abandonment, stand on the same footing. [P. 666, C. 1]

* (c) *Madras Estates Land Act, S. 6, (2)— S. 6 (2) does not govern exception to S. 8 (Per Krishnan J.).*

S. 6 (2) is not intended in any way to govern the exception to S. 8 or to control its general language. [P. 666, C. 2]

A. Krishnaswami Aiyar and *Ch. Ragava Rao*—for Petitioner.

S. Varadachariar and *V. Govindarajachar*—for Respondents.

Order of Reference

Wallace, J.—The point for decision in this case is whether the exception to S. 8 of the Madras Estates Land Act applies to the surrender of the kudivaram right by a tenant to his landlord, leading to the result that the land ceases to be part of the estate. The unhappy wording of Ss. 8 and 6 of the Act makes the question a very difficult one to settle, and Benches of this Court have in consequence taken varying views on the meaning of the exception.

The wording of the section as it stands barely makes sense. A captious critic might contend that "shall cease to be part of the estate" means "shall cease to be an inam or the inamdar's property at all" which is absurd. It also seems absurd to speak of the acquisition by an inamdar of the kudivaram interest "before . . . . the commencement of this Act" resulting in the land ceasing to be part of the estate, when ex hypothesi the Act and therefore the definition of "estate" under it were non-existent at the time of the acquisition. And this anomaly applies to the land in this case since the surrender was in 1888. I presume the language is meant to imply in a case of this kind that the land does not form part of the estate and therefore never was, and never can be, within the operation of the Act.

The real point, however, is whether such a surrender falls within the term "acquired" in the exception. It is argued on one side that "acquired" is confined to the modes of passing of the kudivaram right from the ryot to the landholder mentioned in the section (S. 8), to which the exception is appended that is, "transfer, succession or otherwise." It is contended on the other side that the phrase 'or otherwise" will include a case of surrender, and that, even if it does not, the language used in S. 66 (2) implies that such a surrender is a method by which the landholder acquires an occupancy right with such effect that he can pass it on to a ryot. To this it is answered that "or otherwise" can only import a species of passing of the kudivaram right ejusdem generis with transfer or succession, and that the position of the phrase, "surrendered or abandoned" in S. 6 (2), in juxtaposition to "comes into the possession of the landholder," seems to imply that by surrender or abandonment the kudivaram right does not come into the possession of a landholder but remains suspended in the air, until another ryot is admitted to the land, and that therefore these terms cannot be methods of acquisition of that right by an inamdar.

It must be admitted that the loose language employed in these sections gives plausibility to either view, and one has to decide the case rather on the broad principles of the sections than on their actual wording. S. 8 as a whole is obviously intended to cover cases in which the occupancy right is transferred

to or comes into the possession of the landholder, and to prevent him in such cases from using that merger to destroy the character of the land as ryoti land. That is, a landlord is forbidden to become his own occupancy tenant. It was evidently considered that in normal cases the landholder would be bound to admit and would admit, another ryot to the land, and that ryot would by the very fact of admission step into the occupancy-right left which the landholder is forbidden to hold as such. But, there are certain exceptions to the rule. One is set out in sub-section (4) by way of giving the landholder some compensation for value spent before the passing of the Act on acquiring the kudivaram right, and by way of giving some effect to cases of succession both before and after the Act.

The exception to the Act was, I think, intended to exempt inamdars alone among landholders from the application of this principle that the landholder cannot be his own occupancy tenant, and to permit him to be so when the rights of third parties were not adversely affected. The effect of the exception, whatever its language, is to take what was ryoti land, in which the inamdar had not, ex hypothesi the kudivaram right, out of the operation of the Act altogether, when the occupancy right had passed to the inamdar so that it ceased to be ryoti land and the inamdar could henceforth deal with it unhampered by any of the provisions of the Act.

That being so, there seems no obvious distinction in principle between the passing of the occupancy right from the ryot to the inamdar by sale, gift or succession and its passing by a deed of surrender. The test is obviously not the passing of consideration, because in a case of succession there is no consideration. Nor is it a deed of transfer or a voluntary act, because in the case of succession there may be no deed and in the case of an intestacy there is no voluntary act. I would hold then prima facie that when a ryot has, by a voluntary act, transferred his right to the inamdar or when the passing of that right is the result of the legal right of inheritance, the inamdar has "acquired" that right within the meaning of the phrase used in this exception. To put it in a different form, the phrase "or otherwise" in S. 8 (1) will include the case of a surrender.

The case of an abandonment is different and more difficult and fortunately we are not concerned with it here. In such a case it is open to argument whether the occupancy right automatically reverts to the landholder at all. That a right of occupancy can remain in suspense, vested in no one, but ready to descend on the next comer is apparent from S. 10 (2) and may also be deduced from a consideration of the conception of ordinary unoccupied ryoti waste, the right of occupancy to which comes into being on the admission by the landholder of a ryot thereto. I would leave that question open here.

Against the view thus derived from the general scope of S. 8 that the term "acquired" includes all cases whereby the right passes by operation of a legal form of transfer from the ryot to the inamdar we are referred to the language of S. 6 (2). It is argued that having regard to that language, cases falling within S. 8 (4) and the exception to S. 8 are species of methods whereby the right of occupancy "comes into the possession of the landholder" and are categorically distinguished from cases of surrender and abandonment. There is much to be said for the view that abandonment is not a method by which that right "comes into the possession of the landholder." But it is difficult to see why surrender, especially a surrender by deed as in this case is not, and I must simply record my opinion that the language of S. 6 (2) was not intended to convey the contrary.

It is moreover doubtful if that language does draw the categorical distinction pleaded, for while the essence of the rule laid down in S. 8 (4) is the method of transfer, the essence of the exception is not the method of transfer but the party in whose favour the transfer is made. One cannot reasonably contract a mode of transfer with a transferee. Again as pointed out by Mr. Varadachari, it was unnecessary to include the exception to S. 8 in S. 6 (2), because by that exception the land is taken out of the operation of the Act altogether and therefore S. 6 or any other section in the Act will not apply to it.

Again, if one gives S. 8 (1) its full meaning and "otherwise" does not include surrender, then any and every landholder acquiring by surrender by

which certainly whatever right the occupancy ryot had is passed on to him can hold the land as a ryot. This is, I feel sure, contrary to the principles of the Act.

The rulings of this Court have not been uniform on the interpretation of this exception. In *Suryanarayana* v. *Patanna* (1), two learned Judges Sadasiva Aiyar and Spencer, JJ. differed as to whether surrender is included in the word "acquired." In *Ponnusamy Padyachi* v. *Karuppudayan* (2), a third Judge, Miller, J., agreed with Spencer, J., and agreed that surrender is so included. In *Venkata Sastrulu* v. *Sitaramudu* (3) Seshagiri Aiyar, J., agreed mainly with Sadasiva Aiyar, J., and in *Venkata Ramiah* v. *Lakshminarayana* (4) Napier, J., expressed agreement in this view. That, however, was a case not of surrender but of abandonment, into which, in my view different considerations will enter. In an unreported case, S. A. No. 1244 of 1919, Oldfield, J., adopted the view held by Spencer, J. There is thus a clear conflict of authority; and that being so, I think it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to S. 8 covers a case of surrender."

Madhavan Nair, J.—The defendant is the petitioner. The question for decision in this case is whether the suit land is part of an 'estate' within the purview of the Madras Estates Land Act and the suit is not triable in a civil Court. The lower Courts have found that the suit village is an estate under S. 3, sub-S. (2), Cl. (*d*) of the Estates Land Act, and this finding has not been attacked before us. It has also been found that the kudivaram interest of the tenant has been surrendered by deed to the landlord in 1888. The learned vakil for the plaintiffs (respondents) argues that, though ordinarily the jurisdiction of the civil Court should be held to have been ousted because the suit village is an estate under S. 3, sub-S (2), Cl. (*d*), still the civil Court has jurisdiction, because, by reason of the surrender the kudivaram interest in the village has been acquired by the inamdar within the meaning of the exception to S. 8 of the Act and the land has, therefore, ceased to be part of an estate. It is argued on behalf of the petitioner that surrender is not a mode of acquisition of the kudivaram interest within the meaning of the exception.

The short question for consideration is whether the inamdar in this case has acquired the kudivaram interest in the suit land within the meaning of the exception to S. 8 of the Estates Land Act. If he did so acquire, the land has ceased to be part of an estate and the civil Courts have jurisdiction to try the suit. The exception to S. 8 runs as follows:

> Notwithstanding anything contained in this section where, before or after the commencement of this Act, the kudivaram interest in any land comprised in an estate falling within Cl. (*d*) of sub-S. (2) of S. 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate.

Mr. Krishnaswami Aiyar argues that this provision being an exception to S. 8 the word "acquired" referred to in it must obviously refer to one of the modes of the acquisition of kudivaram interest contemplated by sub-Ss. (1) to 4 of S. 8 which do not refer to acquisition by surrender as a mode of acquiring the kudivaram interest. Reference has also been made to sub-S. (2) of S. 6 of the Act to support the above argument.

S. 8 of the Estates Land Act deals with the merger of occupancy right. Generally stated sub-S. (1) deals with the merger of the entire interests of the landholder and the occupancy right by transfer, succession or otherwise. Sub-S. (2) deals with the transfer of the occupancy right in any land to a co-sharer. Sub-S. (4) deals with the acquisition by the landholder of the kudivaram interest by transfer for valuable consideration or by inheritance. Surrender is not specifically mentioned as a mode of acquisition in the section. The kudivaram interest of the tenant acquired in any of the aforesaid ways does not give the landholder any private rights of ownership, unless the landholder happens to be an inamdar and acquires the kudivaram interest in the way indicated in the various sub-sections referred to above. This is the interpretation put upon the exception by the learned vakil for petitioner. Sub-S. (2) of S. 6 of the Act relied on in support of this interpretation is in these terms:

(1) [1915] 38 Mad. 608=22 I. C. 339=26 M. L. J. 99.
(2) [1915] 38 Mad. 843=24 I. C. 217=26 M. L. J. 285.
(3) [1915] 38 Mad. 891=24 I. C. 224=26 M. L. J. 585.
(4) A. I. R. 1922 Mad. 281.

"where land held by a ryot with a permanent right of occupancy is *surrendered* or abandoned or, save in the cases falling within sub-S. (4) of S. 8, and the exception to S. 8, comes into the possession of the land-holder. . ."

It is pointed out that in this sub-section acquisition by surrender is put in a different category from the acquisition under the exception to S. 8.

The question is not free from difficulty, but I am inclined to hold that the arguments of the learned vakil for the petitioner should not be acceptad. The object of S. 8 is to preclude the landholder, who acquires by transfer, succession or otherwise the occupancy right in a holding, from treating it as his private land and preventing the tenant from acquiring a right of occupancy in it. But an exception has been deliberately made by the Legislature in the case of an inamdar whose village is an estate falling within Cl. (*d*) of sub-S. (2) of S. 3, when he acquires the kudivaram interest in any land comprised in the estate. When the intention of the Legislature was to show this exceptional favour to inamdars departing from its general policy, I do not see any reason why giving effect to this intention in all its fullness should be defeated by placing a narrow interpretation on the word "acquired" so as to exclude acquisition by surrender. No reason is suggested for thus excluding "acquisition by surrender" from the scope of the exception.

No doubt, the clause appears as an exception to S. 8 ; but in giving effect to the intenion of the Legislature to its fullest extent, it is not right to uphold the narrow construction suggested by the learned vakil for the petitioner. Even if the exception is to be confined in its operation to the modes of acquisition mentioned in S. 8, it seems to me that the word "otherwise" in the expression "by transfer, succession or otherwise" would include within it, acquisition by "surrender." In interpreting the word "otherwise" it is difficult to apply the ejusdem generis principle, for the mere reason that there is no similarity in the two modes of acquisition mentioned, namely transfer and succession, except that in the result, the landholder obtains a kudivaram interest. The one method denotes a voluntary act and consideration : the other method is purely involuntary and has nothing to do with consideration. In such circumstances, it is difficult to apply the ejusdem generis principle of construction in finding out what is meant by "otherwise."

The contrast between the right obtained by the landlord through "surrender" and the right to kudivaram obtained under S. 8 of the Act supports to some extent the argument advanced on behalf of the petitioner. Sub-S. (2) of S. 6 states that in land surrendered or abandoned by a ryot, a landlord cannot obtain rights of occupancy before the expiry of ten years. It may be, as pointed out by Miller, J., that by referring to the exception to S. 8 in sub-S. (2) of S. 6, the Legislature intended that, in construing sub-S. (2) of S. 6, we should exclude surrender and abandonment from the methods of acquisition by which a landholder may acquire indefeasibly an occupancy right.

However that may be, I do not think that it is permissible to adopt a construction of the exception to S. 8 which would, by restricting the meaning of the word "acquired," stultify the intention of the Legislature in enacting that exception. The difficulty felt in construing S. 6, sub-S. (2) and the exception to S. 8 together is due to the loose language employed in sub-S. (2) of S. 6. As pointed out by the respondents' learned vakil, reference to the exception to S. 8 in sub-S. (2) of S. 6 is unnecessary because by that exception land ceases to be part of an estate and is thus taken out of the Act altogether and no section of the Act will, therefore, apply to such land.

The view advanced on behalf of the petitioner finds support in the opinion of Sadasiva Aiyar, J., in *Suryanarayana* v. *Patanna* (1), but Spencer, J. in the same case dissented from this view. Miller, J. in *Ponnuswami Padayachi* v. *Karuppudayan* (2) accepted the view of Spencer. J., while in *Zamindar of Chellapalli* v. *Somayya* (5) Seshagiri Aiyar, J., was inclined to follow the views of Sadasiva Aiyar, J., in *Suryanarayana* v. *Patanna* (1). Napier, J., sitting with Sadasiva Aiyar, J., (4) held that surrender is not a mode of acquiring kudivaram interest within the meaning of the exception. It may be pointed out that this decision deals with lands in a

(5) [1916] 39 Mad. 341=27 I. C. 77=27 M.L.J. 718.

zamindari. In the latest decision in S. A. No. 1244 of 1919, Oldfield and Spencer, JJ., upheld the view which found favour with Spencer, J., in *Suryanarayana* v. *Patanna* (1). As the judicial opinion is thus divided, I agree with my learned brother that it is necessary to refer to a Full Bench the question whether the word "acquired" in the exception to S. 8 covers a case of "surrender."

I may state that the question whether abandonment is a mode of acquiring kudivaram interest by the inamdar within the meaning of the exception to S. 8 does not arise in this case though Mr. Varadachari for the respondent was willing to concede in the course of his arguments that acquisition by abandonment does not come within the scope of the exception.

Opinion.

Phillips, J.—The question that has been referred for our opinion is whether the word "acquired" in the exception to S. 8 of the Madras Estates Land Act covers a case of "surrender." That exception reads as follows:

> Notwithstanding anything contained in this section where, before or after the commencement of this Act, the kudivaram interest in any land comprised in an estate falling within Cl. (*d*) of sub-S. (2) of S. 3 has been or is acquired by the inamdar, such land shall cease to be part of the estate.

It is not seriously disputed that the word "acquired" in its ordinary sense is wide enough to cover a case of acquisition by surrender or abandonment as well as any other form of acquisition. It is, however, contended that in this exception the word must be construed in a limited sense so as to exclude surrender and abandonment, and two grounds are put forward in support of this contention. The first is that, inasmuch as the exception is an exception to S. 8, the modes of acquisition must be limited to those mentioned in S. 8, Cl. (1), namely, "transfer, succession or otherwise," and it is argued that these words specifically exclude "surrender" and "abandonment" This was the view taken by Sadasiva Aiyar, J. in *Suryanarayana* v. *Patanna* (1), but Spencer, J., did not agree with him. Since then there has been a conflict of opinion in this Court. Sadasiva Aiyar, J., relied on the decisions of the Calcutta High Court in *Badan Chandra Das* v. *Rajeswari Debya* (6) and *Muktakeshi Dasi* v. *Pulin Behari Singh* (7). The latter purports to follow the decision in the former and contains the remark:

> In construing words like "or otherwise" it has always been held that the matters reserved must be ejusdem generis, and that is very clearly brought out in the case of *Badan Chandra Das* v. *Rajeswari Debya* (6).

From a perusal of the judgment in *Badan Chandra Das* v. *Rajeswari Debya* (6) it would appear that the head-note, which runs, "the terms transfer, succession or otherwise" in S. 22 [equivalent to S. 8 (1), Estates Land Act] do not mean and include a "surrender"; the expression "or otherwise" as used in the section means "or in a similar way" is worded in a considerably wider manner than the language of the judgment. As, however, one of the Judges in *Muktakeshi Dasi* v. *Pulin Behari Singh* (7) was a party to the prior decision, we must take it that that was the meaning of the latter judgment, but it must be observed that the judgment does not expressly lay down the proposition, which can only be inferred from its general tenour, and there is no argument in the judgment to support such a proposition; similarly the judgment in *Muktakeshi Dasi* v. *Pulin Behari Singh* (7), which purports to follow the former decision, does not contain any argument.

One difficulty in the way of construing "or otherwise" as limited to matters ejusdem generis is that it is very difficult to imagine what other means of acquisition can be referred to which are of the same nature as "transfer" and "succession," terms which in themselves are extremely wide. Even supposing that the exception to the section must be governed by the first clause thereof, it does not appear that the word "acquired" must be interpreted in a limited sense, so as to exclude surrender and abandonment. However this may be, I am of opinion that the exception, so called, is in effect a substantive provision and there is no necessity to qualify its meaning by the preceding clauses.

The second argument put forward is that the language of S. 6, Cl. (2), shows that the Legislature intended to exclude "surrender" or "abandonment" from the provisions of the exception to Cl. (8). That runs as follows:

(6) [1905] 2 C. L. J. 570.

(7) [1908] 8 C. L. J. 324=13 C. W. N. 12.

Where land held by a ryot with a permanent right of occupancy is surrendered or abandoned or, save in the cases falling within sub S. (4) of S. 8, and the exception to S. 8 comes into the possession of the landholder.

This would seem to draw a distinction between cases of surrender and abandonment and other cases in which the right of occupancy comes into the possession of the landholder. The whole of this provision seems somewhat unnecessary in view of S. 6, Cl. (1) which in effect deals with the same subject, but it has possibly been provided *ex abundanti cautela*. Whatever the reason for the provision, the language of a succeeding section, when it is clear in its terms, must be read as it stands, and should not be interpreted in a strained manner merely in order to bring it into consonance with a previous section. There is no ambiguity in the language of the exception to Cl. 8 and there is therefore no reason why in interpreting it reference should be made to S. 6 (2). The word "acquired" has a very general meaning and would ordinarily include acquisition by surrender, and the only argument that has been advanced against this proposition is that when a tenancy is surrendered the tenant's rights under the lease are not acquired by the landlord, but they merely cease to exist. Here, however, it is not a question of acquiring the tenancy rights, but it is a question of acquiring the kudivaram interest, and that, I take it, means the right of occupancy in the land and not merely rights under a particular lease. If this argument is rejected, as it must be, we have the word "acquired" in its ordinary sense and that is wide enough to include acquisition by surrender. In this reference, acquisition by abandonment has not been dealt with, but so far as the case has been argued before us it would appear that the two modes of obtaining the kudivaram right, namely by surrender or abandonment, stand on the same footing.

The question referred must therefore be answered in the affirmative and the Civil Revision Petition will be remitted to the Division Bench for disposal accordingly.

Krishnan, J.—The question raised in this reference is whether the exception to S. 8 of the Madras Estates Land Act covers a case of surrender or not. It has been answered in the affirmative by Miller, Oldfield and Spencer, JJ., in *Ponnusami Padayachi* v. *Karuppudayan* (2), *Suryanarayana* v. *Pattanna* (1) and S. A. No. 1244 of 1919 respectively, but in the negative by Sadasiva Aiyar, Seshagiri Aiyar and Napier JJ., in *Suryanarayana* v. *Pattanna* (1), *Venkata Sastrulu* v. *Sitaramudu* (3) and *Zamindar of Nuzvid* v. *Lakshminarayana* (4), respectively. It is on account of this direct conflict of opinion that the matter is referred to the Full Bench, and we have to decide it on the section of the Act.

The word "acquired" in the exception which is the word to be construed, it cannot be denied, is of wide enough import to include all cases of acquisition, by surrender, abandonment or otherwise. The word is defined in Murray's Oxford Dictionary as meaning "to gain; to obtain; to get as one's own, to gain the ownership of, to come into possession of." Is there any reason then why it should be restricted or cut down in its meaning in the exception? The object of the exception is clearly to exempt inamdars as distinguished from zamindars from the applicability of Cls. (1) and (3) of S. 8. There is nothing in the policy of the Act, so far as I can see, nor in the language in the exception to restrict the exemption to cases other than those of surrender or abandonment.

It is, however, contended that there are words in S. 8 (1) and in S. 6 (2) which necessitate that we should construe the word "acquired" in the exception as not including cases of surrender and abandonment. It is first argued that the word "otherwise" in Cl. (1) of S. 8 must be read ejusdem generis with the preceding words "transfer or succession," and that so read it will not include cases of surrender or abandonment. It is then argued that as the exception in S. 8 is an exception to Cl. (1) it should also be read as not ncluding such cases when the clause itself does not include them. The whole of this argument turns upon reading "otherwise" as governed by the rule of ejusdem generis. The word is wide enough to include all cases of the interest of the landholder and of the occupancy ryot becoming united in the same person. To read it as ejusdem generis with transfer and succession thus excluding cases of surrender and abandonment will lead to the result that the prohibition in it against a landholder holding the land as a ryot will not be applicable to cases

where he obtains the ryoti interest by surrender or abandonment even when the landholder is a zamindar. This is clearly incorrect; for Cl. (4) shows in what case alone an exception is allowed in the case of zamindars.

As my learned brother, Phillips, J., observes in his judgment, which I have had the advantage of reading, if the word "otherwise" is limited to matters ejusdem generis with transfer and succession, it is difficult to see to what case it can possibly refer. The learned vakil for the appellant suggested that it might refer to cases of acquisition of title by prescription, but they are no more ejusdem generis with transfer and succession than surrender can be said to be. I think the argument based on the language of S. 8 (1) is erroneous.

The more difficult point, however, is the one raised on the language of S. 6, Cl. (2). That language, it is argued, suggests that the exception to S. 8 does not apply to cases of surrender or abandonment, but only to cases where the landholder comes into possession of the land in some other manner as the saving clause which refers to the exception is not applied to cases of surrender or abandonment in the clause. If we read the exception to apply to cases of surrender or abandonment as well, it is argued that there will be a conflict between it and Cl. (2). On the other hand if we are to restrict the exception as contended for we will have to read into it the words "otherwise than by surrender or abandonment" after the word "acquired"; there is no warrant for doing this. The words "and the exception to S. 8" in Cl. (2) seem to be quite superfluous as by the exception to S. 8 itself such cases are taken entirely out of the Act. It seems to me that S. 6 (2) is not intended in any way to govern the exception to S. 8 or to control its general language and that if there is any conflict the exception which refers to inamdars only must be taken to override the general provision in S. 6, Cl. (2) which refers to landholders generally, and not vice versa.

In the view I take I see no difference between cases of surrender and of abandonment. I agree that our answer to the reference should be that the case of surrender is within the exception to S. 8.

Ramesam, J.—I agree.

Reference answered in the affirmative.

A. I. R. 1926 Madras 667

MADHAVAN NAIR, J.

(*Kavalappara*) *Mooppil Nair* and *another*—Petitioners.

v.

Ammalu Amma and *others*—Respondents.

Civil Revision Petition No. 71 of 1924, Decided on 25th January 1926, against the order of the Dist. J., South Malabar, D/- 4th September 1923, in Civil Misc. Appeal No. 40 of 1923.

Court Fees Act, S. 7, Cl. IX—Kanom mortgage —Redemption suit—S. 7 Cl. IX applies—Reference to plaintiff's title in plaint is immaterial

In suits to redeem a kanom mortgage the Court-fee payable by the plaintiff should be in accordance with provisions of S. 7, Cl. IX. The fact the plaintiff refers to his title in the plaint does not make it obligatory on him to pay any additional Court-fee. The question litigated is his right to redeem : 5 *Mad.* 284 (*F. B.*) *Ref.*

[P 667 C 2]

C. V. Anantakrishna Iyer — for Petitioners.

Judgment.—This petition raises the question as regards the Court fee that should be paid by the plaintiff. The plaintiff's suit was one for redemption of a kanom dated 3rd November 1899 : see paragraph 2 of the plaint. In paragraph 11 it is stated that the cause of action arose since 4-11-1911 that is, after the expiry of 12 years from the date of kanom. It has been held by this Court ever since *Zamorin of Calicut* v. *Narayana* (1) that in suits to redeem a kanom mortgage the Court-fee payable by the plaintiff should be in accordance with provisions of S. 9, Cl. (7) of the Court Fees Act. There is no question that that fee has been correctly paid by the plaintiff in this case. The fact that he refers to his title in the plaint does not make it obligatory on him to pay any additional Court-fee. The question litigated is his right to redeem.

The real question for decision has not been considered by the lower Courts. As a matter of fact in obedience to the order of the Court the plaintiff has paid some amount by way of additional Court fee.

(1) [1882] 5 Mad. 284 (F. B.).

As he has paid the Court fee required by S. 7, Cl. 9, the lower Court's order asking him to pay additional Court-fee should be set aside.

The findings on Issues 7 and 8 are therefore set aside. The District Munsif is directed to receive the plaint and proceed with the case. Costs will abide the result.

Petition allowed.

A. I. R. 1926 Madras 668

SPENCER, J.

Appu Bhatta—Plaintiff—Appellant.

v.

Uma Sundari Amma and *another*—Defendants—Respondents.

Second Appeal No. 449 of 1923, Decided on 30th October 1925, from the decree of the Dist. J., South Kanara, in A. S. No. 408 of 1921.

Madras Hindu Transfers and Bequests Act (1 of 1914)—*Gift to unborn persons—No life estate intervening between the death of testator and the vesting of property in the donee—Bequest is invalid.*

A person unborn at the date of the Will can avail himself of the provisions of the Act of 1914, only in a case where a life estate is interposed between the death of the testatrix and the time provided for his taking the property but not otherwise, as the vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event, nor by the intervention of trustees : 40 *Mad.* 818; 7 *Cal.* 178 and 26 *Bom.* 449 ; *Ref.* [P 668 C 2, P 669 C 1]

B. Sitaram Rao and *K. Srinivasa Rao*—for Appellant.

K. Sundara Rao—for Respondents.

Judgment.—The plaintiff in this suit claimed the property of his deceased great-grandmother on the strength of a Will executed by her in 1883. The testatrix died in 1886. The plaintiff was born in 1899 and he must have come of age in 1917. The suit was brought in 1920. The Will, Ex. II, provided that the testatrix's grandson, Subraya, who is the 2nd defendant in this suit, and his wife Yamuna Bai should manage the estate as agents for the testatrix, collect the amount due to her under a mortgage and out of it pay off mortgages due by her and meet the expenses of her funeral ceremonies and maintain their children ; and lastly without alienating the property in any manner, they should deliver all the properties moveable and immovable to the great-grandchildren of the testatrix upon their attaining their majority. At the time when the Will was made and also when Laxmi died, no great-grandchildren had been born. The Will on the face of it is in favour of a person unborn at the decease of the testatrix. Madras Act (1 of 1914) has since validated bequests and transfers in favour of unborn persons in the Presidency of Madras. In *Venkayamma* v. *Narsamma* (1) and *Muthuswami Ayyar* v. *Kalyani Ammal* (2) it has been held that this Act has the effect of validating dispositions made under Wills executed before the date when the Act came into force, provided that some life estate was interposed. Abdur Rahim, J., observed that if there was no intervening life estate, the argument of appellant's vakil that only persons born on the date of the death of the testator could take would no doubt have force. In *Shanmuga Devar* v. *Shanmuga Devar* (3) it was held for similar reasons that if a life estate created and an ulterior estate was bequeathed to a person on his attaining age, the disposition would be valid provided that the final vesting took place after the passing of the Act. It has therefore been argued in the first place by Mr. Seetharama Rao that Ex. II creates a life estate. But I cannot accept this contention, because the Will provides that the 2nd defendant, Subaraya and his wife were to hand over all the properties moveable and immovable upon their great-grand children attaining their majority. The Will does not give them authority to retain those properties for the length of their lives. The testatrix speaks of her grandson and his wife as her "agents." It is obvious that after her death they could no longer fulfil the capacity of agents. Assuming that her intention was that they should be trustees or executors to carry out the provisions of her Will, the question then arises whether a person unborn at the date of the Will can avail himself of the provisions of the Act of 1914, in a case where no life estate is interposed between the death of the testatrix and the time provided for his taking the pro-

(1) [1917] 40 Mad. 540=31 M. L. J. 33=35 I. C. 150=4 L. W. 189.

(2) [1917] 40 Mad. 818=38 I. C. 223=5 L. W. 334.

(3) [1919] 53 I. C. 203.

perty. The case referred to in the lower appellate Court's judgment *Varadaraja Mudaliar* v. *Narayanasami Mudaliar* (4) is not of much help as it was a decision of Mr. Justice Kumaraswami Sastri, in a case arising within the limits of the City of Madras to which Madras Act (I of 1914), did not apply although similar provisions have been applied subsequently by the Imperial Act (VIII of 1921). If there was no person in whom the estate could vest at the date of the testatrix's death it follows that there was an intestacy. The vesting of an estate cannot be kept in abeyance or be, as the District Munsif observes, indefinitely postponed upon the bare contingency of the 2nd defendant having male issue. It is hardly necessary to quote authorities. But Mayne's Hindu Law page 512; West and Bhuhler's Hindu Law, pp. 179 and 112 and *Nilcomul Lahuri* v. *Jotendro Mohun Lahuri* (5); make it clear that the vesting of an estate cannot be kept in abeyance pending the happening of an uncertain event, nor by the intervention of trustees as was the case in *Gordhandas* v. *Bai Ramcoover* (6).

Mr. Seetharama Rao's second argument therefore was, that the testatrix's grandchildren took a life estate which, was determinable by the birth of children. The Will, however, contains no valid gift of the remainder at the date when it was executed. There is do direction in it as to the disposal of the surplus income. To treat the grandchildren as having a life estate defeasible upon the birth of children to them makes the gift in favour of unborn persons no more valid as there is no provision in the Will that, if there should be no great-grandchildren born at the date of the testatrix's death, the grandchildren should take the estate absolutely. In *Nafar Chandra Kundoo* v. *Ratan Mala Debi* (7) both the son and his wife whom he was to marry were made beneficiaries under the Will and were alive at the time of the testator's death and the property was vested in the executors. *Jamnabai* v. *Dharsey* (8) was a case in which all the estate vested in trustees for the benefit of the son who was to be adopted by the testator's widow. It does not appear that the son to be adopted was unborn at the date of the testator's death. It was held in the end that the widow took an absolute estate. The facts in *Amirto Lall Dutt* v. *Surnomo Das* (9) which came up in *Amirto Lall Dutt* v. *Surnomoyi Dassee* (10) and *Watkins* v. *Administrator-General of Bengal* (11) can be distinguished from the present case. The Will in that case created a power. The question was whether a direction to accumulate the income of the estate was valid during the continuance of the life estate. It was held that the accumulation could go on for so long a time as the absolute vesting of the entire interest could be withheld. No case has been quoted in which a disposition has been made in favour of a person unborn in which the vesting of the estate was postponed without the interposition of any life estate.

I am therefore of opinion that the lower Courts were right in finding that the dispositions in this case in favour of a person unborn were invalid and had not been validated by the passing subsequently of Madras Act (I of 1914)) seeing that if the validity of the transaction had been questioned at any time in probate or other proceedings undertaken after the testatrix's death but prior to the passing of that Act it must have been held that the Will was invalid and that in consequence an intestacy had been created, and a disposition invalid at the date of the testatrix's death could not be rendered valid by the subsequent birth of a great-grandson, nor could an intestacy be converted into a testacy in consequence of an event happening after the death of the testatrix.

The second appeal is dismissed with costs.

Appeal dismissed.

(4) [1914] 27 M. L. J. 681=27 I. C. 298.
(5) [1881] 7 Cal. 178=8 C. L. R. 401.
(6) [1902] 26 Bom. 449=3 Bom. L. R. 857.
(7) [1910] 15 C. W. N. 66=7 I. C. 921=13 C. L. J. 85.
(8) [1902] 4 Bom. L. R. 893.
(9) [1898] 25 Cal. 662=2 C. W. N. 389.
(10) [1897] 24 Cal. 589=1 C. W. N. 345.
(11) [1920] 47 Cal 88=56 I. C 376 n.

A. I. R. 1926 Madras 670

DEVADOSS AND WALLER, JJ.

Public Prosecutor—Appellant.

v.

Ayitha and *another*—Accused.

Criminal Appeals Nos. 339 and 340 of 1925, Decided on 17th December 1925, against the finding of acquittal of the accused by the Sub-Divl. Mag., Tellicherry, in Criminal Appeals Nos. 13 and 12 of 1925.

(a) *Madras Planters Labour Act, S. 4—Rules under, R. 2 (4)—Omission to give descriptive marks vitiates contract.*

The descriptive marks of a labourer are as important as his name and caste and, therefore, the omission to give descriptive marks makes the contract unenforceable. Whatever may be the reason for the Legislature requiring such particulars, it is not for the Court to enquire into the reasonableness of it. [P 671, C 1]

(b) *Interpretation of statutes—Legislature prescribing formalities for a contract—Court cannot enquire into their reasonableness.*

When the Legislature, for reasons best known to itself, requires certain formalities to be gone through, or certain formalities to be observed, in order to make a contract valid, or when it requires certain descriptions, or particulars to be given in a contract to make it valid the Court cannot consider any one of the terms or requisites as of no importance. [P 671, C 1]

J. C. Adam—for the Crown.

T. A. Ananta Aiyar—for Accused.

Devadoss, J.—(*Cr. A. No.* 339 of 1925.) This is an appeal by the Public Prosecutor against the decision of the Sub-Divisional Magistrate of Tellicherry who quashed the conviction of the 2nd Class Magistrate of Vayitri under S. 30 of the Madras Planters' Labour Act (Act I of 1903) on the ground that the contract executed by the appellant did not contain his descriptive marks as required by law. The contention of the Public Prosecutor is that the omission to mention the descriptive marks of the accused was not a wilful omission, but an oversight and that omission should not be held to invalidate the contract. The question is whether the omission to enter any particulars required by the rules vitiates the contract or makes it unenforcible under the Act. The argument of the Public Prosecutor is that the omission to give the descriptive marks of a labourer is such a negligible thing that it cannot be held to invalidate a contract. He argues, could it be said that a person, who has no descriptive marks or is unable to give his father's name, as required by the rules, cannot enter into a contract of this kind. The Governor-in-Council has framed rules under Ss. 4, 13 and 42 of the Planters' Labour Act of 1903. R. 2 (4) is in these terms :

"Labourer's native place (Village, Taluk and District) Caste, Age, and descriptive marks"

and S. 4 says :

"Every contract between a planter and a maistry and every labour contract shall be in writing and shall be in such form and shall contain such particulars as the Local Government may by rules made under this Act direct.

The question is whether the non-compliance with any of these rules as to particulars vitiates the contract ? In the contract form there is a column for descriptive marks. That column has not been filled in. It is unnecessary to enquire, for the purpose of this case, whether the accused has any descriptive marks or not. What we are concerned with is to see whether the rules have been complied with. The argument that it is not necessary to fill up one of the columns required to be filled up under the rules, either because the column cannot be filled up or it is not necessary to fill it up because of its minor importance does not commend itself to me. The Madras Planters' Labour Act of 1903 is an exceptional piece of legislation. It converts the civil liability into the criminal liability of a labourer and subjects him to imprisonment for one month with or without fine. When the Legislature enacts that in order to give validity to a contract certain formalities should be complied with, it is not for the Court to say whether any of the formalities is necessary or not. It may be as the Public Prosecutor argues that if a person has no descriptive marks, or if he is not able to give his father's name, the contract cannot be executed. But where, owing to wilful omission or carelessness the columns are not filled up, it cannot be said that one of the particulars required by the rules is not of such importance as to make the contract invalid. The rules require that the labourer's native place, village, taluk and district, caste, age and descriptive marks should be given. If a labour contract does not contain the name, caste or age of the labourer, can we hold that the contract is a valid one ? Whatever may be the

reason for the Legislature requiring such particulars, it is not for the Court to enquire into the reasonableness of it. When the Legislature, for reasons best known to itself, requires certain formalities to be gone through, or certain formalities to be observed, in order to make a contract valid, or when it requires certain descriptions or particulars to be given in a contract to make it valid, the Court cannot consider any one of the terms or requisites as of no importance. I think the descriptive marks of a labourer are as important as his name and caste and, therefore, the omission to give descriptive marks makes the contract unenforcible. It is not suggested that these rules have not got the force of law. Such a contention would be on the face of it untenable for the rules are framed under Ss. 4, 13 and 42 of the Act. In the Assam Labour Act (Act VI of 1901) the form to be filled in is made part of the Act itself and the Madras Act is evidently based upon the Assam Labour Act and it cannot be said that the Madras Legislature has required certain particulars to be given in the form without due consideration. When a similar enactment in another province requires the descriptive marks to be given in the contract, we may take it that it is for good reasons that the Legislature required them.

The Legislature does require certain formalities for the validity of certain contracts. For instance in the case of statutory bodies no contract which is not under seal is valid. Even if a statutory body has acted on such a contract, yet, when that contract is sought to be enforced in a Court of law, it cannot be enforced if it is not under seal. The law requires certain documents to be attested and such documents may be proved only by proving attestation. The Courts are bound to give effect to the law as they find it and not to consider whether certain formality is essential or non-essential. It is urged that a good many contracts might be declared invalid if such a literal construction of the rules is to prevail ; but it is not the function of the Court to consider what effect the decision will have. The duty of a Court is to interpret and apply a statute as it finds it, and no provision of law should be considered unnecessary or immaterial. The labourer is as much entitled to protection as the planter. Labourers are mostly ignorant people and the protection given under the Act should not be lightly taken away. The Legislature evidently in order to prevent unscrupulous maistries and others inducing labourers to enter into contracts which might afterwards be found irksome to them, require that certain formalities should be gone through and certain particulars should be entered in the contract to safeguard them and to prevent them from escaping the consequences of the non-fulfilment of the contract by pleading that they are not the persons who signed the contract. The Act takes the precaution to see that everything is done above board and to the knowledge of the labourer. For instance, it lays upon the Magistrates or other persons before whom such labour contracts are signed, a duty to see that the terms are fully explained to and are understood by the parties. In the face of the considered policy of the Act and the clear terms of Ss. 4 and 7 it cannot be said that the Sub-Divisional Magistrate was wrong in setting aside the conviction of the accused on the ground that the descriptive marks were not given in the contract. I, therefore, decline to interfere with the order of the Magistrate and dismiss this appeal.

Cr. A. No. 340 *of* 1925 : Same order on Cr. A. No. 340 of 1925.

Waller, J.—(Cr. A. Nos. 339 and 340 of 1925) : I agree that the appeals must be dismissed. The rule framed under S. 4 of the Act requires that, among other particulars, the descriptive marks of the labourer shall be entered in the contract. In these cases, no such marks have been entered. In fact, no attempt has been made to comply with the rule.

It is not asserted that respondents have no descriptive marks and I infer from Mr. Adam's admission that a large number of similar contracts may be affected by our decision, that the rule has been habitually ignored. There is, of course, in neither case any dispute as to the identity of the labourer, but that is not to the point. In order that the contract may be enforceable under the Act the law requires that certain things shall be entered in it. If they are omitted the contract cannot be enforced.

Appeal dismissed.

* A. I. R. 1926 Madras 672

WALLACE AND MADHAVAN, NAIR, JJ.

T. R. Ramaswami Aiyangar — Appellant.

v.

Official Receiver of Coimbatore—Petitioner—Respondent.

Appeal No. 176 of 1923, Decided on 7th December 1925, from the order of the Dist. J., Coimbatore, D/- 25th October 1922, in Second Appeal No. 163 of 1921.

(a) *Provincial Insolvency Act, S. 53—Transfer need not be to defeat or delay creditors—Want of good faith or valuable consideration is sufficient —Whole transaction must be in good faith.*

To attract the operation of S. 53 it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. It is open therefore to the alienee to escape the operation of the section by showing good faith and payment of valuable consideration, but a document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at. [P. 672, C. 2]

* (b) *Provincial Insolvency Act, S. 53—Transfer in good faith—Alienee paying off prior debts of alienor will stand in shoes of the creditor paid to the extent of amount paid.*

The general principle applicable to cases under S. 53 is that when the transfer is found to be partly not in good faith and for valuable consideration, the assignment, as an assignment, is void; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment: 33 *Mad.* 334 and *A. I. R.* 1924 *Mad.* 450, *Rel. on.* [P. 673, C. 1]

C. S. Venkatachariar—for Appellant.

T. M. Krishnaswami Aiyar—for Respondent.

Wallace, J.—This is an appeal against the order of the lower Court setting aside a mortgage in favour of the appellant under S. 53 of the Provincial Insolvency Act on a petition by a petitioning creditor dated 12th July 1920. This very alienation by mortgage was held to be an act of insolvency and adjudication followed thereon. The mortgage was dated 10th April 1920 and was for Rs. 6,000, and the consideration was four prior debts of a total sum of Rs. 2,500, which the mortgagee undertook to discharge, and a cash payment of Rs. 3,500. It is found by the learned Judge, and it is not disputed here, that two of the debts amounting to Rs. 1,000 were genuine and were paid by the mortgagee. The Judge holds that the Rs. 3,500 cash was never paid. He records no clear finding as to the nature of the document, viewing it at one time as a sham and at another time as a fraudulent preference. He has set it aside in toto.

The first point for consideration is whether the Rs. 3,500 cash was paid. I agree with the lower Court that the appellant, on whom the onus lay, has not proved the payment. (His Lordship then discussed the evidence and found that Rs. 3,500 were not paid as alleged.) I have now to consider the effect of these findings. I do not think that it can be concluded that the insolvent had the dominent idea of cheating his other creditors by preferring the creditors of these four debts. It is thus not properly a case of fraudulent preference under S. 54 of the Provincial Insolvency Act, but I think it can be got under S. 53. As already pointed out the District Judge has held this mortgage to be the act of insolvency and the adjudication was based on this conclusion. That adjudication is not now before us and I take it that this finding stands, namely, that the document is one got up by the insolvents to defeat and delay creditors, of whom the petitioning creditor was one. The alienee in such circumstances no doubt is faced with this handicap: that it is not open to him to attack that finding; but on the other hand, to attract the operation of S. 53 of the Provincial Insolvency Act, it is not in terms necessary that the document should be to defeat or delay creditors. It is sufficient if it was a transfer not in good faith or not for valuable consideration. It is open therefore to the alienee to escape the operation of the section by showing good faith and payment of valuable consideration. Now, this alienee has paid valuable consideration to the extent of Rs. 1,000; but considering that the intention of the document was to secrete a much larger part of the insolvent's estate from his creditors it is impossible to hold that the mere payment of Rs. 1,000 will avail to make the document one taken in good faith. A document cannot be partly in good faith and partly not. The dominant intention underlying the document is what has to be looked at, and, in this case, that intention was to deceive and

defraud creditors. It is therefore a document taken not in good faith and liable to be declared void against the Official Receiver. There is therefore no reason to disturb the order of the District Court setting it aside.

The appellant contends that, even so he is entitled to stand in the shoes of the creditors whose debts he has discharged. One of these was a simple money debt and the other was a mortgage debt. We have been referred to certain rulings under S. 53 of the Transfer of Property Act. In *Chidambaram Chettiar* v. *Sami Aiyar* (1) it was held that a transfer to defeat creditors is wholly void even if it is in part for valuable consideration and that it cannot be upheld even to the extent to which it is supported by consideration. But the upholding contended for and negatived in that case was an upholding as an assignment. In *Palamalai Mudaliar* v. *South Indian Export Company* (2), after a mortgage had been paid off, the alienee was given a charge on the property to the extent of the payment ; and the same principle was acted upon in *Chinna Pitchiah* v. *Pedakotiah* (3), *Loorthi Odayar* v. *Gopalaswami Aiyar* (4) and *Rajani Kumar Das* v. *Gana Kishore Shaha* (5). The general principle applicable to cases under S. 53 of the Provincial Insolvency Act, I think is this : the assignment, as an assignment is void ; but, for money genuinely paid in discharge of genuine debts, the alienee will stand in the shoes of those whom he has paid. In the case of a mortgage debt paid off, the transfer will not operate as a mortgage at all, not even to the extent of the amount paid, but the alienee will be entitled to rank in the schedule of secured creditors to the extent of his payment. Consequently, I think the proper method of disposal by the Official Receiver is that the appellant should be allowed to rank in the schedule of secured creditors to the extent of the amount paid by him to discharge the mortgage, and as an unsecured creditor to the extent of the amount paid by him to discharge the unsecured debts ; and I would direct that this be done.

(1) [1907] 30 Mad. 6=16 M. L. J. 427.
(2) [1909] 33 Mad. 334=20 M. L. J. 211=5 I. C. 33=(1910) M. W. N. 239.
(3) [1911] 36 Mad. 29=11 I. C. 868=(1911) 2 M. W. N. 152.
(4) A. I. R. 1924 Mad. 450.
(5) [1908] 35 Cal. 1051=7 C. L. J. 586=12 C. W. N. 761.

I would give the appellant roughly proportionate costs on his success and direct that he receive one-third of the costs throughout and pay two-thirds of the costs throughout.

Madhavan Nair, J.—I entirely agree. The learned District Judge has held that the alienation in favour of the appellant should be set aside under S. 53 of the Provincial Insolvency Act, but he has also found that the appellant has paid a sum of Rs. 1,000 thereby discharging two prior debts of the insolvent, namely : (1), Rs. 500 due to one Sinnakkal under a mortgage, Ex. II ; and (2) Rs. 500 due to the Bank under Ex. III. I agree with my learned brother that the evidence in the case fully supports these conclusions. It is argued that the sum of Rs. 1,000 having been paid, the alienation in favour of the appellant should be upheld at least to the extent it is supported by consideration, and in this connexion, some decisions under S. 53 of the Transfer of Property Act dealing with transfers made with intent to defeat or delay creditors were referred to in the course of the argument. In *Chidambaram Chettiar* v. *Sami Aiyar* (1) [confirmed by the Privy Council in *Chidambaram Chettiar* v. *Srinivasa Sastrial* (6)] it was held that a transfer intended to defeat creditors is wholly void as an assignment though it is in part supported by valuable consideration ; but this does not mean that the alienee is not to get any credit for the debt that he may be found to have actually discharged. In *Palamalai Mudaliar* v. *The South Indian Export Company* (2) an alienee who paid a portion of the consideration by discharging a valid mortgage previously binding on the property alienated was given a charge on the property to the extent of his payment. This principle is recognized in *Loorthi Odayar* v. *Gopalaswami Aiyar* (4) though this decision covers a wider ground. Applying the principle of these decisions, I think that though the assignment as an assignment is void under S. 53 of the Provincial Insolvency Act, the alienee is entitled, in so far as he has paid off the mortgage debt due to Sinnakkal, to rank in the schedule of secured creditors to the extent of payment : and, in so far as he has paid off the debt due to the Bank, to rank as an unsecured creditor. I agree with my learned brother that the Official

(6) [1914] 37 Mad. 227=23 I. C. 714=26 M. L. J. 473 (P. C.).

Receiver should be directed to dispose of the claims of the appellant as regards these two debts on this basis. I also concur in the proposed order as to costs.

Appeal partly allowed.

A. I. R. 1926 Madras 674

DEVADOSS AND WALLACE, JJ.

Tambi Reddy Viraredddy—Appellant.

v.

Devi Reddy Pattabhirami Reddy and *Co.* and *others*—Respondents.

Civil Miscellaneous Appeal No. 106 of 1923, Decided on 24th November 1925, from the order of the Dist. J., Nellore, in E. P. No. 44 of 1924.

(a) *Civil P. C., O. 21, R. 2 (3)—In the absence of certificate of payment, decree-holder, however fraudulent, is entitled to execute the decree against the judgment-debtor as well as against the surety.*

In the absence of a certificate of payment, a decree-holder, however fraudulent his conduct may be, is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment-debtor, a surety, who undertakes to pay the decree-amount, cannot plead that there is no decree against the judgment-debtor and therefore he is released from liability under the bond: *A. I. R.* 1923 *Cal.* 313, *Foll.* [P 675, C 2]

(b) *Civil P. C., S. 145—No second decree is passed against surety but decree in the suit is executed against him.*

The decree that is executed against the surety of judgment-debtor is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him. [P 676, C 1]

B. Somayya—for Appellant.

T. V. Venkatarama Ayyar—for Respondents 1 and 2.

Judgment.—The plaintiffs who are Respondents 1 and 2 herein arrested the second defendant, the third respondent herein, in execution of a money decree. The appellant executed a security bond on 11th December 1923 undertaking to produce and hand over the second defendant whenever the Court passed an order to produce him. The bond also provided that in default of the surety producing the second defendant and handing him over to the Court the amount of decree, interest, and costs shall be recovered by the plaintiffs from the surety personally.

On the execution of the bond, the second defendant was released from arrest. The plaintiffs applied to the lower Court for an order that the surety be directed to produce the second defendant and in default of producing him, the decree-amount be realized from him. The appellant contended that the decree of the plaintiffs against the second defendant had been satisfied and that no execution could issue against him in execution of a decree already satisfied. The District Judge overruled the objection of the appellant and directed him to produce the second defendant on or before a certain date and on his failure to do so that execution should issue against him.

The appellant has preferred this Civil Miscellaneous Appeal. Two points arise for consideration in this case, one of fact and the other of law. (The judgment then discussed the point of fact and came to the conclusion that the appellant had not shown that the decree had been satisfied by any amount being paid by the third defendant.) The next question is, granting for argument's sake that the decree amount was paid by the third defendant, can the appellant take advantage of the payment, when the payment has not been certified by the Court as required by O. 21, R. 2. The appellant's argument is that the surety is not a party to the decree and he could not apply to the Court to enter up satisfaction of a decree which has been satisfied by payment by the third defendant. The surety is not a party to the decree but becomes a party only for a limited purpose, that is, for the purpose of appeal when an order is made against him under S. 145, Civil Procedure Code: vide *Ramanathan Pillai* v. *Doraiswami Aiyangar* (1). The fact that he is not a party to the decree is no ground for getting round a definite provision of law under O. 21, R. 2, Cl. (3).

Mr. Somayya strongly urges that the said provision is contained in procedural law and should not be held to override substantive law and under the Law of Contract a surety is not bound to pay, when the debt which he undertook to pay in case of default of the principal debtor has been paid off or adjusted.

Whatever may be the policy of the Legislature in enacting Cl. (3), the Court is bound to give effect to it. Where the decree is adjusted wholly or in part the judgment-debtor should apply within

(1) [1920] 43 Mad. 325=11 L. W. 45=55 I. C. 363=(1920) M. W. N. 114=38 M. L. J. 65.

three months to the Court and that such adjustment or payment should be recorded as certified and if he fails to do so, he cannot plead adjustment or payment in answer to the execution of the decree against him. Considerable reliance is placed by Mr. Somayya on the interpretation of O. 21, R. 16, by the Madras High Court that the executing Court has a discretion to refuse execution at the instance of a transferee of a decree.

In *Rama Ayyan* v. *Sreenivasa Pattar*, (2) the judgment-debtor transferred some of his immovable properties to a person in consideration of his paying the judgment-debt to the original decree-holder. The vendee without paying the decree-holder the amount of the decree, got a transfer of the decree to himself and, as assignee, applied for execution. It was held that he was not entitled to execute the decree when he himself in spite of his undertaking to discharge the decree had fraudulently obtained a transfer of the decree from the decree-holder, Mr. Justice Subrahmanya Ayyar observed at page 232, with regard to S. 258 of the old Code corresponding to O. 21, R. 2 of the present Code:

> The last paragraph prohibits judgment-debtors, who omit to apply under the second paragraph or having applied fail to establish their case, from relying in execution proceedings upon any payment, satisfaction or adjustment not duly certified. Manifestly therefore the enquiry under the said second paragraph can take place only between a person standing in the relation of a judgment-debtor and a judgment-creditor.

The surety not being a party to the decree could not apply under O. 21, R. 2. I am unable to accept the argument that a surety though he is not a party to the decree could not ask the Court to hold an enquiry as to the decree being satisfied by payment or adjustment provided the application is made within the time allowed by the law.

Though he has no locus standi to insist upon an enquiry he could apply to the Court to hold an enquiry inasmuch as he has an interest in showing that the decree has been satisfied. In *Ponnuswami Nadar* v. *Letchmanan Chettiar* (3), there was a a difference of opinion between Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar, as regards the question whether the prohibition regarding uncertified adjustment will or will not apply while the adjustment is made by the third party. In *Ramayya* v. *Krishnamurti* (4), it was held that

> Order 21, R. 2, did not disentitle a judgment-debtor from proving facts that a transferee of a decree applying for execution was merely a benamidar for another judgment-debtor.

These cases have no application to the present question and they do not throw any light upon the points raised in this case. The real question is whether a surety can plead adjustment or the discharge of a decree when the judgment-debtor himself could not successfully put forward that plea. In this case the payment or adjustment was not certified by the Court as required by O. 21, R. 2, and therefore execution could proceed against the second defendant.

When there is an executable decree against the second defendant, can it be reasonably contended that so far as the surety is concerned there is no executable decree? The Court cannot recognize any adjustment or payment out of Court unless certified as is required by law and in the absence of such certificate a decree-holder, however fraudulent his conduct may be, is entitled in law to execute his decree against the judgment-debtor, and so long as he is entitled to execute the decree against the judgment-debtor, a surety who undertakes to pay the decree-amount cannot plead that there is no decree against the judgment-debtor and therefore he is released from liability under the bond. S. 145 says:

> When any person has become liable as a surety, a decree or an order may be executed against him to the extent to which he has rendered himself personally liable.

On the failure of the surety to carry out the terms of the bond, he makes himself liable for the amount of the decree or such amount as he has undertaken to pay.

It is next suggested that the original decree is not executed against the surety but a second decree passed on his failure to carry out his undertaking and therefore that decree is different from the original decree. No second decree is passed against the surety. The order under S. 145 is passed when he makes himself liable by failing to carry out the terms of the bond to the extent to which he has rendered himself liable. The

(2) [1896] 19 Mad. 230=5 M. L. J. 218.
(3) [1912] 35 Mad. 659=(1911) 2 M. W. N. 568=12 I. C. 657=22 M. L. J. 170.
(4) [1917] 40 Mad. 296=(1916) 1 M. W. N. 133 =32 I. C. 952=3 L. W. 186.

decree that is executed against him is the decree passed in the suit and therefore it cannot be said that a second decree is passed against him.

The contention of Mr. Somayya for the appellant that uncertified adjustment or payment could be pleaded by the surety was specifically negatived in a recent case decided by a Bench of the Calcutta High Court in *Onkarmal Agarwala* v. *Nritya Gopal Chaki* (5). The learned Judges observed at page 886 :

The surety is bound so long as the judgment-debtor is bound. The judgment-debtor is bound so long as any payments which he may have made are not certified by the Court.

In the result we have no hesitation in holding that so long as there is an executable decree against the judgment-debtor the surety is not relieved from his liability to pay the decree amount under the terms of the security bond executed by him.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(5) A. I. R. 1923 Cal. 313.

✻ A. I. R. 1926 Madras 676

WALLACE, J.

(*Kolisetti*) *Basavayya* and *others*—Petitioners.

v.

Mittapalli Venkatappayya and *another*—Respondents.

Civil Revision Petition No. 677 of 1925, Decided on 18th February 1926, from the order of the Addl. Dist. Munsif, Guntur, D/- 26th August 1925.

(a) *Civil P. C., S. 149—Accepting deficient Court-fees after time fixed—Revision lies.*

Where under S. 149 Court has accepted deficient Court-fees after the time fixed for its payment, although without specifically excusing the delay, review lies on proper and legal grounds. [P 677 C 1]

✻ (b) *Civil P. C., S. 149 and O. 7, R. 11—Under S. 149 Court can extend time or accept fees beyond the time fixed, but it cannot refuse to fix time under O. 7, R. 11.*

The Court must fix a time within which the deficient Court-fee shall be paid and has no discretion to refuse to fix it. The Court also has discretion to extend the time already fixed. S. 149 implies that Court may, in its discretion, at any stage, allow a party to pay the deficient Court-fee. But this will not override O. 7, R. 11, in the sense that S. 149 gives the Court any discretion to refuse to grant the time which O. 7, R. 11, says it shall grant. When the party pays beyond the time fixed and has not asked the Court to extend the time for payment, but the Court nevertheless excuses the delay and receives the fee, the only reasonable interpretation is that the Court has implicitly, although not explicitly, extended the time. 20 *C. W. N.* 615, *Ref.* Under S. 149 Court has discretion to accept payment after the time fixed. [P 677 C 1, 2]

✻ (c) *Civil P. C.—General provisions prevail over rules under Sch. I.*

S. 149 is one of the general provisions of the Code not liable to annulment or alteration by any proceedings under Part X, and if there is any conflict between such a general provision and a rule under the first schedule, the general provision must prevail. [P 678 C 1]

V. Govindarajachari—for Appellants.

K. Kameswara Rao—for Respondents.

Judgment.—This Civil Revision Petition is against the decision of the Additional District Munsif of Guntur declining to grant a review of an order by his predecessor excusing delay in re-presentation of a plaint. The facts were as follows : A plaint was presented on 20-4-1923 with a one rupee stamp, the proper stamp being Rs. 142. It was returned on 4-6-1923 for two reasons : (1) to pay deficient Court-fee ; and (2) to compare the copy of accounts. Seven days time was given. On 16-6-1923 a further extension of time of ten days was given. The plaint was not re-presented until 4-3-1924. On that date a petition was put in by the plaintiff under S. 151, Civil P. C. with an affidavit by the pleader's clerk stating that the plaint had been mislaid and asking that the delay in re-presentation be excused. The deficient Court-fee was put in and paid on the same day. On 5-3-1924 the District Munsif, without giving notice to the other side, made an order on that petition: " Excused." On 20-8-1925 the present District Munsif was asked under O. 47, R. 1, Civil P. C. by the defendant to review that order and he has declined to do so ; and the defendant comes up with this petition.

The first point urged is that there was really no definite order by the first District Munsif indicating that he gave his mind to the long delay in paying up the deficient Court-fee, and therefore it was open to his successor to consider that matter de novo. Certainly the affidavit filed in support of the application for excusing delay does not make any mention of the payment of the Court-fee and was not put in under S. 149, Civil P. C.

but under S. 151, Civil P. C. Nevertheless I think it must be held that the matter was brought to the notice of the District Munsif and that he exercised his mind consciously thereon and decided to excuse the delay in paying up the deficient Court-fee. That was the chief question in the matter of excusing the delay in re-presentation and I must take it that the District Munsif applied his mind to it.

That being so, it was open to his successor to treat that order as one open to review by him if proper and legal grounds for review were made out. The lower Court however seems to regard the matter as one which it had no power to review. That view seems to be wrong. But since the matter was within the discretion of the first District Munsif, and since it has not been brought to my notice that any new facts have appeared since that order was passed, there is no ground for interference with the lower Court's refusal to review unless the first Munsif had no jurisdiction whatever to excuse delay. Even so, the more proper course would have been for the petitioner to have come up here at once against the order excusing delay. Had he done so, he would have been able to urge with more propriety that the District Munsif should have given notice to him and heard him before he passed his order excusing delay. That he did not do, and the order was passed on 5-3-1924. He did not come up here against it, and even his petition for review was belated, having been put in on 20-8-1925. In such circumstances I would not interfere unless it is an absolute rule of law that such condonation of delay is illegal.

This is the second point urged before me, namely, that the District Munsif had no option but to dismiss the plaint since the deficient Court-fee was not paid within the time allowed. O. 7, R. 11, Civil P. C., is called in aid, and various rulings have been cited before me.

Order 7, Rule 11 declares that when a plaintiff does not pay the deficient Court-fee within a time to be fixed by the Court the plaint shall be rejected. That the Court must fix a time within which the deficient Court-fee shall be paid, and has no discretion to refuse to fix it, is settled law. The Court also has discretion to extend the time already fixed. S. 149, enacted in order to set at rest a matter on which the case law was conflicting, implies that the Court may, in its discretion, at any stage, allow a party to pay the deficient Court-fee. But this will not override O. 7, R. 11 in the sense that S. 149 gives the Court any discretion to refuse to grant the time which O. 7, R. 11 says it shall grant: see *Achut Ramachandra* v. *Nagappa Bab Baljya* (1) and *Juvan Das* v. *Khushibi Ram* (2). This seems to make it clear that the Court has discretion to extend to any limit the time within which the deficient Court-fee may be paid, and that if the fee is paid within the time fixed the plaint shall stand good as on the date of its presentation. What is the law then when the party pays beyond the time fixed and has not asked the Court to extend the time for payment, but the Court nevertheless excuses the delay and receives the fee? I think the only reasonable interpretation is that the Court has implicitly, although not explicitly, extended the time. Two courses are open to the Court in such cases; either it may reject the plaint or it may accept it, and both courses are within its discretion. That is, whether it rejects or accepts, a superior Court will not as a rule interfere. When the Court has accepted a belated payment but has not explicitly extended the time, the natural inference is that it intended to extend the time and in effect did so: See *Gopal Proshad Bhagat* v. *Rajendra Lal Panja* (3), *Maria Thangathammal* v. *Iravatheswara Iyer* (4): *Priyanath* v. *Meajan* (5); *Amir Hussain Khan* v. *Nanak Chand* (6); and *Rajkishori Koer* v. *Madan Mohan Singh* (7). An extension of time to quote authorities was held to imply an extension of time to pay. To the other effect, namely, that the Court has no discretion to admit payment after the time fixed is a ruling in *Brahmomoyi* v. *Andi Si* (8) under the old code. In *Midnapur Zamindary Company Ltd.*, v. *Secretary of State* (9) the appellate Court refused

(1) [1914] 38 Bom. 41=15 Bom. L. R. 902.
(2) [1917] 27 P. L. R. 1917=25 P. W. R. 1917.
(3) [1916] 20 C. W. N. 615=34 I. C. 625.
(4) [1915] M. W. N. 228=28 I. C. 504.
(5) [1915] 24 C. L. J. 88=29 I. C. 571.
(6) [1910] 12 C. L. J. 62=14 C. W. N. 882.
(7) [1904] 31 Cal. 75.
(8) [1900] 27 Cal. 376.
(9) [1917] 44 Cal. 352=21 C. W. N. 834.

to interfere with an order by the lower Court rejecting the plaint because the additional Court-fee had not been paid within the time fixed. Possibly the language used is too strong when the learned Judges say that the Subordinate Judge had "no other alternative but to reject the plaint." S. 149 is not referred to in the judgment. The Full Bench case in *Padmanund Sing* v. *Anant Lal Misser* (10) was under the old Code and therefore the discretion given by S. 149 was not considered. In *Budhan Sha* v. *Sitanath Sha* (11) it was held that S. 149 will not avail if the payment is not made within the time fixed under O. 7, R. 2. In that case the prior Court had first dismissed the suit and on review held that S. 149 gave it discretion to excuse and condone the delay. The ground on which the learned Judges held that S. 149 will not avail was that it only applies to cases where the payment has been made within the time fixed, and that it gives no discretion to a Court to condone a payment made after the time fixed. But, with respect, I think that this is giving too narrow a construction to the wording of S. 149. That section is one of the general provisions of the Code not liable to annulment or alteration by any proceedings under Part X, and if there is any conflict between such a general provision and a rule under the first schedule, I take it that the general provision must prevail. The section appears to me to give a Court wide discretion, once the time for payment has been fixed, either to allow payment at any stage or to disallow it. I am not prepared to hold that the order of the District Munsif excusing delay in re-presenting the plaint was illegal.

It would no doubt have been better in the present case if the first District Munsif had given notice to the petitioner and heard him before excusing the delay, but its omission to do so is certainly not an unimpeachable ground for review and cannot therefore be used here to justify interference with an order passed on review. I am therefore not able to hold that the lower Court, in refusing to interfere with the order of its predecessor excusing delay, committed any error of law. I therefore decline to interfere and dismiss this petition with costs.

Petition dismissed.

(10) [1907] 34 Cal. 20=4 C. L. J. 421=11 C. W. N. 38 (F. B.).

(11) [1911] 13 C. L. J. 78=7 I. C. 578.

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* A. I. R. 1926 Madras 678

VENKATASUBBA RAO, J.

Karuppana Tevar — Plaintiff — Petitioner.

v.

Angammal and *others*—Defendants—Respondents.

Civil Revision Petition No. 973 of 1925, Decided on 25th January 1926, from the order of the Sub-J., Tuticorin, D/-21st September 1925, in O. S. No. 15 of 1925.

(a) *Court-fees — Determination — Plaint has to be looked to and not written statement.*

For the purpose of ascertaining the Court-fee payable, Court must have regard to the allegations in the plaint. Whether they have or have not been denied in the written statement is immaterial. [P 679 C 1]

* (b) *Court-Fees Act, S. 7 (4) (c) and Art. 17 (b)—Suit for declaration that particular alienation by widow is not binding—Appointment of Receiver is consequential relief when both reliefs are claimable on same facts.*

The relief by a reversioner for the appointment of a Receiver to take possession of the estate from the widow and manage it during her lifetime is not consequential to the relief for a declaration that an alienation specifically mentioned in the plaint is not binding on him, as there is no necessary connexion between the two reliefs. But it is quite conceivable that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts, so as to constitute the relief for Receiver as consequential to the one for declaration. [P 679 C 1]

(c) *Civil P. C., S. 115 — Decision as to what Court-fees should be paid—Revision lies.*

High Court will interfere in revision with the orders of the lower Courts deciding what Court-fee is payable. [P 679 C 2]

T. Krishna Kurup—for Petitioner.

R. Krishnaswami Aiyangar—for Respondents.

Judgment.—The question to be decided in this case is : What is the Court-fee payable ? Is S. 7 (4) (c) of the Court-Fees Act or Art. 17 (b) of Sch. II, applicable ? The plaintiff who claims to be the reversionary heir of a certain deceased Hindu, has filed the suit questioning an alienation made by the 1st defendant, the latter's widow, and making various charges regarding alleged

waste by her of the property. The plaintiff asks substantially for two reliefs : (1) for a declaration that an alienation specifically mentioned in the plaint is not binding upon him and (2) for the appointment of a Receiver to take possession of the estate from the widow and manage it during her lifetime. The short question to be decided is : Is the relief for the appointment of a Receiver a "consequential relief" within the meaning of S. 7 (4) (c) ? The words used in that section are "to obtain a declaratory decree or order, where consequential relief is prayed." Does the second relief follow as a consequence from the first ? I must now turn to the plaint to examine the allegations made in this respect. The plaintiff first states that the widow made a certain alienation and he impeaches it. He then proceeds to say that the widow has been wasting the estate in the following manner, by allowing debts to become barred by limitation, by making gifts of certain items of property and by executing fraudulent receipts in respect of payments not really made to her. For the purpose of ascertaining the Court-fee payable we must have regard to the allegations in the plaint. Whether they have or have not been denied in the written statement is not a matter which signifies. In order to determine whether the second relief is consequential upon the first, let me see how the position stands. Supposing the first relief is not granted does it follow that the plaintiff cannot obtain the second relief ? The Court may hold that the alienation impeached is good, but if it comes to the conclusion that the widow has been guilty of the other acts alleged, it may appoint a Receiver. Then again take the converse case. Supposing the Court comes to the conclusion that the alienation is not binding on the estate does it follow that the second relief will be granted ? It clearly does not, because the Court may find that the particular alienation is bad but that there has not been such waste as to justify the appointment of a Receiver. As a matter of fact there is no necessary connexion between the two reliefs. It is quite conceivable of course that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts. In that case the second relief may properly be said to be consequential upon the first. In the present case, however, the facts are entirely different and as I have shown, the two reliefs asked for are independent of each other. No case binding upon me which takes a different view has been cited and I hold that the proper Court-fee is the aggregate of two sums of Rs. 100 made up thus :

(1) Under Sch. II (17) (a) (1), Rs. 100 for declaration and

(2) under Sch. II (1) (b), Rs. 100 for Receiver.

The plaintiff has paid Rs. 200 and I declare that the proper Court-fee has been paid upon the plaint.

A preliminary objection has been taken that the order before me is in the nature of an interlocutory order and no revision petition will therefore lie. This contention is unsound, and this Court has often (and I have myself) interfered in revision with orders of this kind. If authority is needed I may refer to *Ramrup Das* v. *Sujaram Das* (1) and on this point I am prepared to follow also the decision in *Dodda Sannekappa* v. *Sakravva* (2).

The civil revision petition is allowed with costs.

Petition allowed.

(1) [1910] 14 C. W. N. 932=12 C. L. J. 211.
(2) [1916] 36 I. C. 831.

A. I. R. 1926 Madras 679

DEVADOSS, J.

Abdul Ameeth Sahib—Plaintiff—Petitioner.

v.

Ponnambala Muthurian—Defendant—Respondent.

Civil Revision Petition No. 440 of 1924, Decided on 4th February 1926, from the decree of the Small Cause Court J., Trichinopoly, D/-10th December 1923, in Suit No. 1088 of 1923.

Provincial Small Cause Courts Act, S. 25—Court deciding that it has no jurisdiction—It should not decide the case on merits.

Where the Court decides that it has no jurisdiction, it is not competent for it to go into the merits of the case and give a decision on them. It should return the plaint for presentation to the proper Court. [P 680, C 1]

T. V. Ramamurthi Iyer—for Petitioner.

N. Swaminatha Iyer—for Respondent.

Judgment.—This is an application to revise the order of the Small Cause Judge of Trichinopoly. The Judge found

that the Court had no jurisdiction. Having decided that the Court had no jurisdiction it was not competent for him to go into the merits of the case and give a decision on them. He should have returned the plaint for presentation to the proper Court. I therefore set aside the decree of the Small Cause Court Judge and direct him to return the plaint to the plaintiff for presentation to the proper Court. The plaintiff is responsible for filing the suit in a Court which had no jurisdiction. Therefore the defendant is entitled to the costs of the suit incurred in the Small Cause Judge's Court, Trichinopoly. As the revision petition was necessitated by the wrong order of the learned Judge I make no order as to the costs in this Court.

Order set aside.

A. I. R. 1926 Madras 680

WALLACE, J.

Godan Nambudiripad—Appellant.

v.

Krishnan Nambudiripad and *others*—Respondents.

Appeal No. 101 of 1924, Decided on 2nd February 1926, against the order of the Sub.-J., Ottapalam, D/- 5th December 1923 in Appeal No. 57 of 1922.

Malabar Tenants Improvement Act, S. 6 (3)—Commissioner has to consider compensation for improvements subsequent to decree awarding compensation—Onus lies on kanomdar to supply material for determination.

Under S. 6 (3) the Commissioner has to consider if any and what compensation is to be given for new improvements subsequent to the date up to which compensation for improvements has been adjudged in the decree, and whether any improvement, which has already been adjudged, has to be re-valued in consequence of some change in its condition since the adjudication of it in the first case. It is not his business to make a valuation de novo. The starting point of the second valuation is the point where the first left off, and on the kanomdar rests the onus of putting before the Commissioner evidence on which he has to make his decision. [P 680 C 2; P 681 C 1]

D. A. Krishna Variar—for Appellant.

S. Ranganatha Iyer, A. V. K. Krishnan Menon and *P. K. Manavikrama Raja*—for Respondents.

Judgment.—This is an appeal against the order of the lower appellate Court declining to give effect to a re-valuation held under S. 6 (3) of the Malabar Tenants Improvement Act. The decree of the first Court was passed on 18-2-18. For the purpose of the suit there had been a valuation of the "improvements" by a Commissioner in 1916. The suit went up on appeal and second appeal and the second appeal decree was passed on 16-11-20. On an application for re-valuation under S. 6 (3) of the Act a second Commissioner was sent in September 1921 and he reported his valuation of the improvements. This valuation both the lower Courts have declined to accept and the appellant appeals.

The method followed by the second Commissioner apparently was not to value how much the property had improved since the first valuation in 1916, but how much it had improved since the date of the kanom, i. e., as if he was carrying out a first valuation and not a re-valuation. As his total figure is much larger than the figure of the first Commissioner, appellant claims compensation at that figure. Needless to say, if the second figure had been less than the first, appellant would have claimed the contrary. This indicates that this line of reasoning is wrong. The first figure is already embodied in the final decree and cannot be disturbed, and must be accepted so far as it goes. That is, the duty of the second Commissioner was to accept it as the compensation payable up to the date up to which the final decree said compensation had been fixed and decreed, and consider whether, after that date, there had been further improvements which would entitle the kanomdar to further compensation. This principle is enunciated in a case reported at *Kunhammad Kutti* v. *Punchara Aleewa* (1), and seems to me to follow clearly from the wording of S. 6 (3) of the Act. As I understand the section, the Commissioner has to consider (1): if any and what compensation is to be given for new improvements subsequent to the date up to which compensation for improvements has been adjudged in the decree; and (2) whether any improvement, which has already been adjudged, has to be re-valued in consequence of some change in its condition since the adjudication of it in the first case. It is not his business to make a valuation de novo. The starting point of the second valuation is the point

(1) [1916] 30 M. L. J. 203=33 I.C. 746.

where the first left off, and on the appellant rests the onus of putting before the commissioner evidence on which he has to make his decision.

The method of the Commissioner was therefore wrong. But I am not prepared to direct a fresh re-valuation, as it is clear that his error was due to the laches of appellant. His kariasthan P. W. 3, who accompanied the Commissioner, does not appear to have furnished him with any copy of the first valuation and to have taken any steps to see that it was furnished to him. The original valuation was not produced even at the hearing of this application before the Court of first instance. It was clearly the appellant's duty to see that the second Commissioner was provided with information as to each item for valuation, as to its condition at the time of the first valuation and its value as adjudicated by the final decree. Vague evidence, which is all that is now given, that some trees have increased in girth is of no use. Other trees have probably disappeared altogether, and some new ones may have grown up. Appellant has not even examined either of the Commissioners. Appellant in this failed to supply the necessary information to enable the re-valuation to be properly conducted by the Commissioner and tested by the Courts. I do not subscribe to all the reasons given by the lower appellate Courts for rejecting the re-valuation, such as e. g., that no compensation is permissible for trees of spontaneous growth. But even so, appellant has failed to adduce evidence to justify the award of any additional compensation. I decline to interfere and dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 681

ODGERS, J.

V. Gopala Chetty—Defendant—Appellant.

v.

V. Narayanaswami Chetty—Plaintiff—Respondent.

Second Appeal No. 1427 of 1923, Decided on 17th March 1925, from the decree of the Dist. J., Bellary, in A. S. No. 81 of 1922.

(a) *Limitation Act, Arts. 123 and 120—Bequest to son and minor grandson — Widow of testator appointed executrix—Son entering into management after the latter's death becomes executor* de son tort—*Suit by grandson for account and mesne profits—Art. 123 applies.*

A Hindu died leaving a Will whereby his self-acquired properties were divided equally between his minor grandson, the plaintiff, and his own third son, the defendant. Testator's widow was appointed executrix by the Will. After the death of the testator, when the widow was alive, the defendant took up the management and continued to do so till after widow's death. Plaintiff after attaining majority filed a suit for account and mesne profits against defendant in 1922.

Held : that defendant was in the position of an executor *de son tort* after the death of the testator and Art. 123 applied : *A. I. R.* 1922 *Mad.* 457 (*F. B.*) ; *Rel. on.* [P. 681, C. 2]

(b) *Executor*—De son tort—*Person permitted by executor to take possession of assets on testator's death is not executor* de son tort.

Where a person has been permitted by the executor to obtain possession of part of the assets of the testator he will not be executor *de son tort* to the original testator or of the executor even if he retained those assets after the executor's death when there is no personal representative of either. [P. 682, C. 2]

V. S. Narasimhachar—for Appellant.

K. Sundara Rao, Ponnuswami Aiyar and *Narayanaswami Aiyar*—for Respondent.

Judgment.—This was a suit brought by the plaintiff who attained his majority in 1918 for an account of the properties left by his grandfather, Kasturi Chetti, who died in 1912, and for division of the same between the plaintiff and the defendant and for accounts and mesne profits. Kasturi Chetti left self-acquired properties which he divided equally between his grandson, the plaintiff, and his own third son, the defendant. The defendant raised a number of pleas including a prior division and the issues were : (1) whether the division pleaded by the defendant is true ; (2) whether the defendant is accountable to the plaintiff as claimed in the plaint. If so, to what extent ? and (3) Is the claim to mesne profits barred by limitation ?

It appears from the judgment of the Subordinate Judge that there was no final division of the immovable properties as alleged by the defendant and that as to the second issue a plea was taken that the defendant was the guardian of the plaintiff and kept him under his protection. This is found against.

On the third issue, the question was whether Art. 123 of the Limitation Act

applied to the facts of this case, and the learned Subordinate Judge held that as the defendant must be held to be at best an intermeddler or an executor de son tort and as Art. 123 of the Limitation Act does not apply to an executor de son tort the plaintiff was only entitled to recover mesne profits from the defendant for three years prior to suit. On appeal to the District Judge he held that Art. 123 did apply to the facts of the case, that the defendant was an executor de son tort and therefore liable to account for 12 years' mesne profits. Two points have been taken before me on second appeal, namely: (1) that the District Judge was wrong in holding that the defendant was an executor de son tort. It is admitted that if he was an executor de son tort, Art. 123 applied by reason of the recent Privy Council ruling which has confirmed the decision of this Court reported in *Zamindar of Bhadrachalam* v. *Venkatadri Appa Rao* (1).

The second point taken is that if he is not an executor de son tort he is in the position of a mere accountant and therefore he is only liable to account for 6 years under Art. 120 of the Limitation Act, no reliance being placed on S. 10 of the Limitation Act before me. It has been somewhat strenuously contended that this defendant is not an executor de son tort or, at any rate, if he was, he certainly was not such between 1912, the date of Kasturi Chetti's death, and 1915, the date of his widow's death. There is no question but that the widow Venkamma was appointed executrix by the testator, but I rather doubt if she really entered on her duties at all. It is pointed out that the Subordinate Judge found that she took charge of the estate and managed it till her death in 1915 being helped by her sons in the collection of rents from houses and lands. The learned District Judge finds that the evidence shows that the defendant has been managing the estate of Kasturi Chetti since his death. I cannot say he is wrong. I have been referred to the evidence and it appears that the widow was in a poor state of health very soon after the death of her husband and unable to move about. A legal point is taken that the defendant cannot be an executor de son tort as long as the widow is alive. Reliance is placed on the Succession Act, S. 265, which of course does not apply to a Hindu Will. The section says:

> A person who intermeddles with the estate of the deceased . . . . while there is no rightful executor or administrator in existence.

As I said the section has no binding character in the present case; but what I think the section really means is not that the executor has to be alive but must not have disclaimed; and that of course is the difficulty in a Hindu Will in the moffusil where there are no means of finding out whether an executor or an executrix has formally disclaimed or not. It was further attempted to be argued that on the findings of the learned Subordinate Judge the defendant had in fact acted as an agent or under the authority of the rightful executrix. I very much doubt if this point has been agitated in either of the lower Courts and the finding of the District Judge is certainly against it. There is of course no doubt that where a person has been permitted by the executor to obtain possession of part of the assets of the testator he will not be executor de son tort to the original testator or of the executor even if he retained those assets after the executor's death when there is no personal representative of either: see *Tomlin* v. *Beck* (2). It is further urged that under the circumstances of this case the defendant is only liable for mesne profits for 6 years; and a number of cases were referred to, beginning with *Gajanan Vinayak* v. *Waman Shamrao* (3). That is a decision by a single Judge. There the contest was between S. 10 and Art. 120 of the Limitation Act. It was held that the plaintiff could not take advantage of Art. 123 but was restricted to accounts for six years only. The main argument seems to have been on the applicability of S. 10. The suit brought by the plaintiff for a share in the estate in question was brought 21 years after the death of the testator. In the present case it is said that the fact that for some little time the Will was disregarded and the legatees and others lived together as a joint Hindu family, must have the effect of depriving the plaintiff of the benefit of Art. 123 and must reduce him to six years' mesne profits under Art. 120. I am quite unable to see on what principle of law and justice this can be effected provided the defendant is an executor de son tort,

(1) A. I. R. 1922 Mad. 457 (F. B.)

(2) [1823] Turn. & R. 438.

(3) [1910] 12 Bom. L. R. 881=8 I. C. 189.

and as to this I am unable to say that the District Judge is wrong either in his view of the evidence or in his decision on the law. If the defendant was an executor de son tort from the death of the testator I cannot see any reason why he should be allowed to put several years' mesne profits into his pocket by virtue of availing himself of the provisions of the residuary Art. 120. In a case of pure accounting such will, of course, be the consequence, as for instance in *Barada Proshad Banerjee* v. *Gajendra Nath Banerjee* (4), where the Judges refer to the suit as a suit for accounts pure and simple of the description now before us, and they held that it could not be treated as a suit against the trustee for the purpose of following the trust property. There again S. 10 came up for consideration. In *Hemangini Dasi* v. *Nebin Chand Ghose* (5) there was a period of 16 years between the death of the testator and the institution of the suit by one of the annuitants claiming a share under the Will and asking for a partition. There it was held that in taking the accounts only six years would be allowed on the authority of *Saroda Pershad Chattopadhya* v. *Brojo Nath Buttacharjee* (6). In *Parusotam Rao Tantia* v. *Radha Bai* (7) a similar decision was come to, but the facts of the case seem to be peculiar. There, a widow of one of the members of the family sued to recover from the manager of the family. and the term 'manager' is used not in the sense in which we usually use it but in reference to the individual to whom this particular family entrusted the management of its affairs. The question was whether it was a suit for money had and received or a suit to which Art. 120 applied. It remains to note that the case in *Zamindar of Bhadrachalam* v. *Venkatadri Appa Rao* (1) which has been approved by the Privy Council was followed by a Bench of the Lahore High Court in *Gurbaksh Singh* v. *Bhagwan Singh* (8) and in the Madras Law Journal case, Schwabe, C. J., said:

In my view Art. 123 applies to suits for legacies against any person rightly or wrongly in possession of the estate under such circumstances that he is bound to deal with it as the estate of the deceased.

I think, on the finding of the learned District Judge, that exactly describes the position of the defendant in this case. The defendant will of course be accountable for sums that have actually come into his hands under the ruling in *Ponaka Subbarani Reddy* v. *Vadamadi Seshachalam Chetty* (9) and will be entitled to all due allowances for payments made to or on behalf of or for the benefit of the grandson of the testator. With these modifications, I think the District Judge was right. I think as the appellant has failed he must pay costs in this Court.

The Second Appeal is dismissed with costs.

Appeal dismissed.

(4) [1909] 13 C. W. N. 557=1 I. C. 289=9 C. L. J. 383.
(5) [1882] 8 Cal. 788=11 C. L. R. 370.
(6) [1880] 5 Cal. 910=6 C. L. R. 195.
(7) (1915) 37 All. 318=28 I. C. 953=13 A. L. J. 407.
(8) A. I. R. 1924 Lah. 561.
(9) [1910] 33 Mad. 359=5 I. C. 79=20 M. L. J. 328.

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* A. I. R. 1926 Madras 683

SPENCER AND ODGERS, JJ.

Shanmugam Pillai — Defendant 1—Appellant.

v.

Panchali Ammal and *others*—Plaintiff 2 and Defendants 2 and 6—Respondents.

Second Appeal No. 751 of 1924, Decided on 28th October 1925, against the decree of the 2nd Addl. Sub-J., Madura, in Appeal Suit No. 2 of 1924.

* (a) *Civil P. C., O. 2, R. 2—S. 11 and O. 21, R. 103—Limitation Act, Art. 11 A.*

Purchaser from coparcener of his undivided interest is not a tenant in common as in Bombay but only a holder of equity to get partition.

A partition suit by a purchaser of a coparcener's interest in a joint Hindu family property is not barred by a prior decision against him in a suit brought by him for declaration of his right to possession under O. 21, R. 103, the cause of action in the latter being the adverse order in claim proceeding and in the former the purchase of undivided interest of a Hindu coparcener. It is evident that the partition suit is also not barred though filed after one year of the adverse order; 12 *L. W.* 408 (*P. C.*) *Rel. on.* [P 684 C 1]

(b) *Hindu Law—Alienation by co parcener—Madras Law.*

Purchaser from coparcener of his undivided interest is not a tenant-in-common as in Bombay but only a holder of equity to get partition; 38 *Mad.* 684 *and* 39 *Mad.* 265, *Rel. on.* [P 686 C 2]

P. R. Srinivasan—for Appellant.

C. A. Seshagiri Sastri—for Respondents.

Spencer, J.—The 2nd plaintiff in the suit, who is the 1st respondent in this appeal is the second wife of one Ganapathia Pillai (deceased), who was the assignee of the rights of one Sankararama Aiyar, auction-purchaser of a house, which belonged to the joint family of one Ramalingam Pillai and the 1st and 2nd defendants, and which was attached in execution of a money decree obtained by one Narayanaswami Aiyar against Ramalingam Pillai. The present suit is for partition by metes and bounds of a block of houses belonging to the joint famlly and for delivery to the plaintiff of the share of the minor son of Ramalingam Pillai, who is now dead. The question to be decided in second appeal is whether the suit is barred by reason of its having been instituted more than one year after an order which was passed on 7th September 1915, under O. 21, R. 101 of the Civil P.C., re-delivering the property to the possession of Defendants 1 and 2 after the plaintiff's husband had got possession in spite of their obstruction. Within a year of the order under R. 101 the plaintiff's husband brought a suit (O. S. No. 40 of 1916) for setting it aside and for a declaration that the defendants had no manner of right in these properties. That suit was finally dismissed, by this Court in S. A. No. 707 of 1919 on the ground that the plaintiff was not entitled to joint possession along with the other members of the joint family of the defendants.

Additional arguments against the maintainability of this suit are based on defences arising out of S. 11 and O. 2, R. 2, Civil P. C. in consequence of the prior suit of 1916 having been dismissed.

For establishing his contention that this suit is barred by limitation under Art. 11 (a) the appallant's vakil relies on *Ganpat Rai* v. *Husaini Begam* (1) : *Bhimappa* v. *Irappa* (2) and *Baldeo* v. *Kanhaiyalal* (3) and on *Tilok Chand* v. *Sada Ram* (4).

In *Ganpat Rai* v. *Husaini Begam* (1) the plaintiff's father was resisted in attempting in execution to get present possession of a house that he had purchased in Court auction and an order passed against him. Eleven years later, the plaintiff sued for separation and present possession of a two-fifths share of the same property by virtue of his purchase. Pigott, J., observed :

> On the principle that the greater includes the less, it seems reasonable to hold that the right now claimed to present possession over portion of the house is included in the right claimed in the year 1906 to present possession over the entire house so as to bring into operation the provisions of Art. 11 (a) of the Limitation Act Schedule.

He also observed that the order itself had very definitely referred the auction purchaser to his remedy by way of a regular suit ; yet he had put off availing himself of this remedy to rectify the adverse order passed against him for nearly 12 years.

This case can be distinguished from the one before us on the ground that the property there belonged to Muhammedans and that the plaintiff in the suit asserted that the judgment-debtor whose share he had purchased was the owner of a two-fifths share while the claim order negatived his right to any portion of the house. A purchaser of the share of a sharer under Muhammadan law is entitled to something more than a mere equity to partition of the joint family property, which is what the purchaser of the undivided share of a coparcener in a Hindu family in Madras gets by his purchase. I do not see any occasion to regard this decision as directly opposed to *Yelumalai Chetti* v. *Srinivasa Chetti* (5) as Phillips, J., did recently in S. A. No. 1708 of 1922, a second appeal in which, as in this case, a question arose as to the right of a Court auction purchaser to enforce his right to an order for partition of joint family property more than one year after the dismissal of an application for delivery of possession.

The principle established by *Yelumalai Chetti* v. *Srinivasa Chetti* (1) as I understand the decision, is that an order for partition of joint family property cannot be passed in execution proceedings, and, therefore, a subsequent suit for that relief is not barred either by S. 47 (old S. 244) of the Civil P. C. or by failure to appeal against an order made under O. 21, R. 95 (old S. 318). The case does not deal with the ap-

(1) [1921] 19 A. L. J. 53=60 I. C. 905.
(2) [1902] 26 Bom. 146=3 Bom. L. R. 594.
(3) [1920] 16 N. L. R. 103=58 I. C. 21=24 C. W. N. 1001 (P. C.).
(4) 7 N. W. P. 113.
(5) [1906] 29 Mad. 294.

plication of any article of the Limitation Act.

In *Bhimappa* v. *Irappa* (2) a purchaser at a Court sale having been obstructed, applied for removal of the obstruction and for possession, and his application was rejected. More than a year after the order passed against him he filed a suit praying that the order in the miscellaneous proceedings might be set aside and that a partition might be directed and that the whole of the plot of land which he purchased might be allotted to the share of his judgment-debtor and that he might be placed in present possession of it. Chandavarkar, J., remarked that his suit, though in name a suit for partition, was in substance a suit for possession of that very property under the self-same right put forward without avail in the miscellaneous proceedings and so it was a suit to establish his right to the same property covered by the order, and, having been brought more than a year after the date of the order in the miscellaneous proceedings which he asked to have set aside, it was barred. In considering how far we should be influenced by the ruling of the Bombay Court in such a matter we must remember that, as noticed by Mr. Mayne in paragraph 355 of his Hindu Law :

> In Bombay it is held that even before partition the purchaser of the interest of one coparcener is a tenant-in-common with the others ; but, in Madras, this view is not accepted, and it is held that the purchaser is not a tenant-in-common but has only an equity to enforce his rights by partition.

To make this clear, it will be sufficient to refer to *Patil Hari Premji* v. *Hakamchand* (6) and *Naro Gopal* v. *Paragawda* (7) where it was laid down that an alienation by a joint tenant effects a severance, as a result of which the alienee before division by metes and bounds becomes a tenant-in-common. But in *Bala Bhadra Patro* v. *Khetra Doss* (8), *Manjaya* v. *Shanmuga* (9), and *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (10) it was held that a purchaser of a coparcener's interest in the joint family property has not a common right to joint possession with the rest of the family nor is he a tenant-in-common ; but he has only an equity to compel a partition and to work out his rights against the share that falls to him : see also *Subba Goundan* v. *Krishnamachari* (11). Here, as in other cases where the application of Art. 11 (a) of the Limitation Act is in question, the important thing is to see, as the Judicial Committee did in *Baldeo* v. *Kanhaiyalal* (3) what was asked for in the claim proceedings and what is asked for in the present suit. The law provides *ut sit finis litium* that a person defeated in claim proceedings shall not ask for the same relief that was denied him in those proceedings which are summary, except in a suit filed within a year of the order. Under O. 21, R. 103, Civil P. C., a party against whom an order for possession is made under R. 101 may institute a suit to establish his right to present possession of the property, but on his failing to do so the order becomes final.

From the fuller report of the Privy Council case of *Baldeo* v. *Kanhaiyalal* (3) which appears in 24 *C. W. N.* 1001, it appears that the village which belonged to a joint family was on the death of the head of the family registered in the names of his two sons, and that the appellant both in his application for possession under R. 97 and in his suit asked for actual possession of the eight annas share of one of the sons whose interest he purchased. Their Lordships observed that it was too clear for argument that on both occasions he asked for exactly the same relief, and his suit, brought more than one year after the disposal of his claim was thus time barred.

In *Tilok Chand* v. *Sada Ram* (4) which was a decision under the Civil P. C. of 1859, the plaintiff asserted in execution proceedings that there had been a partition and he claimed to recover one-fourth of certain immovable property which had fallen by the partition to his lot. Both at the time of the claim and at the time of the suit a right to present possession was asserted, and the suit being more than one year after his failure in the claim proceedings, was thus barred. The facts of the case before us are different. Both in the claim proceedings and in the prior suit (O. S. No. 407 of 1915) the

(6) [1886] 10 Bom. 363.
(7) [1917] 41 Bom. 347=19 Bom. L. R. 69.
(8) [1917] 4 L. W. 99=(1917) M. W. N. 149=37 I. C. 168=31 M. L. J. 275.
(9) [1915] 38 Mad. 684=26 M. L. J. 576=22 I. C. 555=(1914) M. W. N. 356.
(10) [1916] 39 Mad. 265=27 M. L. J. 409.
(11) A. I. R, 1922 Mad. 112.

plaintiff asserted his right to have his title to actual possession of the house declared; but, in the present suit, he asks for a partition, after allowing for good and bad qualities of the family properties, and for delivery of a moiety to him. In making such a partition it is not necessary to go behind or re-open the decisions in the prior proceedings. The plaintiff is only exercising the equitable right of the coparcener, whose share he has purchased to demand a partition at any time. Art. 11 (a) is thus not a bar to this suit, and as the relief the plaintiff now asks for in a suit based on the cause of action of his purchase of the undivided share of a member of a joint family would be inconsistent with what he asked for in the prior suit, in which the cause of action was the order on the claim petition, there is equally no bar of res judicata under S. 11 Civil P. C. or by O. 2, R. (2).

The decrees of the lower Courts are confirmed and the Second Appeal is dismissed with costs.

Odgers, J.—The facts are fully set out in the judgment of my learned brother and the only question of importance to be decided in the second appeal is whether the present suit is barred under the provisions of Art. 11 (a) of the Limitation Act by reason of the order made against the plaintiff's husband (and son) on 7th September 1915, (Ex. C.), whereby possession of the suit house was re-delivered to the Defendants, Nos. 1 and 2 under O. 21, Rr. 100 and 101, Civil P. C. The plaintiff's husband then brought a suit on 8th September 1915 (O. S. No. 407 of 1915) for a declaration that all the suit properties belonged to him and that Defendants Nos. 1 and 2 had no right to the same and for cancellation of the order of 7th September 1915. The Munsif dismissed the suit, but the Subordinate Judge held that plaintiff was entitled to retain possession of item 2 till the *otti* was redeemed and for joint possession of all other items with Defendants Nos. 1 and 2. On second appeal (S. A. No. 707 of 1919) to this Court, Abdur Rahim and Oldfield, JJ., held that plaintiff was not entitled to get possession along with members of the family as being the purchaser of joint family property. They restored the decree of the Munsif. Now in the present suit the plaintiff asks for possession after partition. The simple question is: Is this a different thing from what was asked for in the suit of 1915 as appears on the face of it, or is it in fact the same thing so as to attract the limitation of one year under Art. 11 (a) of the Limitation Act?

Now a person who acquires the rights of a coparcener of joint family property is not a person entitled to present possession; in other words, he does not become a tenant-in-common with the joint family. His only right is to obtain by partition the share to which his alienor is entitled: c. f. *Balabhadra Patro* v. *Khetra Doss* (8), where the Court thought it unnecessary to discuss the rulings of the Bombay High Court; and Seshagiri Aiyar, J., remarked in the course of the argument that the law in Bombay is different. To the same effect is the decision in *Maharaja of Bobbili* v. *Venkataramanjulu Naidu* (10): see also *Subba Goundan* v. *Krishnamachari* (11) and the cases therein cited. The cases relied on by the appellant may be shortly referred to. In *Baldeo* v. *Kanhaiyalal* (3) there are indications that the property had become divided though this is not clear and the plea was raised that the appellant was not entitled to actual possession as purchaser in Court auction of the eight annas' share of one of the sons. Their Lordships say this does not matter, the question being not what appellant might or ought to have asked but what he did ask. Viewed by this standard the present case seems to be outside the purview of the Privy Council decision. There the appellant twice asked for exactly the same relief. Here the plaintiff first asked for a declaration of his title and possession as against Defendants Nos. 1 and 2, but in the present suit, after setting out in para. 12 of the plaint that plaintiff and Defendants Nos. 1 and 2 are each entitled to half the suit properties, he asks for partition and delivery of his share. In my opinion these facts have only to be stated to put the present case outside the Privy Council decision. In *Ganpat Rai* v. *Husaini Begam* (1) the case was one between Muhammadans as to whom of course the doctrine of the Hindu Law set out above has no application. The purchaser of a share of a Muhammadan heir no doubt has a right to present possession after partition.

in 1906 the plaintiff's father claimed the entire house. He then discovered that his vendor was only entitled to 2/5ths of the house and asked to be put in possession. It was held that he had in effect asked for this before, when he was definitely referred to a suit and did not bring one till the last possible day. I do not think this case helps us. In *Bhimappa* v. *Irappa* (2) the suit was "both in form and in substance one for establishing plaintiff's right to and for the present possession of Survey No. 78" in which he had purchased the right, title and interest of Defendant No. 1 at a Court sale and as to which when, he went to take possession, he was obstructed. If the law in Bombay is that a purchaser of an undivided coparcener's share is entitled to possession (as to which see *Patil Hari Premji* v. *Hakom Chand* (6); *Naro Gopal* v. *Paragauda* (7) there is no doubt that the plaintiff here was asking for exactly the same thing in the suit as he asked for in the summary proceedings. I very much doubt if the case is useful as a guide.

Tilok Chand v. *Sada Ram* (4) was a case under S. 246 of Act 8 of 1859 which corresponds to the present O. 21, R. 58, the claims section. There was no question of present possession and I think this case affords no help.

In *Yelumalai Chetti* v. *Srinivasa Chetti* (5) it was held that as the only right acquired by Court sale against the Defendant No. 2, whose undivided half-share had been purchased by plaintiffs, was to effectuate the sale by a suit for partition of the joint property of the coparceners, it was not competent to the Court, on a mere application for execution by the purchaser to enforce the purchaser's right by an order for partition. So that present S. 47 could not be a bar to plaintiff's suit for partition. The question of Art. 11 (a) did not arise in this case.

A recent ruling of Phillips, J., in S. A. No. 1708 of 1922 has been cited to us in which he held that *Yelumalai Chetti* v. *Srinivasa Chetti* (5) is directly opposed to *Ganpati Rai* v. *Husaini Begam* (1). With respect, I think, if we bear in mind that the latter case had to do with Muhammadans who are tenants-in-common whereas *Yelumalai Chetti* v. *Srinivasa Chetti* (5) had to do with the alienation of an undivided share of a Hindu coparcener the opposition disappears as the cases do not really relate to the same doctrine at all. The authority of *Yelumalai Chetti* v. *Srinivasa Chetti* (5) can be accepted without in the least diminishing the weight of the argument adduced for the respondent in this case.

I have examined the authorities adduced for the appellant on this point at some length as the issue is of importance. I agree with my learned brother that they do not enable or compel us to say that the view of the lower appellate Court is wrong. I agree with my learned brother as to the other points raised and that this appeal must be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 687

ODGERS AND VISWANATHA SASTRI, JJ.

Linga Aiyar—1st Defendant—Appellant.

v.

Lakshumanan Chettiar and *another*—Plaintiff and Defendant No. 2—Respondents.

Second Appeal No. 182 of 1923, Decided on 8th September 1925, against the decree of the Sub-J., Dindigul, in Appeal Suit No. 12 of 1921.

Civil P. C., S. 47—Explanation—Suit against A and B—A's name struck off plaintiff not wishing to proceed against him—A is a party to the suit under S. 47.

A suit was brought against A and B. A's name was struck off by consent and plaintiff was asked to pay his half costs but his name was retained in the cause title in the decree finally drawn up.

Held: in spite of A's name being struck off he was a party within S. 47. Striking is the proper procedure to be employed in the case of misjoinder. In any other case the proper precedure is dismissal. [P. 688, C. 2, P. 689, C. 1]

A. Krishnaswami Aiyar and *M. Patanjali Sastri*—for Appellant.

K. P. Padmanabha Pillai—for Respondents.

Odgers, J.—This is an appeal from the decree of the Subordinate Judge of Dindigul confirming in part the decree of the District Munsif of Dindigul. The suit was brought by the plaintiff for a declaration that certain property in the hands of the 1st and 2nd defendants belonged to a debtor of his, Subbaraja Aiyar. The

2nd defendant was Subbaraja Aiyar's widow and the 1st defendant was his brother. The suit was brought in consequence of the allowance of a claim petition in favour of the brother, the 1st defendant. Ex. B is the judgment in O. S. No. 598 of 1917 in which the same plaintiff sued to recover from the widow and the brother certain money due on dealings and promissory notes. The District Munsif in the fourth paragraph of his judgment states as follows: By consent I strike off the 2nd defendant's name. Plaintiff will pay by consent half of his costs.

The point raised in second appeal is whether the 2nd Defendant is in spite of that procedure a party to the suit under S. 47 (explanation). If he is, the present suit is barred and the proper remedy would be by way of appeal under that section. For the respondent stress has been laid on the form of words used by the learned District Munsif, namely, that the 2nd Defendant's name was "struck off." It is admittedly a form of words more appropriate to striking off a misjoined plaintiff or defendant than applicable to the case of a party against whom the plaintiff does not wish to proceed further, as is the fact in the present case. It is well known that the state of the law was uncertain until the legislature enacted the explanation to S. 47 whereby the Madras view as contained in *Ramaswami Sastrulu* v. *Kameswaramma* (1) was affirmed as against the view of certain other High Courts. In that case it was held that when a party defendant is exonerated from a suit, i. e., the suit is dismissed against him and a decree passed against a co-defendant and in execution of that property belonging to and in possession of the exonerated defendant is attached and sold the latter is not entitled to maintain a suit, but the question of his claim to and recovery of possession of the property is a question falling under S. 244 (now S. 47 of the Code). The case in *Rama Rao* v. *Raja of Pittapur* (2) shows that the substance of the order and not the form of it is to be regarded. In that case a preliminary objection was taken against the maintainability of the appeal as the learned Subordinate Judge had struck out the name of the 1st defendant under O. 1, R. 10 (2) and removed him from the record. It was contended that that being so no appeal was provided, but Mr. Justice Seshagiri Aiyar says:

> In my opinion this is an adjudication determining the rights of the plaintiffs to bring a suit of this nature, and his order is a 'decree' as defined in S. 2 (2) Civil Procedure Code. Consequently where a substantial claim has been adjudicated upon and where the party's name has been struck out not on the ground that a suit against him would not lie and where a substantial relief claimed in the suit has been ordered to be deleted, I am of opinion that the Court has conclusively adjudicated the rights of the parties with regard to a matter in controversy and that therefore the order of the Subordinate Judge is a decree.

The important part for the present purpose of the judgment is that we are to regard the substance of the order and not the form. It is quite clear that if the learned District Munsif in the suit of 1917 had said he dismissed the suit as against the 2nd defendant the case would have been perfectly plain and S. 47 would have applied. The trouble has arisen because he has employed the words "struck out." The authoritative case on the subject is *Sannamma* v. *Radhabhayi* (3). There the Full Bench held that where a party has been properly impleaded as one of the defendants in the case and it is not contended in the present case that the 2nd defendant was improperly impleaded-the case as against him would have proceeded to judgment but for the fact that the plaintiff elected to abandon part of his case and the suit was in consequence dismissed as against this defendant, he is a defendant against whom a suit has been dismissed within the meaning of the explanation to S. 47. The learned Chief Justice expresses the opinion that under O 1, R. 10 (2) the proper course would be for the Court to exercise the power which it now has of ordering at any stage of the proceedings the name of a defendant improperly joined to be struck out instead of dismissing the suit against him. That will, following the decision in *Ramaswami Sastrulu* v. *Kameswaramma* (1), have the effect of taking him out of the operation of S. 47 which ought not to apply to him seeing that he has no real connexion with the suit. Therefore the opinion of the Full Bench is that striking out under O. 1, R. 10 (2) is the proper procedure to be

(1) [1900] 23 Mad. 361=10 M. L. J. 123 (F.B.)
(2) [1919] 42 Mad. 219=36 M. L.J. 169=49 I.C. 835=9 L. W. 329.
(3) [1918] 41 Mad. 418=34 M.L. J. 17=7 L.W 234=43 I.C. 935=(1918) M.W.N. 23 (F.B.)

employed in the case of misjoinder. In any other case the proper course is dismissal. This would appear to be also the opinion of the learned Judges who decided the case reported in *Krishnappa* v. *Periyaswami* (4) that where a party sets up a paramount title in a mortgage suit to both the mortgagor and the mortgagee and has been exonerated from the suit on the ground of misjoinder he does not remain a party to the suit for the purpose of S. 47.

The lower Courts here have dealt with this question in what may be described as a perfunctory manner. The issue is distinctly raised as No. 6 in the suit. The learned District Munsif says:

As stated in the latter Full Bench ruling in *Sannamma* v. *Radhabhayi* (3) the 1st defendant's name should be deemed to have been struck off from the record though erroneously retained in the cause title in the decree, and as such the 1st defendant cannot be said under S. 47 to be a person against whom a suit has been dismissed.

This opinion has not been attempted to be supported by the learned counsel for the respondent and it is in my opinion an entire misreading of the result of the Full Bench case in *Sannamma* v. *Radhabhayi* (3). It does however furnish one possibly useful item, and that is, that in spite of the 2nd defendant's name being struck off his name was retained in the cause title in the decree that was finally drawn up so that if as insisted by the learned counsel for the respondent, one is to insist on the importance of the form, this would seem to show that the 2nd defendant's name had in fact not been struck off. The learned Subordinate Judge deals with the point in an even more perfunctory manner. He says: "The failure to strike off his name is not a ground for holding that he is still a party to the suit" referring to the alleged mistake of continuing the 1st defendant's name in the cause title of the decree. In my opinion, following the Full Bench ruling in *Sannamma* v. *Radhabhayi* (3) there can be no other conclusion than that what the learned District Munsif really did in the original suit was to dismiss it as against the 2nd defendant. By an unhappy or mistaken use of language he used the expression "Strike off" in the judgment which is I think appropriate only to the case of misjoinder of parties, or causes of action. I therefore am of opinion that the suit is incompetent throughout. The second appeal must be allowed and the suit dismissed with costs throughout. The memorandum of objections is dismissed without costs.

Viswanatha Sastri, J:—I fully agree with what has fallen from my learned brother and have nothing to add.

Appeal allowed.

(4) [1917] 40 Mad. 964=32 M. L. J. 532=38 I. C. 297=5 L. W. 369

A. I. R. 1926 Madras 689

PHILLIPS, J.

Obla R. Narasimha Aiyar—1st Defendant —Appellant.

v.

Gunnia V. Rangachari and *another*—Plaintiffs—Respondents.

Appeal No. 37 of 1925, Decided on 18th January 1926, from the Appellate order of the Dist. J., Madras, in A. S. No. 248 of 1924.

Civil P. C. S., 55 (4) *and* 148—*Court cannot extend period af one month prescribed by S.* 55 (4), *even under S.* 148.

In an order under S. 55 (4), there is no question of the period being fixed or granted by the Court, for, the period is fixed by the Code itself and consequently S. 148 is not applicable, and the Court has no power to extend the perlod of one mounth allowed under S. 55 (4). (1916) *M. W. N.* 179 *Foll*, and 10 *Cal*, 55 (*P. C.*) *Dist.*

[P 680 C 2 P 689 C 1]

A. Swaminatha Aiyar—for Appellant.

P. V. Krishnaswami Aiyar—for Respondents.

Judgment.—In this case, the petitioner was released on giving security under S. 55 (4) of the Code of Civil Procedure. Under that section, he has to file his petition in insolvency within 30 days of the order but he did not do so in the present instance and applied for extension of time on the ground that he has been ill for the latter half of the one month allowed. The lower appellate Court has held that the Court had no jurisdiction to increase the time of 30 days allowed by S. 55. It is now contended that under S. 148 the time may be extended, but under S. 148 the time that can be extended is a period fixed or granted by the Court. In an order under S. 55 (4). there is no question of the period being fixed or granted by the Court, for the period is fixed by the Code and consequently S. 148 would not appear to be applicable.

Reliance is, however, placed on a decision of the Privy Council in *Burjore* v. *Bhagana* (1) in which it was held that the lower Court had rightly exercised its jurisdiction in extending the time provided by S. 602 of the old Code. which corresponds to the present O. 45, R 7. In the old Code, there was no provision corresponding to S. 148 and that section, which is an enabling section placed certain limitations upon the power to be exercised, the chief limitation being that the period which can be extended is that which is fixed or granted by the Court, and this would impliedly exclude periods fixed by law. A Bench of this Court held in *Vannisami Thevar* v. *Periaswami Thevar* (2) that the time prescribed in O. 21, R. 92, could not be extended by the Court and a single Judge of this Court in A. A. A. O. No. 117 of 1922 held that the time under S. 55 (4) could not be extended by the Court. I agree with the views expressed in these two cases and hold that the Court has no power to extend the period of one month allowed under S. 55 (4)

S. 151 is also invoked, but certainly the circumstances of this case are not such as to warrant the exercise of such powers. No particular injustice has been committed, nor has the process of the Court been abused and even if there were power to interfere under S. 151, I certainly should decline to do so in the present circumstances.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) [1884] 10 Cal. 557=11 I. A. 7=4 Sar. 498 (P. C.).
(2) [1916] 1 M. W. N. 179=33 I. A. 996=3 L. W. 271.

A. I. R. 1926 Madras 690

PHILLIPS AND MADHAVAN NAIR, JJ.

Srinivasa Iyengar—Appellant.

v.

K. R. Aravamudu Iyengar and *others*—Respondents.

Appeal No. 85 of 1924, Decided on 9th February 1926, against the appellate order of the Dist. J., West Tanjore, in Appeal Suit No. 210 of 1923.

Hindu Law—Debts—Decree against father—Partition after decree—Decree cannot be executed against son's share.

The property which is given to the son on partition may be liable in proper proceedings for the debt incurred by the father, but it does not necessarily follow that the decree against the father can be executed against the son (47 *Mad.* 621 *Ref.*). A decree must be executed against the judgment-debtor or his legal representative and after partition between father and son, the son cannot be said to be the legal representative of his father as regards his separate property.

[P. 690, C. 5]

K. Bhashyam and *S. Krishnaswami Iyengar*—for Appellant.

C. S. Venkatachari—for Respondents.

Judgment.—The appellant obtained a decree against the 1st respondent in respect of a debt binding upon the family consisting of the 1st respondent and his minor son, the 2nd respondent. The 2nd respondent had been impleaded in the suit, but was given up, and a decree was passed against the father alone. After the decree the father and son have divided their properties as a result of a partition suit. The appellant now seeks to execute the decree against the father by proceeding against the property allotted to the separate share of the 2nd respondent, contending that the 2nd respondent is liable for the debts incurred for family-necessity prior to partition and that execution can be taken against his property.

It is true that the property which is given to the 2nd respondent on partition may be liable in proper proceedings for the debt incurred by the father, but it does not necessarily follow that the decree against the father can be executed against the son, and there are observations to this effect in *Jagannatha Rao* v. *Viswesam* (1). In the first place a decree must be executed against the judgment-debtor or his legal representative. In the present case it cannot be said that the 2nd respondent is the legal representative of his father in respect of his separate property. Further there is the difficulty which meets the appellant that if it were to be held that the father retained some sort of right in this separate property of the son and that therefore it can be proceeded against as the property of the father, no leave has been obtained to institute these proceedings under S. 28 of the Provincial Insolvency Act.

A further request is put forward by appellant that this petition should be remanded for a finding as to whether the partition was fraudulently effected in

(1) A. I. R. 1924 Mad. 682.

order to defeat his debt. The point was incidentally but not specifically mentioned in the execution petition. It was not argued in either of the lower Courts and no request was made either in the trial or in the lower appellate Court for taking evidence on this point, and it is too late now to raise such a question. The second appeal is therefore dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 691

WALLER AND MADHAVAN NAIR, JJ.

Raman Chettiar—Appellant.

v.

Chokkalinga Chettiar—Respondent.

Appeal No. 207 of 1923, Decided on 25th November 1925, against the order of the Sub-J., Negapatam, D/- 26th October 1922, in Execution Appeal No. 743 of 1922.

Civil P. C., S. 47—Dispute between assignee of decree-holder and one holding charge on decree—Order relating to, is not appealable.

A dispute between an assignee from decree-holder and a person having a charge over the decree is one between persons who occupy substantially the position of decree-holders and the order passed relating to such dispute is not appealable under S. 47, Civil P. C. [P. 691, C. 2,]

T. V. Venkatrama Iyer, and *T. V. Ramanatha Iyer*—for Appellant.

K. S. Desikan—for Respondent.

Judgment.—The appellant is the assignee of the 5th plaintiff decree-holder in O. S. No. 15 of 1905 on the file of the Subordinate Judge's Court, Negapatam. The respondent is the decree-holder in O. S. No. 64 of 1916 on the file of the same Court. In that suit he obtained a decree against the appellant's assignor under which he (the respondent) was entitled to get from him Rs. 3,000 in four months' time with interest at eight annas per cent. per mensem from this date and in default Rs. 4,000 with interest at 1 per cent. per mensem from this date and the decree debts in O. S. No. 15 of 1905 were also made liable for this claim giving the respondent a charge over them. The appellant executed the decree in O. S. No. 15 of 1905 and the money was deposited in Court. When the respondent applied for the payment of his decree amount from this sum in E. A. No. 1215 of 1919, he was ordered to be impleaded as a supplemental respondent in E. P. No. 207 of 1919 (namely, the appellant's application for execution in O. S. No. 15 of 1905 and he was accordingly made a respondent. The application out of which the present appeal arises was filed by him as a fresh application for the same relief. The Subordinate Judge ordered that a cheque should be issued in his favour for the amount claimed.

In appeal it is argued that the lower Court ought to have held that the condition in the compromise decree that the sum of Rs. 4,000 should be paid instead of Rs. 3,000 which was the sum payable, with interest at one per cent. per mensem, amounts to a penalty and that, in any event, the lower Court ought to have held that the respondent is not entitled to more than Rs. 3,000 with interest at 6 per cent.

Mr. Desikan for the respondent takes a preliminary objection that no appeal lies in this case under S. 47, Civil P. C. inasmuch as the dispute is between the parties who occupy the position of rival decree-holders in O. S. No. 15 of 1905. In our opinion the objection is well founded. The sum deposited in Court is admittedly the amount realized in execution of the decree in O. S. No. 15 of 1905. The decree was executed by the appellant who as an assignee is in the position of the decree-holder himself. By virtue of the charge over the decree in O. S. No. 15 of 1905 the respondent substantially occupies the position of a decree-holder in O. S. No. 15 of 1905 and he now intervenes in E. P. No. 207 of 1919, namely the appellant's execution proceedings for the payment to him of a portion of the decree amount. His right to so interfere is not challenged by the appellant. The parties are now disputing over the distribution of the amount realized in execution of the decree in O. S. 15 of 1905 and in this dispute, the judgment-debtor in that decree has no place at all. Though the proceedings relate to the execution of a decree, since the dispute, in the case is one between persons who occupy substantially the position of decree-holders and the judgment-debtor in the suit has nothing to do with this dispute, the order passed by the Subordinate Judge relating to such dispute is not appealable under S. 47, Civil P. C. In this view no

appeal lies in this case and the appeal should be dismissed.

We heard the learned vakil for the appellant on the merits also. Assuming that the provision in the decree in O. S. No. 64 of 1916, on which the respondent relies for the relief claimed by him, amounts to a penalty, we see no reason why on equitable grounds the appellant should be given any relief. He is an assignee from the 5th plaintiff-decree-holder in O. S. No. 15 of 1905. When he purchased the decree by assignment he did so with open eyes with full knowledge of the existence of the so-called penal provision in the decree in O. S. No. 64 of 1916. He cannot now be heard to grumble against it.

We dismiss the appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 692

RAMESAM AND VENKATASUBBA RAO, JJ.

Aukula Sanyasi—Appellant.

v.

Gundala Ramachandra Row and *others*—Respondents.

Second Appeal No. 1559 of 1922, Decided on 2nd February 1926, from the decree of the Addl. Sub-J., Vizagapatam, in Appeal Suit No. 115 of 1922.

(a) *Civil P. C., S. 11 — Mortgage by widow—Suit by mortgagee and sale in execution—Sale proclamation mentioning mortgage to be for necessity—No finding as to necessity—Suit by reversioner to declare that sale is not binding beyond widow's lifetime—Statement in sale proclamation is no bar—Hindu Law—Widow—Decree against.*

In a suit against a widow to enforce a mortgage by her, if there is a finding that the debt was binding on the estate and the sale proclamation states that the debt for which the property was being sold was for necessity and the whole right of the defendant was being sold in execution, then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser. But where the evidence that the debt is binding on the estate is wanting and where the proceedings in the suit do not show that the widow represented the estate so as to attract the application of res judicata in a subsequent case, it is not permissible merely by reference to the proclamation to say that the whole property has passed though it has not been shown that there was necessity.

The mere fact that the mortgage suit arose out of widow's own acts would not prevent her from representing that estate. Whether the limited owner represented the inheritance must be gathered from the nature of the suit and the defence put forward, the issues tried and raised and decided in that former suit.

[P 693 C 1, 2.; P 694 C 2]

✲ (b) *Hindu Law — Widow — Mortgage by widow and sale under it — Suit by reversioner challenging necessity for mortgage after a long time — Recitals in mortgage deed about necessity ought not to be disregarded.*

In cases where sales by widows have been questioned after long lapse of time the recitals in the document as regards necessity ought not to be disregarded even though they are not strictly evidence: for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with circumstances, would be sufficient evidence to support the deed. But it does not follow from the above principles that all ancient transactions ought to be upheld; where the circumstances tend the other way it will be reasonable not to apply these principles; 44 *Cal.* 186 (*P. C.*); 43 *Mad.* 541 (*P. C.*); and *A. I. R.* 1925 *Mad.* 673, *Foll.* [P 693 C 2; P 694 C 1]

V. Govindarajachari—for Appellant.

T. R. Ramachandra Iyer and *Y. Suryanarayana*—for Respondents.

Ramesam, J.—The facts of this second appeal may be stated as follows: One Gundala Jagannatha Row died some time before 1859. He was succeeded by his daughter Sitamma. He had a brother, Gundala Venkataramdas, who had died before him and left a widow, Venkamma. In 1862 there was some dispute between these two ladies which resulted in a suit and a compromise. Exhibit I evidences the settlement of that suit. According to this compromise Sitamma was to get two-thirds of all properties including the debts due to the estate and bear two-thirds of the liabilities of the estate and Venkamma was to get the other one-third share. In 1882 Sitamma mortgaged the suit property to one Mokka Sanyasamma. It purported to be for discharging a prior debt due by her to one Kamma Appadu. The purpose of the debt to Kamma Appadu was not stated. In 1888 the mortgagee brought a suit against Sitamma on the basis of Exhibit II and obtained a decree. The defendant did not appear in that suit. Exhibit III is the decree. While execution was being taken out Kodanda Rao, 1st plaintiff's father, claiming as reversioner, filed a claim petition under

S. 278, Civil P. C., alleging that Sitamma, being possessed of lands fetching a net rent of about Rs. 100 a year, had no necessity to incur debts binding on the estate and praying that the life interest only of the widow may be sold. The District Munsif, without going into the claim petition dismissed it on the ground that the sale proclamation had already been settled. This proclamation is not forthcoming. The property was ultimately sold only in 1892. In the last column of the sale proclamation of 1892, there was a statement that the debt was one for discharging all the debts contracted by defendant's father for family expenses and for defendant's maintenance and that the whole right of the defendant was to be sold in auction. The present suit has been filed by the reversioners in January 1918 for recovery of the property sold in 1892.

Meanwhile the property was purchased by the decree-holder in the auction and was afterwards sold to the present defendant by a sale deed Exhibit VII, dated the 9th of April 1913. The 4th issue in the case is:

Was the mortgage made for legal necessity, and are the sales in execution binding on the Estate?

The District Munsiff found on this issue in favour of the plaintiffs and decreed the suit. On appeal the Subordinate Judge confirmed the decision of the District Munsif. The 1st defendant files this second appeal.

It has been argued by Mr. Govindarajachari for the appellant that on the construction of the proclamation it should be held that the whole property passed. If there is a finding that the debt was binding on the estate, then it is the most proper construction of the proceedings in the suit and execution that the whole property was intended to pass to the purchaser, and I think this is the effect of *Veerabadra Aiyar* v. *Marudaga Nachiar* (1) and *Rameswar Mandal* v. *Provohali Debi* (2). But where the evidence that the debt is binding on the estate is wanting, and where the proceedings in the suit do not show that the widow represented the estate so as to attract the application of res judicata in a subsequent case, I do not think it is permissible merely by reference to the proclamation to say that the whole property has passed though it has not been shown that there was necessity. I do not think that such a proposition of law has ever been laid down. In this case the proclamation was drafted after the claim petition and is therefore suspicious.

The next and most important contention raised in the case is that the finding of the Subordinate Judge is vitiated by various defects. First, it is said that he has not properly applied the principle of the two Privy Council decisions; *Bangachandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowduri* (3) and *Venkata Reddi* v. *Rani of Wadhwan* (4). In these two cases the Privy Council have laid down that in cases where sales by widows have been questioned after long lapse of time the recitals in the document ought not to be disregarded even though they are not strictly evidence. In 44 *Calcutta* it is pointed out:

As time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed.

The same principle has been practically followed by this Court in *Venkata Reddi* v. *Wadhwan* (4), the decision being confirmed by the Privy Council in a short judgment. My learned brother in *Somayya* v. *Venkayya* (5) has explained these decisions and re-affirmed their principles. He says:

In this respect again, Courts do not insist upon strict proof and if the circumstances are such as to justify an inference that an enquiry was made, the Courts will hold without rigid proof that an enquiry was actually made. This is the general rule and the omission of full details may be made good by presumptions at whatever point the proof is wanting. It is difficult to lay down any hard and fast rule. A sound exercise of judicial discretion is the only safe guide.

(1) [1911] 34 Mad. 188=8 I.C. 1072=(1910) M.W.N. 799=21 M.L.J. 320.
(2) [1914] 20 C.L.J. 23=19 C.W.N. 313.
(3) [1917] 44 Cal. 186=43 I.A. 249 (P.C.).
(4) [1920] 43 Mad. 541=47 I.A. 6 (P.C.).
(5) A.I.R. 1925 Mad. 673.

I entirely agree with these remarks. In cases where there is a long lapse of time and where the recitals raise suspicion that the transaction was for a proper purpose, or at any rate such purpose was represented to the purchaser, Courts ought to apply the principles of these three decisions as far as possible to uphold the sale. But it does not follow from these decisions that all ancient transactions ought to be upheld ; where the circumstances tend the other way it will be reasonable not to apply these decisions.

In the present case, Exhibit II, the mortgage deed of 1882 does not mention the purpose for which the prior debt in favour of K. Appadu was contracted. It shows that the document in favour of Appadu was also handed over to the mortgagee and the mortgagee handed over all the records connected with the sale deed Exhibit VII. But that document has not been produced. This rather goes against the defendant.

Then again it is said that the Subordinate Judge committed a serious mistake in construing Exhibit VIII. It is a sale deed by Sitamma in 1879 of another of her properties. That document recites that it was made for the purpose of discharging prior mortgage deed executed by her which was itself contracted for the purpose of discharging her two-thirds share of her father's debt. The Subordinate Judge says that this document shows that all the family debts were wiped out. In this he is undoubtedly wrong, and if we think that this error has prejudiced the appellant in the rest of the judgment we should in strictness call for a finding. But I do not think that this error in construing Exhibit VIII has any bearing on the rest of the judgment. It is true that Exhibit VIII does not show that all the debts were wiped out ; but a perusal of Exhibit I shows that they were all debts due on usufructuary mortgages or deeds of conditional sale. It was open to Sitamma to redeem them if she liked, and if she borrowed for the purpose of redeeming, the debts would be binding on the reversioners. There is nothing to connect the debt of Appadu with any one of such debts. The contract between the recitals in Exhibit II and the recitals in Exhibit VIII also goes against the appellant. The interval in this case between the transaction and the suit is 36 years. It is true that it is not so much as in the two Privy Council cases or 48 *M. L. J.* It is impossible to lay down any hard and fast rule as to the length of time. Each case must depend on its own facts. All that I can now say is, on the facts of this case, it is impossible to say that the Subordinate Judge has committed any error of law or has even acted perversely in refusing to apply the principle of the two Privy Council cases. Whether this principle is applicable in a particular case is certainly a question of fact. However much we may set aside the lower Court's judgment in first appeal, we cannot do so in second appeal unless there is some error of law. In a case reported in the Law Times I refused to interfere in second appeal where the Subordinate Judge applied the principle of these cases though I was inclined to differ from the Subordinate Judge, while expressing my inability to set aside his judgment.

On these grounds the second appeal fails and is dismissed with costs.

Venkatasubba Rao, J.—I agree and I would like to add a few words. The mortgagee under Ex. 11 filed a suit and obtained a decree. The first question to be determined is whether Sitamma in this suit represented the estate of her father. The mere fact that the mortgage suit arose out of her own acts would not prevent her from representing that estate see my judgment in *Pothukuchi Rajagopala* v. *Valivety Ramamurty* (6). As I have said in that judgment, whether the limited owner represented the inheritance must be gathered from the nature of the suit and the defence put forward, the issues tried and raised and decided in that former suit. Unfortunately we have not before us the materials which will help us in the decision of this question. The appellant has not shown by referring us to the necessary records, that what passed at the Court sale held in execution of the mortgage decree was the entire estate and not merely the daughter's interest.

This makes the decision of the second question necessary, namely, whether the debt incurred by Sithamma was for purposes binding upon the reversion. When the transaction impeached happened long while ago, it is undoubtedly true that the alienee is entitled to ask the Court to

(6) A.I.R. 1924 Mad. 301.

have regard to this fact when estimating the value of oral evidence or making inference from circumstances. It is equally true that the alienee, when oral evidence is wanting, can rely on circumstances which, however feeble, may yet point to the truth of his case. After the lapse of a long time, the alienee always happens to be in a difficult position and this is more especially the case when the party in possession (as in the present case) happens to be a stranger to the original transaction and there have been intervening alienations. It is but reasonable and just that one should not unduly strain a point against an innocent purchaser tracing his ultimate source of title to a distant alienation like the one before us. The point, however, remains, whether the learned Subordinate Judge has failed to properly direct his mind to the various factors which have a bearing upon the issue. I am not prepared to say that his decision is wrong in the sense that I can interfere with it in second appeal.

I agree therefore that this appeal fails and should be dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 695

ODGERS, J.

Gurusami Pillai—2nd Plaintiff—Appellant.

v.

Veerabhadra Thavalkaran and *another*—Defendants—Respondents.

Second Appeal No. 453 of 1922, Decided on 13th March 1925, from the decree of the Sub-J., Tanjore, D/- 12th January 1922, in A. S. No. 25 of 1921.

* (a) *Grant—Service grant—Grant is resumble only for wilful neglect of service ; not for cessation of its necessity.*

In the case of a grant, burdened with service the grant is not resumable merely because the necessity for service has ceased, though it will be liable to forfeiture in case of wilful failure in the performance of service. [P 698 C 1]

(b) *Deed—Construction—Service grant—Grant of house site, structure and some lands in lieu of service—Default in service—Lands are to be resumed and not the site and structure.*

A service grant set out that, in consideration of melam service, the trustees had granted to the defendant's ancestor some wet and dry lands and a thatched construction and the vacant site and other lands. The aforesaid ancestor was to reside from son to grandson in succession in the house with thatched construction mentioned thereunder. For the wages of service and the prasadams due every year to the defendants' ancestor he, the latter, was to enjoy from son to grandson the income derivable from the land. If the service (to be rendered) as per the above agreement suffered default either by the said grantee or, after him, by his descendants, of the wet and dry lands etc., and the residential sites, etc., granted, barring the manaikattu and kattukoppu, the said grantee or his descendants would give up the rest of the lands.

Held : that the document meant that if default was made in the service, then the defendants should have no longer any right to the income of the lands, but that they should be allowed to keep the site and superstructure. [697 C2 P698C1]

* (c) *Civil P. C., S. 11—Construction of a grant in a previous suit is binding on the parties, even in respect of properties not involved in that suit.*

Where a document has been construed in a suit between the parties that construction even if erroneous, is binding on them in subsequent suits relating to the property not involved in the original suit. [P 697.C 1]

(d) *Civil P. C., O. 41. R. 23—Decision of trial Court reversed and additional issues remitted to it for trial—Remand is not on preliminary point, and is not appealable.*

Where trial Court has completely decided a case, but in appeal that decision is reversed and additional issues are remitted to the trial Court, the remand is not a remand on a preliminary point and hence is not appealable under O. 41, R. 23. [P 697 C 1]

A. Krishnawami Aiyar and *S. Subramaniya Aiyar*—for Appellant.

T. R. Venkataram Sastri and *V. Sundaram Aiyar*—for Respondents.

Judgment.—This case has had a long history. The plaintiffs are the trustees of the Brahmapureswara Swamy Kovil in the village of Pasupathi Kovil, and they sue the defendants, who were the temple drummer and his brother, for the delivery of a certain house and mesne profits. In consequence of the course that this case has taken, it becomes important to examine the pleadings with some care. The plaint alleges that in 1880 the trustees permitted the 1st defendant and his two deceased elder brothers to reside in a house which was built by the former trustees of the temple on a certain site belonging to the temple for occupation by the pipers who did melam service in the temple. In return for this permission the defendant and his brothers undertook to do melam service in the temple living in the house rent free so long as they did that service, under an obligation to deliver up possession of the house in case they

failed to perform the melam service or the trustees dispensed with their services. As the 1st defendant had discontinued his melam service from Chitrai 1916 he was bound to deliver possession of the house. A notice was sent by the plaintiffs to the 1st defendant on 14—11—1916 demanding possession. The defendant replied on 13—12—1916 contending that the house did not belong to the temple. The plaint continues that in case the oral agreement set up i. e., the agreement of 1880, is held to be invalid, the present trustees are entitled to possession as the 1st defendant has been simply living in the house as a licensee of the prior trustees. The cause of action is said to have arisen in Chitrai 1916, when the 1st defendant ceased to do his service. In the written statement the defendants admit that the ground site belongs to the temple, and they set up that, as consideration for the melam service, the trustees granted to the brother of the 1st defendant the sites in question and nanja, punja etc., pertaining to a quarter pangu (share) in the village as manyam. They refer to a registered agreement dated the 21st of July 1880. They further say that during the time of the 1st plaintiff as trustee, the trustees leased out the lands and paid the defendants 64 kalams of paddy every year and when the defendants demanded payment of 108 kalams of paddy due to them, they brought this suit. They further plead that the grant cannot be resumed as the defendants' right has been established.

Of the issues framed only two need be referred to here, viz:—

1. Whether the plaint house sites were granted to the defandants' ancestors on the terms and conditions set forth in the plaint, i. e., the oral agreement ?

2. Were the sites given to the defendants' ancestors absolutely as contended for the defendents ?

The District Munsif found in favour of the plaintiffs. He examined the agreement of the 21st July 1880, which is Ex. 1 in the case, and found that it did not grant an irresumable inam to the defendants. He also found that the defendants had not been rendering their services. On appeal to the Subordinate Judge he observed that the plaintiffs gave up their rights to recover possession of the suit house and mesne profits and they only sought to recover possession of the sites. This is also apparent from the judgment of the District Munsif. The Subordinate Judge found that the oral agreement set up in the plaint was false. He then goes on to consider the terms of Ex. I and at the end of paragraph 8 of his judgment says :

I find that plaintiffs are entitled to recover possession of the suit sites in case the defendants make default in rendering the services of periamelam and chinnam elam to the temple without any default on the part of the plaintiffs to act according to the terms embodied in Ex. 1.

The Subordinate Judge remanded the suit to the District Munsif to consider the three points set out in his judgment and framed three additional issues. The District Munsiff at the re-hearing, decided on the three issues that the lands pertaining to the quarter pangu never went into the possession of the defendants and that the plaintiffs were given possession with the defendants' consent. He also found that the plaintiffs paid the emoluments due to the defendants up to the time when the defendants failed to render services of periamelam and chinnamelam to the temple. It appears, by the way, that this latter service was never performed and no complaint or question seems to arise with regard to it. The District Munsif also found that the defendants had wilfully ceased to render the services even after they had been paid. He remarks at the end of his judgment :—

It was sought to be contended that the house site was given as consideration for the defendants removing from Manojiappan Chavadi and that the lands were consideration for the services. This is a new case for the first time set up at the trial.

The Subordinate Judge to whom an appeal was taken, remarks that the previous Subordinate Judge considered the effect of Ex. 1 and that the suit has been developed into one based on the agreement Ex. 1; but there are no allegations in the plaint as to how the plaintiffs were entitled under the provisions of that document to recover possession of the suit sites. He finds that the sites are not liable to be given up and that he is not bound by the observations of the first Subordinate Judge with regard to the effect of that document. He also finds that as the plaintiffs did not carry out their part of the contract, viz., to put the defendants in possession of the lands, they cannot enforce the remaining terms of the contract, and that so long as the plaintiffs have not established that they

have paid to the defendants the entire income from the ¼th pangu of lands, they are not entitled to their service. As to the reasons which led to the cessation of the services by the defendants, he says he cannot come to a conclusion on the evidence before him.

The points taken in second appeal are three :

1. The second Subordinate Judge from whose judgment the second appeal is now taken, was not entitled to review the decision of the previous Subordinate Judge as to Ex. 1.

2. An appeal ought to have been preferred against the remand order.

3 The inam is resumable.

Now as to the first contention certain cases have been quoted to show that where for instance, a will has been construed in a suit between the parties, that construction, even if erroneous, is binding on them in subseqnent suits relating to the properiy not involved in the original suit, *Secretary of State* v. *Maharajah of Venkatagiri* (1) ; compare also *Latchumamal* v. *Gangammal* (2) ; and *Hook* v. *Administrator General of Bengal* (3). It is not disputed by the learned vakil for the defendants that such is the law. But what he says is that although the first Subordinate Judge used the word "I find" that does not affect a finding or decision on the construction of Ex. 1, and he points to the fact that in the latter part of the third of the issues, which he framed for the first time on remanding the case, he says :

> And if so, whether they (i. e., the defendants) are not liable to surrender possession of the suit sites to the plaintiffs.

It is difficult to see how this could be reviewed if he had already given a binding finding as to the effect of the document. I am inclined to think that this is right and that the second Subordinate Judge was not concluded by the observations made in the remand order.

Next, as to the obligation on the defendants to have appealed from the remand order: this is clearly not a remand on a preliminary point within the meaning of the decision in *Ramachandra Joshi* v. *Hazi Kassim* (4) ; and if it is not a remand on a preliminary point under O. 41 R. 23, there is no appeal. (*Athappa Chetty* v. *Ramanatham Chetty* (5), and *Venkatasubbarayudu* v. *Zamindar of Nuzvid* (6).

The next point argued for the appellant is that the inam is resumable and conditional on the performance of service and that, on the termination of the service, the inam can be resumed and no occupation is permissible after such termination. I cannot agree that Ex. 1 is a grant in lieu of wages for services. I think it is clear from Ex. G, which is admissible in evidence, that it was intended that the defendants should get the whole of the produce of the land in question and that a fixed sum for wages was never stipulated for. The second Subordinate Judge deduces this largely from Ex. 2. It is contended that from 1892 to 1916 the defendants handed over the lands to the trustees and the latter paid them the produce. But I am inclined to think that the fact is that the defendants were never in occupation of the lands ; and so long as they received the produce, they were entitled to, there was no point in having divided cultivation. We really are thrown back in this case on the terms of Ex. 1. It cannot be said that Ex. 1 does not enter into the case because, although it finds no place whatever in the plaint, it is pleaded in the written statement, and it is perfectly clear that an issue was taken on Ex.1 it sets out that, in consideration of melam service, the trustees have granted to the defendant's ancestor 10 mahs and 35 kulies of wet and dry lands due for the one-fourth share and the thatched construction and the vacant site and other lands belonging thereto. The aforesaid ancestor is to reside from son to grandson in succession in the house with thatched construction mentioned thereunder ; and he has to construct a house for the residence of the dancing girl on the vacant site adjoining the said construction. For the wages of service and the prasadams due every year to the defendants' ancestor he the latter shall enjoy from son to grandson the income derivable from the land. This must mean the whole income of the land. I may here express my obligation to the Chief Interpreter of this Court who at my request has translated the entire

(1) [1916] 4 L. W. 133=31 M. L. J. 97=35 I. C. 266=(1916) 2 M.W. N. 96.
(2) [1911] 34 Mad. 72=(1910) M.W. N. 692.
(3) [1921] 48 Cal. 499=48 I. A.187 (P. C.).
(4) [1898] 16 Mad. 207.
(5) [1919] 10 L. W. 359=37 M. L. J. 536.
(6) [1921] 12 L. W. 667=60 I. C. 609.

document. In default of service the following clause is to have effect :

If the service (to be rendered) as per the above agreement suffers default either by the said Ramasami or, after him, by his descendants, of the wet and dry lands, etc., and the residential sites. etc., granted by the said Panchayat Panchanadam Pillai and others, barring the "manaikattu and kattukoppu. This may mean either "site and superstructure" or, "superstructure of the site", but more probably "ground and superstructure. inhabited by the said Ramasami and mentioned herein ; the said Ramasami or his descendants shall give up the rest of the lands to the said Panchayat Panchanadam Pillai and others.

The question is as to the meaning of "manaikattu and kattukoppu." The Chief Interpreter says that the more probable meaning is ground and superstructure. The superstructure referred to must be the thatched construction referred to in the earlier part of the document, for the house on the vacant site was not at the time of Ex. A constructed. It is said that the defendants have, at their own costs, either entirely replaced or considerably altered the existing house. I think, therefore, that on the best consideration I can give to it the document means that if default is made—as default undoubtebly has been made—in the service, then the defendants should have no longer any right to the income of the lands, but they shall be allowed to keep the site and superstructure. In *Vadisapu Appandora* v. *Vyrsicherla Veerabhadraraju Bahadur* (7), it is pointed out that, in the case of a grant, burdened with service the grant is not resumable merely because the necessity for service has ceased, though it will be liable to forfeiture in case of wilful failure in the performance of service. Here there is no finding as to the reason that led to the cessation of the service by the defendants and there is certainly no finding that it was wilful. I think, therefore, that having regard to the provisions of Ex. 1, it must be held that the plaintiffs have not established a case for the recovery of these sites. One can hardly feel any sympathy for them, for they went to Court apparently wilfully suppressing the existence of Ex. 1. The oral arrangement they set up of 1880 has been found to be false and their case of mere permission or license—unlikely on the face of it—is directly negatived by Ex. 1.

(7) [1911] 2 M. W. N. 406=12 I. C. 487.

For these reasons, I am of opinion that the second appeal should be dismissed with costs.

Appeal dismissed.

A.I.R. 1926 Madras 698

RAMESAM, J.

Lalumia—Appellant.

v.

Mazur Hannisa—Respondent.

Appeal No. 62 of 1924, Decided on 28th January 1926, from the appellate order of the Sub-J., Kistna, D/- 16th October 1923, in Appeal Suit No. 115 of 1923.

(a) *Limitation Act, Art.* 182—*Different reliefs.*

Where later application for execution prays for reliefs different from those in the earlier one, it cannot be considered as a revival of the earlier one. [P. 699, C. 1]

(b) *Limitation Act, Art.* 182—*Suspension—Suit by claimant—No injunction stopping execution—No suspension is caused.*

Unless there is any injunction stopping execution any intermediate suit by a claimant and not by the decree-holder will not cause suspension of the execution proceedings. Unless there was a suspension without any default on decree-holder's part, the principle of revival of a former execution petition cannot be utilized in favour of the decree-holder. [P. 699, C. 1]

(c) *Limitation Act, Art.* 180—*Revival theory does not apply,*

In the case of application for delivery the revival theory does not apply. The only question is when the right to apply accrued. [P. 699, C. 2]

P. Somasundaram—for Appellant.

Judgment.—This Civil Miscellaneous Second Appeal arises in the execution of a decree in O. S. No. 316 of 1912, dated 6-1-1915. The decree was obtained by the respondent against her husband the appellant. The first execution petition was filed on 20-9-1915. The appellant's immovable property was attached. There was a claim petition. It was dismissed on 26-2-1916. The attached property was sold in September 1916 and the sale was confirmed on 10-10-1916. Meanwhile the defeated claimant filed an original suit to establish his right, O. S. No. 420 of 1916. This was dismissed on 9-11-1917. An appeal to the Sub-Court, A. S. No. 55 of 1918, was dismissed on 13-11-1919. The decree-holder then filed a petition for further execution, E. P. No. 44 of 1920, dated 13-11-1919. She was asked to state how her petition which was more than three years from the earlier petition was not barred. She gave no explanation. She asked for

further time. After time was extended twice the following order was passed. "Time can no longer be granted. Rejected." It does not appear on what ground it was rejected. If it was rejected on the ground that it was out of time, possibly the order may be res judicata : see *Vyapuri Koundan* v. *Chidambara Mudaliar* (1). But it is not clear to me that it was dismissed as barred. Anyhow the point will have to be considered now. The decree-holder then filed the present petition on 21-2-1922. In this petition she prays for arrest of the appellant. She also applied in C. M. P. No. 2096 of 1922 for delivery of the property which was sold in 1916. The District Munsiff held both the petitions to be barred and dismissed them. There was an appeal to the Subordinate Judge of Masulipatam. He held that E. P. No. 44 of 1920, dated 13-11-1919, must be regarded as a continuation of her execution petition in 1915 on account of the intervening suit by the claimant which terminated in 1919 and therefore that that application was not barred and the present application, which is within three years from that, is also not barred. But this ground of the Subordinate Judge cannot be upheld. The execution petition of 1915 was for attachment of property and sale. The petitions of 1919 and 1922 were for arrest. As the reliefs are entirely different, the later execution cannot be considered to be a revival of the earlier execution petition. Moreover the intermediate suit was by the claimant and not by the decree-holder. There was no order in execution suspending her right to execute. There was no order of injunction in the suit stopping further execution. Not unless there was a suspension without any default on her part can the principle of revival of a former execution petition be utilized in favour of the appellant. The result is it must be held that E. P. No. 110 of 1922 is barred and should be dismissed with costs throughout.

The other petition, C. M. P. No. 2096 of 1922, for delivery of property was not dealt with by the Subordinate Judge in his order apparently by an oversight. To prevent any misconception as to its termination I must deal with it. Under Article 181 of the Limitation Act the application for delivery must be made within three years from the time the right to apply accrues. Such right accrued on 10-10-1916 when the sale was confirmed. The respondent has not appeared before me and has not assisted me. I tried my best to find out in the record something to help her to save her application for delivery of property and the learned vakil for the appellant has placed the facts fairly before me. I am not able to find anything to help her. Though the intermediate suit by the claimant relates to the matter of the house and though in this respect the application for delivery is different from the application for arrest, still it is difult see how it suspends her right, and how the application for delivery can be distinguished from the application for arrest. In the case of application for delivery we have nothing to do with the revival theory. The only question is when the right to apply accrued. It is a different article that governs an application for delivery, and as this application is more than three years from the confirmation of sale, this also must be held to be barred. The result is, in this matter also the District Munsif's order is restored.

Appeal allowed.

(1) [1914] 37 Mad. 314=18 I. C. 607=24 M. L. J. 26.

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* A. I. R. 1926 Madras 699

SPENCER AND RAMESAM, JJ.

(*Chinna*) *Munuswami Nayudu*—Plaintiff—Appellant.

v.

Sagalaguna Nayudu and *another*—Defendants—Respondents.

Appeal No. 431 of 1922, Decided on 5th March 1925, against the decree of the Sub-J., Chingleput, in Original Suit No. 46 of 1920.

* *Transfer of Property Act, S. 130—Right under agreement to obtain reconveyance of property sold, is assignable—Transfer of Property Act, S. 14.*

A right under an executory contract to exercise an option at a certain future date to obtain a reconveyance of immovable property at a certain price is assignable.

Ramesam, J.—Such a transaction does not offend the rule against perpetuities as it does not create an interest in land in India, whatever the rule in England may be. [P. 700, C. 1, P. 704, C. 1]

C. V. Anantakrishna Ayyar—for Appellant.

S. Varada Achariyar — for Respondents.

Spencer, J.—On 28th January 1891 Venkatasubrahmanya Ayyar, on behalf of himself and his minor son Krishnaswami Ayyar, sold the village of Siyatti to Venkatapathi Nayudu for a consideration of Rs. 10,000. On the same day the parties executed what is termed a counterpart document, by which the purchaser Venkatapathi Nayudu agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of Ani 30 years later. Venkatasubrahmanya Ayyar died in 1899, leaving Krishnaswami Ayyar, his only son, surviving him. Krishnaswami Ayyar assigned his interest under the counterpart agreement, Exhibit B (1), to the plaintiff in this suit for a consideration of Rs. 19,200 out of which Rs. 10,000 were to be paid to get a reconveyance according to the terms of that document.

The plaintiff's suit was dismissed in the Court of the Subordinate Judge of Chingleput on the ground that there was no completed agreement, but only a standing offer, the benefit of which could not be assigned to a stranger. I am unable to agree with the learned Subordinate Judge upon this point. In my view Exhibit B (1) was a contract containing an undertaking on the part of the purchaser to accept an offer of repurchase if made by the vendor for a certain amount at a certain future time. In other words, what Krishnaswami Ayyar assigned to the plaintiff was the right under an executory contract to exercise an option at a certain future date to obtain a conveyance of immovable property at a certain price. An offer or proposal cannot of course be enforced till it is accepted; but here the parties had gone beyond the stage of proposal and had entered into a contract which was supported by consideration, as was found in the trial Court. As the learned Subordinate Judge observed:

> Siyatti village was sold by Venkataasubrahmanya Ayyar for Rs. 10,000 plus the benefit of getting back the village under the conditions mentioned in Exhibit B (1).

The fact that Venkatasubrahmanya Ayyar had sold the village to Venkatapathi Nayudu was the consideration for executing this agreement for a reconveyance. The terms of the agreement between the parties were as follows:

> As I have this day purchased absolutely for Rs.10,000 the entire village of Siyatti which belongs to you in the Conjeeveram taluk, Chingleput district, and in which you hold ekabhoga mirasi right and the right to cultivate, I shall again convey to you the said village after a period of 30 years from this date, i. e., in the Ani cultivation season of the 30th year in case you wish to have the village again, and on your paying the said sum of Rs. 10,000 to me.

The translation does not exactly reproduce the Tamil. There is an emphasis on the word "you" where it occurs after the words "I shall convey to" but there is no condition to the effect that the purchaser would reconvey the village only to the vendor and no proviso that both of them should be alive on the date fixed for tendering Rs. 10,000 and writing a deed of reconveyance. In the normal expectation of human life in this Presidency it was improbable that both seller and purchaser should be alive 30 years after the date of contracting. The Subordinate Judge, who knows Tamil, was of opinion that the word "*thangalukai*" should not, in the context where it occurs, be interpreted to mean that Venkatapathi Nayudu undertook to reconvey the property to Venkatasubramanya Ayyar personally and not to his heirs or assigns.

I agree with him. I think that there was no personal element in this transaction which would make the contract incapable of being specifically enforced under S. 21 (*b*) of the Specific Relief Act.

In this Court the main contest has raged over the question whether the Exhibit B (1) was assignable before the sum of Rs. 10,000 was tendered. Under S. 23 (*b*) of the Specific Relief Act the representative in interest of a party to a contract may ordinarily obtain specific performance of it, provided that no personal quality of any party to the contract is a material ingredient. The Subordinate Judge has been led into some confusion of thought by a consideration of the case of *Helby* v. *Matthews* (1). He has also allowed himself to be led into a discussion of "option contracts," whatever they may be, and his judgment is vitiated by a reference to American authorities, a practice which has been condemned by the Privy Council. The case of *Helby* v. *Matthews* (1) was peculiar

(1) [1895] A. C. 471=64 L. J. Q. B. 465=11 R. 232=43 W. R. 561=72 L. T 841=60 J. P. 20.

in that it dealt with what is known as a hire purchase contract. Brewster obtained on hire a piano and, after paying a certain number of monthly instalments, he pawned the piano with the respondents who refused to give it up to the owners (the plaintiffs). It was held by the House of Lords that there was no agreement between Brewster and the appellants that he should buy the piano. Before he paid the 36th and last instalment there should be no right by purchase in the hirer, and he was not bound to keep the piano till he had paid every one of the 36 monthly instalments; and as the owners could not compel him to buy, it was neither a purchase nor an agreement to buy within the words of S. 9 of the Factor's Act of 1889, until the hirer completed the conditions necessary for a sale by making the last payment and exercising his option to purchase the piano. There is no complete analogy between that case and the present one.

The case of *Papa Naidu* v. *Munisamy Aiyar* (2), to the decision of which my learned brother was a party, has been cited before us, as it was held that what was agreed upon in that case constituted not a complete agreement but a mere standing offer. The purchaser of certain lands agreed to execute a reconveyance on payment of Rs. 800 within the 30th day of Vikasi in any year whatsoever. It appears to me that that agreement was not enforceable; for the simple reason that there was no mutuality and no time fixed for performance. Apparently the promisor in that case agreed to sell upon demand before a certain date in any year, but as there was no time limit and no consideration for keeping the offer open for an indefinite time, the promisor was entitled to withdraw at any time before the promisee applied for performance.

At the end of paragraph 14 of his judgment the Subordinate Judge has confounded the tender, which was to be made in future, with the proposal or offer which must form the basis of every completed agreement. The real offer and acceptance were made on the same date as the sale. The date upon which the purchaser agreed to accept a tender of Rs. 10,000 for the purpose of reconveying the village of Siyatti to the seller is quite certain, namely, the month of Ani in the 30th year after 1891, and there is no vagueness upon the point of time for performance. It is as if Venkatapathi had said to Venkatasubrahmanya Ayyar:

> In consideration of your having sold me the village of Siyatti this day for Rs. 8,000 I undertake, if you come to me in the month of June, 30 years hence and tender me a similar amount of Rs. 8,000 I will accept it and will execute to you a reconveyance of that property.

Upon Subrahmanya Ayyar's acceptance of this offer the contract was put in writing and the contract was then registered. Whether the suit document and the sale-deed executed on the same day should be treated as a mortgage by conditional sale or a sale with a simultaneous but independent agreement for reconveyance is not of material consequence, except upon the point of assignability. The plaintiff says he tendered Rs. 10,000 on 19th June 1920 and upon the defendant biding himself, he gave him a registered notice of his willingness to pay the amount, to which the defendant replied refusing to receive it. The Subordinate Judge has found that there was a valid tender as alleged in the plaint, and there is no question of limitation, as sometimes arises when it is doubtful whether a particular transaction is a mortgage or an independent agreement for reconveyance.

The decisions in *Venkateswara Aiyar* v. *Raman Nambudri* (3) and *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4), support the appellant's contention that contracts of this nature are capable of assignment. The last-named decision has recently been reversed by the Privy Council in *Narsingerji* v. *Parthasaradhi* (5), but not on the question of the contract being assignable, as their Lordships found the transaction concerned to be of the nature of a mortgage rather than a sale, and there is no difficulty in treating a mortgage interest as being assignable.

The English cases of *Buckland* v. *Papillon* (6) and *Manchester Brewery Company* v. *Coombs* (7), which were quoted as good law by McCardie, J., in *Country Hotel and Wine Company* v. *London and North-Western Railway* (8),

(2) A. I. R. 1922 Mad. 15.

(3) [1916] 3 L. W. 435=33 I C. 696.
(4) [1921] M. W. N. 519.
(5) A. I. R. 1924 P. C. 226.
(6) [1866] 1 Eq. 477=12 Jur. (N. S.) 155.
(7) [1901] 2 Ch. 608=70 L. J. Ch. 814=16 T. L. R. 299=82 L. T. 347.
(8) [1918] 2 K. B. 251.

are authorities for the proposition that in England options to purchase as well as contracts to sell are capable of assignment.

If the suit contract was a mortgage, the mortgagor's interest was unquestionably transferable.

We have therefore, allowed the question to be argued whether Exhibit B-1, constituted a mortgage by conditional sale or an executory contract. A Bench of this Court has already expressed its opinion that this was a sale rather than a mortgage [*see the judgment in Second Appeal No.* 2180 *of* 1915 *exhibited as Exhibit* 1 (*b*)] ; but this opinion was given prior to the Privy Council decision in *Narasingerji* v. *Parthasarathi Rayanam Garu* (5), which reversed the judgment of Wallis, C. J., and Oldfield, J., in *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4), upon which the Subordinate Judge relied for excluding the evidence of surrounding circumstances and deciding that Exhibit B-1 was not a mortgage. There is much to be said in favour of either view, but it is unnecessary to pronounce in favour of the view that we have here a transaction in the form of a mortgage by conditional sale.

Again the insolvency of Venkatasubrahmanya Ayyar did not affect the right of the plaintiff, seeing that the Official Assignee under an indenture of 22nd February 1916, Exhibit BB, conveyed the father's interest to Krishnaswami, the insolvent's son, and that Krishnaswami's widow under Exhibit BB released her right on 16th February 1921 in favour of the plaintiff after both the father's interest and the son's interest had become combined in the son.

The appeal must, for the above reasons, be allowed with costs throughout and the suit must be remanded. A preliminary decree will be passed directing the defendants to execute a conveyance in proper form on stamp paper and to register the same within one week from the re-opening of the lower Court after the summer vacation and providing that on their failure to do so the Court will execute a conveyance of the suit properties to the plaintiff on their behalf.

The lower Court will take evidence as to the claim for mesne profits due from date of plaint and will pass a final decree after ascertaining what is due to plaintiff on that account. The plaintiff gives up his claim for damages for cutting of trees and depreciation of buildings, etc., covered by the seventh issue. The defendant will be at liberty to draw out the purchase amount deposited in Court.

Ramesam, J. — (After stating facts, his Lordship proceeded.) The main points argued at great length before us relate to the effect of Exhibit B-1. Exhibits B and B-1 formed part of a single transaction and Exhibit B-1 is certainly supported by consideration. The respondent contended that the right created under it in favour of Venkatasubrahmanya Ayyar and Krishnaswami Ayyar was purely personal and could not be assigned (Issue 2-b). He also contended that it was an option to accept or refuse in June 1920 and could be assigned only after the offer was accepted by the tender of the amount and thus ripened into a contract to sell and buy. He argues that before 14th June 1920 there was no agreement for sale and purchase and therefore there was nothing to assign ; neither Subrahmanya Ayyar nor Krishnaswami Ayyar lived up to that date, and no one else can accept an offer made to them. In other words, the option which an offeree has to refuse or accept an offer made to him, even if it can be called a right, is not such a right as can be assigned, so as to enable the assignee to accept the offer. The two aspects of the questions are to a certain extent connected.

It is true that, in cases of sale and an agreement to resell and other similar cases such as a lease with covenant for sale or a hire with an agreement for purchase, the second part of the transaction, where the vendee has an option, does not amount to an agreement for sale and purchase [vide *Lord Ranelagh* v. *Melton* (9), which was a case of lease with an option to purchase : *Helby* v. *Matthews* (1), which was followed and applied by Ayling. J., and myself in *Papa Naidu* v. *Muniswami Ayyar* (2), where there was no time fixed for the exercise of the option.]

In all these cases, such a pre-contract [see per Lord Watson in *Helby* v. *Matthews* (1)] is, if not supported by consideration, a nudum pactum, but if it is supported by consideration (as in this case) it amounts to an undertaking on the part of the

(9) (1864) 2 Dr. & Sm., 278=62 E.R., 627.

offerer not to withdraw the offer, i.e., it is a contract, not a contract for sale and purchase, but one not to withdraw an offer. It is a contract precedent to the agreement for sale and purchase. If the time fixed for the exercise of the option is any time within a certain date, the option may be exercised at any time within that date and will mature into a contract to buy and sell. But if the option is to be exercised at a certain stated time, i.e., after the expiration of a certain period as in *Lord Ranelagh* v. *Melton* (9), or between certain points of time as in this case, it would seem that the option cannot be irrevocably exercised earlier than the stated time. This seems to be the opinion of Kindersley, V. C., in *Lord Ranelagh* v. *Melton* (9). But the question of assignability of the right of the optionee did not arise in any of these cases. They do not throw any light on that question.

Prima facie, the rights of the parties to a contract are assignable—*Tolhurst* v. *Associated Portland Cement Manufacturers* (10) ; *Tolhurst* v. *Associated Portland Cement Manufacturers* (11). The same principle is embodied in S. 23 (b) of the Specific Relief Act unless "the personal quality of such a party is a material ingredient in the contract." These words of the Indian Act seem to me exactly the same as the words used by Fry., L. J., in his Specific Performance, S. 225. see also *Tolhurst* v. *Associated Portland Cement Manufacturers* (12) where Lord Macnaghten uses the words "personal elements." But he proceeds to state in S. 229 :

> Where though the relation established by the contract may have in it nothing personal, some previous personal relation of favour or otherwise between the contracting parties, has been a material motive to the contract, it can be enforced by that person only.

Mr. Varadachari relies on this statement of Fry, L. J., and on the previous relation between the parties to attract its application. But I do not find anything in S. 23 (*b*) of the Specific Relief Act (which corresponds to S. 225 of Fry, L.J., only) justifying an extension of it, so as to cover a case to which S. 229 of Fry, L.J., could apply. The learned vakil referred to *Vithoba Madhav* v. *Madhav Damador* (13), *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14) and *Toomey* v. *Rama Shai* (15) as examples of the application of this principle. There is no resemblance between this case and the cases *Toomey* v. *Rama Shai* (15) and *Mohendra Nath Mookerjee* v. *Kali Proshad Johuri* (14). Even the case *Vithoba Madhav* v. *Madhav Damodar* (13) is distinguishable. The term of 30 years, in my opinion, makes it clear that the option was not intended to be personal. The parties could not have been so certain of the life of Subrahmanya Ayyar and Krishnaswami Ayyar up to the end of this time and could only have meant that the option might be exercised by them or their heirs.

I may observe that the translation of Exhibit B at page 15 is not quite correct. The vernacular word "Thangalukkai" is a merely emphatic form of saying "you," and though, if it occurs by itself, it may be translated as "you only" ; in this case it represents the vernacular idiom, the emphatic form being sometimes used when the word is repeated in the same sentence. There is no word for "only." Mr. Varadachari also contended that even if there is nothing personal in the contract still the offeree only can accept an offer. This proposition is true of mere offers. But, in this case, we have an offer which is irrevocable under a contract and only the offeree has an option to accept or refuse. This does not stand on the same footing as a bare offer. To say that the rights of an offeree in a case of this kind do not descend to his heirs seems to me a repetition of the argument about personal element in another guise and the term of 30 years seems to afford an answer to this argument as well.

Mr. Varadachari has conceded that the family of Subrahmanya Ayyar was the object of Venkatapathi Nayudu's bounty and the option may be exercised by the heirs, but argued that it is not assignable. But this seems to be a distinction without any principle to support it. If a right can be transmitted to heirs, it is

(10) [1901] 2 K.B. 811.
(11) [1902] 2 K.B. 660.
(12) [1903] A.C. 414=72 L.J.K.B. 834=89 L.T. 196=19 T.L.R. 677=52 W.R. 143.
(13) [1918] 42 Bom. 344=46 I.C. 734=20 Bom. L.R. 654.
(14) [1903] 30 Cal. 265=7 C.W.N. 229.
(15) [1890] 17 Cal. 115.

equally assignable. I therefore think that the option can be assigned even before it matures into an agreement to sell and purchase. In England it was so held in *Buckland* v. *Papillon* (6.) Romilly, M. R., held that it was an interest under an agreement and vested in the assigns in bankruptcy (at page 483). On appeal Lord Chelmsford, L. C., in *Buckland* v. *Papillon* (16) said at page 71 :

"I see no reason why an option to take a lease should not be an interest in land'

and lower down

" it cannot be contended successfully that a person who may call for a lease at his own will and pleasure may not be looked upon as entitled to an agreement for a lease."

Under S. 54 of the Transfer of Property Act an agreement to sell, by itself, cannot create an interest in land ; much less can an option even if it is made irrevocable by reason of a contract. But I do not see why the interest under the contract is not assignable as a right ex contractu if not as a right in rem. The case in *Buckland* v. *Papillon* (6) was referred to with approval by Lord Lindley in *Tolhurst* v. *The Associated Portland Cement Manufacturers* (1900) (12) and in *County Hotel and Wine Co., Ltd.* v. *London and North-Western Railway Co.*, (8) by McCardie, J. : see also Fry on Specific Performance S. 1105, and Redman's Landlord and Tenant, page 28, and Leake on Contracts, page 919, (1901) 2 *Ch.*, 608. In this Court the assignability of an option was recognized in *Venkateswara Aiyar* v. *Raman Nambudri* (3) and *Narasingerji Gyanagerji* v. *Panaganti Parthasaradhi* (4) modified by the Privy Council on another ground in *Narasingerji* v. *Parthasaradhi Rayanam Garu* (5).

The learned vakil for the respondent also contended that the option is void as offending the rule against perpetuities. If it created an interest in land, this contention is correct. But in India it cannot create an interest in land, whatever the rule in England may be. As a right ex contractu intended to be exercised at a stated time (ranging within one month) by the optionees or their representative and assigns, it does not tie up the land and cannot offend the rule against perpetuities : see *Charamudi* v. *Raghavulu* (17) followed in *Raja of Karvetnagar* v. *Velayuda Reddy* (18).

The assignment to the plaintiff is therefore valid. The further question argued by the appellant's vakil that Exhibits B and B-1, on their true construction, amount to a mortgage does not arise. The fact of a long term is in favour of the appellant : see *Swaminatha Aiyar* v. *Appasami Aiyar* (19), *Madhab Charan Das* v. *Rajani Mohan Das* (20) and *Modhu Sudan Das* v. *Rhidoy Moni Baistabi* (21). The oral evidence as to the produce of the lands also seems to be in his favour, but there is no evidence as to the prices of grains in 1890. On the other hand Exhibits II, III, III (*a*) and IV suggest that the lands are of poor quality and, on a former occasion, this High Court held that the documents do not amount to a mortgage : Exhibit I (*b*). This judgment does not constitute res judicata. It is not necessary to pursue this point further.

In the result I agree with my learned brother that the appeal should be allowed and with the order proposed by him.

Appeal allowed.

(16) [1866] 2 Ch. 67=36 L.J. Ch. 81=12 Jur. N.S. 992=15 W.R. 92=15 L.T. 378.

(17) [1915] 39 Mad. 462=28 M.L.J. 471=23 I.C. 871=(1915) M.W.N. 596.

(18) [1915] 18 M.L.T. 83=29 I.C. 435.

(19) [1915] 27 M.L.J. 686=27 I.C. 305=(1914) M.W.N. 906.

(20) [1921] 64 I.C. 583.

(21) [1901] 6 C.W.N. 192.

* A. I. R. 1926 Madras 705

PHILLIPS, J.

Tanjore Permanent Fund, Ltd. — Defendant—Appellant.

v.

T. Sadasiva Rao — Plaintiff—Respondent.

Second Appeal No. 1147 of 1922, Decided on 5th January 1926, from the decree of the Dist. J., West Tanjore, in A. S. No. 653 of 1920.

* *Company — Secretary dismissed by Directors—Dismissal confirmed in Company's meeting which was irregular for want of proper notice — Secretary cannot sue for cancelling dimissal.*

The Secretary of a Company was dismissed from the office by the Directors after three months' notice. At a general meeting of the Company the order of the Directors was cancelled and the meeting was adjourned. At the adjourned meeting the previous resolution was in turn cancelled and the dismissal of the respondent confirmed. The respondent then filed a suit for a declaration that this last resolution was not legal and that he was entitled to continue as Secretary and also for arrears of pay. It was found that proper notice of the resolution to be worked at the adjourned meeting was not given.

Held : that the resolution was a matter within the powers of the Company and it was not open to the plaintiff to treat it as void ; (*English Case Law discussed.*) [P 705 C 1, 2]

P. S. Chandrasekharan for *A. Krishnaswami Aiyar*—for Appellant.

B. Sitaram Rao and *T. Appaji Rao*—for Respondent.

Judgment.—The respondent in this case was the Secretary of the Tanjore Permanent Fund. He was dismissed from the office by the Directors of the Company on the 16th of May 1918, after receiving three months' notice. At a general meeting of the Company held on the 24th of June 1918, the order of the Directors was cancelled and the meeting was adjourned to the 30th of June. At this adjourned meeting the resolution of the 24th June was in turn cancelled and the dismissal of the respondent confirmed. On 18th of July 1918 the respondent filed this suit for a declaration that this last resolution was not legal and that he was entitled to continue as Secretary and also for arrears of pay. His suit was dismissed in the District Munsif's Court, but in the lower appellate Court the District Judge found that the resolution of 30th June was irregular and illegal and gave the plaintiff a decree for arrears of salary and Rs. 500 damages. An additional finding was called for and the District Judge has found that proper notice of the resolution to be worked at the meeting of 30th June was not given, and he has stated that what he meant by the words in his original judgment :

> These resolutions were merely quoted to show that the Company maintained the general position taken up by them on 30th June, 1918,

was that

> from the subsequent resolution it can be inferred that the corporate body accepted and ratified the cancellation made on 30th June 1918, that in any event the corporate body never wanted to go back on what was done at the meeting of 30th June 1918, and that in either view the defendant did not want to rely on the subsequent conduct as an answer to plaintiff's case.

The question for consideration is whether the irregularity in the meeting of the 30th June gives ground for plaintiff's suit. At that meeting a resolution was passed that the dismissal of the plaintiff should stand. Such a resolution was within the powers of the meeting and it would appear that the resolution has been accepted and acted upon by the Company. Can, therefore, the plaintiff be now heard to say that by reason of the irregularity the action of the Company is rendered ultra vires ? The question is a somewhat difficult one and I can find no direct authority on the matter, but it does appear from the cases cited that when a Company does a certain act, although in an irregular manner, a creditor has no right to contend that such an act is void as regards himself. The cases cited are *Browne* v. *La Trinidad* (1), *In re Miller's Dale and Ashwood Dale Lime Co.* (2), *MacDougall* v. *Gardiner* (3) and *In re Oxted Motor Company Limited* (4). These are all cases of irregular procedure by a company in which the Courts held that the irregularity did not vitiate the proceedings. The facts of the case in *Browne* v. *La Trinidad* (1) are not really applicable here ; for that was concerned with an irregular meeting of the Board of Directors prior to the general meeting which passed the resolution. *In re Miller's Dale and Ashwood Dale Lime Co.* (2) a Company at an irregular meeting decided to raise new capital ; it was held that where a Director took shares in the capital raised in accordance with the resolution he was precluded from objecting to the validity of the resolution.

(1) [1887] 37 Ch. D. 1.
(2) [1885] 31 Ch. D. 211=55 L.J. Ch. 203=34 W.R. 192=53 L.T. 692.
(3) [1875] 1 Ch. D. 13.
(4) [1921] 3 K.B. 32.

Again in *In re Oxted Motor Company Limited* (4) a resolution to wind up a Company voluntarily was passed by two of the shareholders. Although no proper notice had been given of the meeting it was held that the creditors could not impeach the validity of the resolution when the shareholders of the Company acting together had waived the formalities required by the Companies Act. At page 39 Greer, J., observed :

> It may also be said that whether the notice required by S. 69 has been duly given or not this is a matter that concerns the shareholders alone, because the Legislature has given the shareholders the right to say whether or not a Company shall be voluntarily wound up.

and he relies on the decision of the Court of appeal in *In re Express Engineering Works, Ltd.* (5). In *MacDougall* v. *Gardiner* (3) a meeting was adjourned without taking a poll. A suit filed by one of the shareholders for an injunction restraining the Directors from carrying out the proposed arrangement was held to be unsustainable as it asked for the interference of the Court in the ordinary management of the Company. It no doubt appears that at the meeting of the 30th June objection as to want of notice was taken, but the objection was overruled and the meeting proceeded to pass the resolution complained of. It was open to any of the shareholders who took this objection to call a further meeting after due notice in order to upset the resolution already passed, but no such action has been taken. On the contrary the irregular resolution has subsequently been accepted and acted upon. Consequently, applying the principle laid down in the above cited cases, I think that this resolution was a matter within the powers of the Company and that it is not open to the plaintiff to treat it as void. In *MacDougall* v. *Gardiner* (3) Mellish, L. J., says :

> In my opinion, if the thing complained of is a thing which in substance the majority of the Company are entitled to do, or if something has been done irregularly which the majority of the Company are entitled to do regularly, or if something has been done illegally which the majority of the Company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes.

These remarks apply very usefully to the facts of the present case and consequently I hold that the plaintiff has no right to maintain this suit. In any event I am of opinion that the decree of the District Judge, which awards arrears of pay from 16th May 1918 to the date of plaint, and Rs. 500 damages, cannot be supported.

On 16th May 1918 the plaintiff was validly dismissed and he certainly would be entitled to no damages until 24th June 1918, the date on which his dismissal was temporarily cancelled. It is not suggested that he attended to the duties of his office at any time after 16th May 1918, and I do not understand on what principle the District Judge has awarded Rs. 500 damages. The plaintiff having been validly removed in the first instance he could have applied for other employment, and it is not shown that, by reason of the resolution of 30th June 1918, he has been materially damaged, and he certainly has rendered no service for which he could claim remuneration.

The second appeal is accordingly allowed and the plaintiff's suit dismissed with costs throughout.

The Memorandum of Objections is also dismissed with costs.

Appeal allowed.

(5) [1920] 1 Ch. 466 = 89 L.J. Ch. 379 = 122 L. T. 790 = 36 T.L.R. 275.

A. I. R. 1926 Madras 706

VENKATASUBBA RAO AND SRINIVASA AYYANGAR, JJ.

Secretary of State for India—Defendant—Appellant.

v.

Raja Parthasarathy Appa Rao and *others*—Plaintiffs—Respondents.

Appeal No. 142 of 1921, Decided on 28th January 1926, against the decree of the Sub.-J., Bezwada, in Original Suit No. 51 of 1918.

(a) *Charter Act,* (3 *and* 4 *Will. IV Ch.* 85), *S.* 1—*'Trust' is not used in strict sense as in Trusts Act —Crown.*

The word "trust" is not used in the Charter Act in its strict technical sense and it will be far-fetched to hold that because the word used is "trust", therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. [P 711 C 2]

(b) *Crown Grants Act* (15 *of* 1895)—*Scope.*

The Act is not ultra vires of the Indian Legislature.

Per Srinivasa Ayyangar, J. — The Crown Grants Act is not an enacting or enabling measure but for which the Crown could not make

a particular kind of grant, but is only an explanatory and declaratory Act and in terms refers only to grants made subsequent to 1882.

[P 719 C 2]

(c) *Madras Regulation* (25 *of* 1802), *S.* 8—*Section does not necessarily apply to sanads issued after passing of the Regulation.*

The fact that a sanad was granted after the date of the regulation does not necessarily make it a sanad issued under the Regulation. And the mere use of the words "sanad-i-milkiyat-i-istimrar" does not show that the Regulation governs the sanad: *A. I. R.* 1922 *P. C.* 168, *Rel. on.* [P 713 C 2]

Per Srinivasa Ayyangar, J.—Section 8 and the Act itself apply only to lands, for the revenue payable to the Government in respect of which, an assessment is permanently fixed. [P 720 C 1]

(d) *Crown Grants Act* (1895), *S.* 3—*Scope — Transfer of Property Act, S.* 10.

A covenant in a grant restraining alienation is not void.

(e) *Evidence Act, S.* 90—*Ownership of property in ancient period—Evidence in unimpeachable old documents is conclusive.*

When the question arises as regards the ownership of property in some ancient period the evidence afforded by some unimpeachable ancient documents should be accepted beyond question. [P 716 C 2]

(f) *Interpretation of Statutes—Declaratory Act cannot create substantive rights.*

An explanatory and declaratory Act cannot be regarded or construed as if it were an enactment creative or regulative of rights or obligations.

[P 718 C 1]

(g) *Transfer of Property Act, S.* 10—*Inalienability.*

An estate inalienable in its nature is not an estate unknown to law. [P 719 C 1]

C. V. Anantakrishna Ayyar—for Appellant.

P. Venkataramana Rao—for Respondents.

Venkatasubba Rao, J.—The suit which has led to this appeal relates to a village known as Ravicherla. It was granted to the ancestors of the plaintiffs by a sanad issued by the Government, dated the 2nd of May 1843. The grant contains two restrictive clauses: one relating to the right of succession which provides that Ravicherla shall be held in perpetuity by the grantees and only such of their heirs could take as the Government might recognize for this purpose from time to time. The second clause, the one with which we are concerned in this appeal, imposes a restriction on the right of alienation, no transfer of the village being valid unless the previous consent of the Government has been obtained authorizing such transfer.

The plaintiffs agreed to sell the property and the proposed vendee having regard to the second provision referred to above desired them to obtain the consent of the Government to the sale. The plaintiffs accordingly requested the Government to give consent, but the Government declined to do so. The suit was then laid against the Secretary of State and the plaintiffs allege that the village though it was nominally granted by the Government, was really acquired as a result of a family settlement, the Government merely acting as mediators in the matter. The plaintiffs urge that in any event the clause in question imposing a restraint on alienation is void.

The Subordinate Judge, agreeing with the plaintiffs, gave them a decree and the Secretary of State has filed this appeal.

The first point to be considered is, was the village granted to the plaintiffs' ancestors by the Government or did they acquire it as a result of a family arrangement?

The facts that have to be considered in connexion with this point mark an important epoch in the history of the Nuzvid Zamindari.

The following genealogy will serve to explain the facts of the case: [See p. 708 for genealogy.]

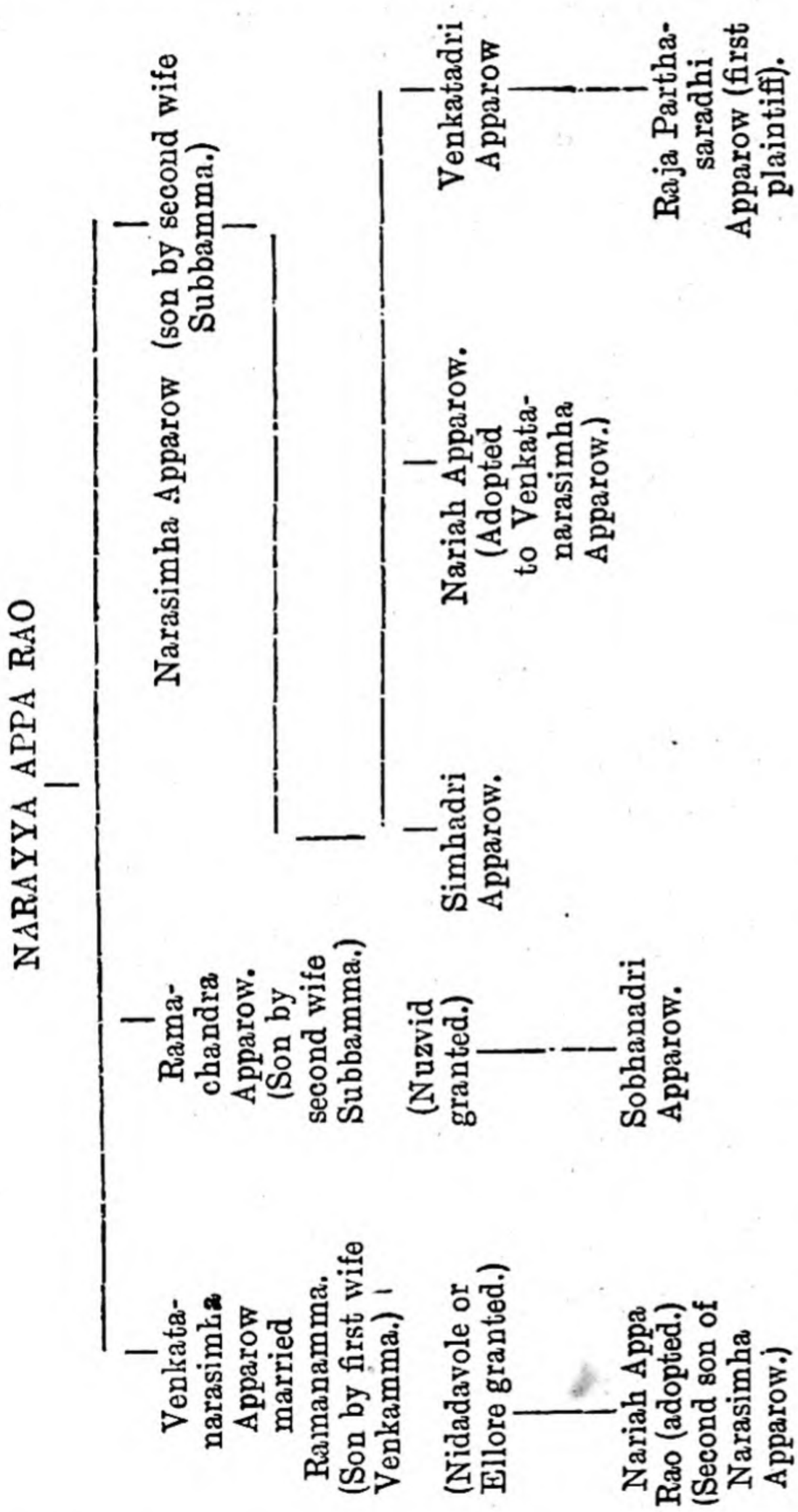
Prior to 1800 A. D. the estate had been transferred to Government management and in that year the Government determined to restore the zamindari, and sanads were issued in 1802 to Venkata-narasimha Appa Rao for the parganas in the Ellore Sirkar now constituting the Zamindari of Ellore or Nidadavole and to Ramachandra Appa Rao for the parganas in the Kondapalli Sirkar now constituting the Zamindari of Nuzvid. Narasimha Appa Rao, the youngest of the three brothers, was then a minor and for some reasons, which it is unnecessary to go into, his rights were completely overlooked.

This, as might be expected, led to litigation which finally ended in the decree of the Sudder Court in 1819 which upheld the division of the zamindari in 1802 as an act of State with which the Courts of law would not be justified in interfering. Narasimha then attempted to carry the matter to the Privy Council, but his circumstances did not permit him to do so and he at that juncture appealed to the Government.

The Collector, Mr. G. E. Russell, on the 16th of March 1820 wrote to the Board

of Revenue pointing out that it would have been more proper if at the division of the zamindari a pension had been secured to the claimant and suggesting that the Government might give him some allowance for his maintenance. The Collector also referred to the fact that Narasimha was head and ears in debt and thus observed :

> That the good intentions of the Government will, therefore, be frustrated unless anything which they may give him shall be protected from the fangs of his creditors.



The Board of Revenue were averse to adopting the suggestion made by the Collector and the matter had to be finally settled by the Government. Sir Thomas Munro, the Governor of Madras, strongly felt that the claim of Narasimha was substantially just and that he was deprived of his lawful rights by the action of the subordinate officers of the Government and that he failed to get adequate relief from the established Courts of law.

> "The Governor in Council" so runs the Government Order, dated the 13th February 1821, "cannot entertain the idea that it is befitting for the Government to look on with passive indifference at a claim like this or at the fate which attends it in Courts of law."

The Government recognized that though they were under no legal liability they had in the matter a moral responsibility. I feel tempted to quote the very words :

> The Government are answerable for the injury which he has sustained. They are answerable also for the ruin in which, owing to the ambiguity in which they left his claims to the course which their judicial institutions led him to adopt, he has been involved. They are answerable for these wrongs not before a Court of justice, any more than they would have been if, in consequence of similar oversights, the country had been thrown into disorder and the lives and property of its inhabitants exposed to hazard. But their responsibility is a matter of reason and of conscience and should induce them to do all that is practicable to compensate for the wrongs which have been committed.

The Government having issued this order advised the Collector to prevail upon the Zamindars of Nidadavole and Nuzvid to make a settlement with the claimant and intimated that if they failed to take a reasonable view the Government might be constrained to adopt measures to give effect to what must be presumed to have been their intention at the time of the grant of the sanads.

These events bring us up to 1821 and the material before us is silent as to what transpired between 1821 and 1829.

It would appear that by this time both the estates of Nidadavole and Nuzvid came under the Court of Wards, both Venkatanarasimha and Ramachandra having died. Venkatanarasimha died having adopted Narayya, and Ramachandra died leaving an only son, Sobhanadri. No settlement was effected and the Government resolved to adopt drastic measures, and on the 10th of April 1829 requested the Sudder Court to draft a regulation revoking the sanads of 1802. Accordingly Regulation IV of 1829 was passed on the 23rd of June declaring the sanads of 1802 to be void and empowering the Government to issue fresh sanads granting Narasimha a third of the whole estate. The Board of Directors did not approve of the Regulation and its opera-

tion was therefore suspended. This takes us to the year 1829.

From 1829 to 1835 there is again a gap, but the crucial events are those that happened subsequent to this period. The facts that have been so far narrated are important only as leading up to the events which I shall now set forth.

The contention of the plaintiff is that Ravicherla fell to his ancestors in a family settlement between the representatives of the three branches, that though the village was acquired ostensibly under a grant from the Government, the source of title was in fact not the grant but the family settlement and that, therefore, the restrictive covenants in the grant are void and of no effect. I shall show that this contention is utterly unfounded. There is not the slightest doubt that Ravicherla was settled upon the plaintiff's ancestors by the Government and that the grant took the final shape of the sanad dated 2nd May 1843.

Narasimha died and his minor sons, Simhadri and Venkatadri, had come of age. Narayya and Sobhanadri had also taken posssession of their estates of Nidadavole and Nuzvid, respectively. In 1835 the then Governor, Sir Frederic Adam, brought his personal influence to bear upon the Zamindars Narayya and Sobhanadri and got them to consent to pay Narasimha's sons Rs. 600 a month for their maintenance. On the 4th February 1835 two agreements were entered into, one relating to the debt due by Nidadavole to Nuzvid which is for the present irrelevant and the other agreement related to three matters:

(1) There was a debt due by Ramanamma the widow of Venkata Narasimham to the Nuzvid Estate. Sobhanadri agreed to give this up.

(2) Narayya similarly waived his right against Sobhanadri in respect of properties that belonged to Venkamma to the mother of the late Venkata Narasimha.

(3) Narayya and Sobhanadri agreed to pay the sons of Narasimha Rs. 600 a month, Rs. 400 to be paid by Narayya and Rs. 200 by Sobhanadri.

To these agreements the two zamindars alone were parties and though a provision was made in favour of the sons of Narasimha they did not execute the agreements. The documents filed in the case make it very clear that this arrangement was brought about by the direct intervention of His Excellency the Governor (in Exhibit F both Narasimha's sons and the zamindars say that these agreements were entered into "in the presence of the Right Honourable the Governor.")

So far it will be seen that there was no reference to Ravicherla. Under orders of the Governor, these agreements were on the 6th of February 1835 sent on to the Collector. In the letter of that date, Exhibit D, there is a reference to the fact that the Governor personally expressed to Simhadri Appa Rao his approbation of the provisions made for the benefit of Narasimha Appa Rao's sons. In the reply of the Collector that followed, dated the 4th March 1835, we find for the first time a reference to Ravicherla. The matter was raised in this way. Narayya by the agreements referred to waived his rights to the properties of Venkamma in favour of Sobhanadri. Ravicherla was one of the properties that belonged to Venkamma. The Collector asked: Would not the surrender in favour of Sobhanadri enure also for the benefit of the sons of Narasimha? The question was raised and it was left open. Mr. Venkataramana Rao the learned vakil for the plaintiff with great resourcefulness and ability argued that this showed that Ravicherla fell as a result of the agreement to Simhadri. But a perusal of the documents will show, as I have said, that this contention is quite unsound. The Collector merely stated what he believed to be the fact and did not speak from personal knowledge. The question regarding Ravicherla was finally settled by the Government Order dated the 10th of November 1836.

It says:

> The Right Honourable the Governor in Council observes that at the time arrangements were made for adjusting the disputes between the Zamindars of Nidadavole and Nuzvid, it was distfnctly understood and repeatedly explained to them that the mokhasa village of Ravicherla had lapsed to Government.

I have already pointed out that His Excellency the Governor was personally present and took part in the arrangements and this minute clearly records that it was distinctly understood that Ravicherla was the property of the Government. If this be so Ravicherla could not have passed to Sobhanadri under the arrangements referred to.

The matter is made even clearer by the subsequent proceedings. The sons of Narasimha were sent for by the Collector and they refused to accept the terms offered by Nidadavole and Nuzvid. Some months were thus wasted. They again appeared and expressed their willingness to agree to the terms, provided the Government granted to them for their support three small villages. This was before the minutes of consultation, dated the 10th November 1836. After the Government had decided that Ravicherla had lapsed to them, the Collector conceived the idea of recommending to the Government the desirability of conferring upon the sons of Narasimha the villages of Ravicherla, Madaca and Rudravaram. Then after a short interval the Collector suggested Sriramavaram in lieu of the villages of Madca and Rudravaram. These events must be carefully followed in their chronological order. Exhibit E, the letter of the Collector, dated the 23rd of May 1837, sets forth very clearly the facts which I have referred to. I will quote three passages from it:

(1) The terms on which he grounded his acquiescence were that three small villages might be bestowed upon him for his support on the part of the Government independent of the pension to be granted by his brothers of Nuzvid and Nidadavole.

(2) Shortly after this occurred, the right to the village of Ravicherla became a subject of enquiry and was ultimately assumed and appropriated by Government under their orders, dated 10th November 1836, and the idea was then awakened of recommending to Government the propriety of conferring it together with the villages of Madaca and Rudravaram upon him.

(3) In making this recommendation I am perfectly aware that Simhadri Appa Rao will be indebted to the beneficence of Government solely for it, not to any personal or private claim but to the operation of those feelings of sympathy which influences Government in all its acts.

Can there be any doubt after this, that before even the idea of settling Ravicherla came to be conceived, it had been unequivocally declared that the village was the property of the Government?

The matter, however, does not stop here. The two zamindars as well as the two sons of Narasimha appeared before the Collector in September 1837, that is about four months after the letter of the Collector referred to above. Simhadri gives a writing, dated the 15th September, and Venkatadri, the other son of Narasimha, a writing, dated the 23rd September. Simhadri says

It is necessary that I should give my unconditional and unreserved agreement in accepting the said allowances, when your (Collector's) recommendation in my favour would be taken into consideration.

What is the recommendation that is referred to? It is obviously the grant of Ravicherla and Sriramavaram by the Government. Again Simhadri says:

I fearlessly accept the terms proposed by the Board, submitting in every respect of such terms alone as Government in their justice may be pleased to extend to me.

Venkatadri in the writing signed by him, agreed to the terms contained in his brother's letter.

The four letters signed by the zamindars and the sons of Narasimha formed enclosures to the communication of the Collector, dated the 5th October 1837, to the Board of Revenue. The Collector says:

I have pledged myself (without which I could not have effected the present arrangement) that Government, to mark their satisfaction at the good understanding which has taken place between the brothers, will make over to Simhadri Appa Rao the villages of Ravicherla and Sriramavaram alluded to in my former letter under date the 23rd of May last.

It is impossible to contend in the face of this very clear evidence that Ravicherla was not the property of the Government at the time of the grant.

I may, however, trace the subsequent history of these negotiations. On the 17th of November 1837 the Government decided finally to grant these villages to Narasimha's son (see Exhibit G). The Board directed the Collector to insert in the sanads conferring on them these two villages, a proviso that the lands should not be liable for any of their debts. The Governor in Council approved of this suggestion of the Board of Revenue. Simhadri and Venkatadri desired that the exemption should extend also to the allowance agreed to be paid by Nidadavole and Nuzvid. The officers of the Government could not accede to their wishes because in the words of Exhibit IV, dated the 20th September 1838, the allowances "do not immediately emanate from the Government." In the enclosure to Ex. IV

Simhadri referred to Ravicherla and Sriramavaram as villages conferred by the Government and requested that the clauses should be inserted in the sanad. The contrast is very marked when he referred to the allowance as payable by Nidadavole and Nuzvid in regard to which also he desired that restrictive clauses should be inserted. It is unnecessary to refer to the further correspondence in the matter. Exhibit J is the sanad, dated 2nd May 1843. This refers to the Government Order, dated the 10th November 1836, by which Ravicherla reverted to the Government. There is further a reference to the arrangement, dated the 4th February 1835, and it is clearly stated that at that time there was "a distinct understanding and repeated exlpanations, in pursuance of which Ravicherla lapsed to the Government. This sanad clearly states also that it was the Government that settled the village upon Simhadri and Venkatadri.

There can, therefore, be no doubt that it was by reason of the grant that the ancestors of the plaintiff acquired Ravicherla and that the source of their title is not a family settlement between the representatives of the three branches. The question does not admit of doubt, but owing to the very strenuous argument addressed to us on this subject I have dwelt on this point at this length.

This disposes of the question of fact raised in the case. I have come to the conclusion that the Subordinate Judge's finding is wrong and must be reversed.

Then remain the points of law that have been raised and I shall now deal with them. It is first contended that the restrictive covenant in question is void. This would be so under the general law, but grants from the Crown are governed by the Crown Grants Act (XV of 1895). Doubts having arisen as to the power of the Crown to impose restrictions upon grants made by it, the Act was passed to remove such doubts. S. 2 makes the Act have a retrospective effect. It says:

> Nothing in the Transfer of Property Act shall . . . . . be deemed ever to have applied to any grant . . . . heretofore made . . . . by or on behalf of Her Majesty the Queen-Empress or Her heirs or successors . . . . but every such grant shall be construed . . . . as if the said Act had not been passed.

Section 3 enacts:

> All . . . . restrictions . . . . contained in any such grant shall . . . . take effect according to their tenor, any rule of law . . . . to the contrary notwithstanding.

I am here quoting only the material portions of the sections. The contention advanced is that the grant was not made on behalf of the Crown and that the Act will not therefore apply to it. The argument is put in this way. In 1858 the Sovereignty of India was for the first time assumed by Her Majesty; it had previously vested in the East India Company. The grant having been made in 1843, it could not be deemed to have been made on behalf of the Crown. If it had not been made on behalf of the Crown, the Crown Grants Act is inapplicable.

Let me examine if this contention is sound. At the time of the grant, the Charter Act that was in force is that of 1833 (3 and 4 Will. IV, Chap. 85). I shall first take the preamble. It recites that the East India Company have consented that all their rights in the territories and territorial and commercial assets and property shall be placed at the disposal of parliament. It further recites that it is expedient that the territories now under the Government of the said Company be continued under such Government, but in trust for the Crown, discharged of all claims of the Company to any profit therefrom to their own use. The first section of the Act gives effect to the intention expressed in the preamble.

If the Government by the East India Company was thus in trust for the Crown of the United Kingdom, does it not follow that the grant made by the Company should be deemed to be on behalf of the Crown? But the plaintiff's learned vakil objects that a trustee does not act "on behalf of" his beneficiary and the act of the East India Company cannot therefore, be deemed to be an act on behalf of the Crown. The answer is that the word "trust" is not used in the Charter Act in its strict technical sense and it will be far fetched to hold that because the word used is "trust," therefore the law of trusts as strictly understood should govern the relations of the Company and the Crown. This could not be the intention of the Legislature and I am unable to accept the argument.

In this connexion, I may notice another argument advanced by the plaintiff's learned vakil. He contends that under S. 1 of the Charter Act of 1833, what is vested in the Company in trust for His Majesty are the lands and hereditaments, revenue, rents and profits of the said Company" and not "the territorial acquisitions and revenues." This objection is not in my opinion sound; even granting it is, it does not avail the plaintiff; for, what was granted is, in any event, the land of the Company.

Is the objection then sound? I may now glance at the provisions of the earlier and later Charter Acts. In the Act of 1853 (16 and 17 Vict., Ch. 95) the first section provides that all the territories in the possession and under the Government of the East India Company shall continue under such Government in trust for Her Majesty. The word "continue" is in this connexion significant.

The Act of 1858 (21 and 22 Vict, Ch. 106) refers in similar terms to the Government of the territories being vested in the Company in trust for Her Majesty. It is by this Act that the Government is transferred to Her Majesty. The statute makes it clear that the rights previously vested in and exercised by the Company in trust for the Crown shall thenceforth become vested in and be exercised in the name of Her Majesty. This shows beyond all possibility of doubt that it was the Crown that was previously the Sovereign and that the rights were exercised by the Company for the Crown, but that subsequent to the passing of the Act the Crown directly exercised the rights and not through the medium of the Company.

The Royal Titles Act of 1876 (39 Vict., Ch. 10) has been relied on by the plaintiff. It is urged that it refers to a transfer of Government and the word transfer implies that the Crown did not previously possess sovereign rights. It is impossible to uphold this contention, for the very section referred to by the plaintiff's learned vakil re-affirms the position that previous to 1858 the Government of India had vested in the East India Company in trust for Her Majesty.

Now turning to the earlier Charter Act of 1813 (53 Geo. III, Ch. 155) we find that the sovereignty of the Crown was clearly emphasized and it is affirmed that the territorial acquisitions are under the Government of the Company "without prejudice to the undoubted sovereignty of the Crown." The view I have taken derives support from the observations of the Judicial Committee in *The Secretary of State in Council of India* v. *Kamachee Baye Sahaba* (1), their Lordrefer to the powers of the East India Company as delegated powers of sovereignty and at page 540 they refer to the Company as the delegate of the British Government.

In *Haji Mahamad Nasurudin Khan Bahadur* v. *Eagambara Mudaly* (2) Subramanya Ayyar and Benson, JJ. assumed (the question was not raised) that the Crown Grants Act applied to a grant of 1848. In *Sheo Singh* v. *Raghubans Kunwar* (3) there is no discussion but the Act was held to apply to a grant of 1861. The contention raised is in my opinion unsound and must be rejected.

The next contention of the plaintiff is that the reference to Her Majesty the Queen, in the Crown Grants Act, as "The Queen Empress" indicates that the Legislature intended that the Act should apply only to grants subsequent to 1876 when that title was assumed by Her Majesty. This distinction is too refined and unsubstantial and I cannot possibly accept it. Long previous to the Crown Grants Act, tha title of the Queen-Empress had become firmly established and it seems unsafe to found an argument on the mere fact that in referring to Her Majesty the words "Queen-Empress" are added. It would be both usual and natural to speak of Her Majesty as the Queen-Empress and much stronger ground, I should imagine, must be shown for limiting the scope of the Act in the way suggested.

The next contention advanced by the plaintiff's learned vakil is that the Crown Grants Act is ultra vires of the Indian Legislature. It it urged that the Crown cannot create an estate unknown to the law and that the estate created by the grant is of this description. Mr. Anantakrishna Ayyar, the learned Government Pleader, answers

(1) [1859] 7 M. I. A. 476.
(2) [1907] 2 M. L T. 55.
(3) [1905] 27 All. 634=32 I. A. 203=15 M. L. J. 352=8 O. C. 317=9 C. W. N. 1009=2 C. L. J. 194 (P. C.).

that this is not an estate unknown to the ordinary Law, and relies upon the passage at 487 of Vol. VI, Halsbury's Laws of England : "A grant by the Crown may contain a condition against alienation."

His second answer is that this estate is in any event not unknown to the Indian Law and in support of this he cites *Gulabdas Jugjivandas* v. *Collector of Surat* (4). In the view I have taken it is unnecessary to deal with these points. Granting that the Crown cannot create an estate of this kind, the Crown Grants Act expressly confers this power upon the Crown and this leads to the consideration of the question whether the Crown Grants Act is ultra vires of the Indian Legislature.

S. 22 of the Indian Councils Act, 1861, enacts that the Governor-General in Council shall have power to make laws for all persons and for all places and things in the Indian territories. But the plaintiff relies upon the proviso that the Governor-General in Conncil shall not have the power of making any laws *which may affect the authority of Parliament.* How does the Crown Grants Act affect the authority of Parliament ? The prerogative of the Parliament remains unaffected and nowithstanding the Act, it can create estates unknown to the law. Further, if the Parliament itself could have passed the statute, why should not the Indian Legislature, created by an Act of the Imperial Parliament, have the same power ? As observed by their Lordships of the Judicial Committee in *Empress* v. *Burah* (5), the Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and when acting within the limits prescribed, it has plenary powers of legislation, as large, and of the same nature as those of Parliament itself. See also *Hodge* v. *The Queen* (6) and *Powell* v. *Apollo Candle Co.* (7). The contention therefore that the Act is ultra vires fails.

It is lastly urged that the sanad contravenes the provisions of S. 8 of Madras Regulation XXV of 1802, which provides that proprietors of land shall be at free liberty to transfer their rights without previous consent of the Government. But this Regulation does not apply, because, in the first place, there was no permanent assessment of the land revenue, no revenue having been imposed at all in regard to this grant ; secondly the Government did not purport to act under the Regulation nor was the intention of the parties that the sanad should be issued under it. The fact that the sanad was granted after the date of the regulation does not necessarily make it a sanad issued under the Regulation. And the mere use of the words "sanad-i-milkiyati-istimrar" does not show that the regulation governs the sanad : See *Secretary of State* v. *Raja of Venkatagiri* (8) ; thirdly the form of the grant is not that prescribed for sanads under the Regulation. Why should a grant then not made under the Regulation be by a fiction treated as made under it and why should it be assumed by so treating it, that provisions of the Regulation were deliberately infringed ? I, therefore, hold that this contention also is untenable.

As I have said in an early part of this judgment, the question that has been raised is in regard to the validity of the covenant imposing a restriction on alienation. No argument has been addressed to us in regard to the other restrictive covenant as no question bearing on it arises in the case and I do not desire (and indeed it is unnecessary to do so) to say anything at present regarding that covenant.

I have now dealt with all the points urged on behalf of the plaintiff. As I have rejected all his contentions, the appeal must be allowed and the suit dismissed with costs throughout.

Srinivasa Ayyangar, J.—My learned brother and myself have practically heard this appeal twice over and after giving the case my very careful consideration, I have also come to the conclusion that the appeal should be allowed.

The appellant is the Secretary of State for India in Council. He was the defendant in the original suit from which this appeal arises instituted by the present Raja of Bhadrachalam and his sons as plaintiffs as the owners of a village called Ravicherla and situate in Kistna district.

(4) [1879] 3 Bom. 186=6 I. A. 54=3 Sar. 889 (P. C.).

(5) [1879] 4 Cal. 172=5 I. A. 178=3 C. L. R. 197=3 Sar. 834 (P. C.).

(6) [1884] 9 A. C. 117=53 L. J. P. C. 1=50 L. T. 301.

(7) [1885] 10 A. C. 282=54 L. J. P. C. 7=53 L. T. 638.

(8) A. I. R. 1922 P. C. 168.

The action was a curious one. The reliefs prayed for were that it should be declared that the plaintiffs were absolutely entitled to the village of Ravicherla and to dispose of the same that the sanad issued in respect of the said village should be construed and it be declared that Cl. 3 of the same is void, illegal and invalid and not binding on the plaintiffs, that even if it were held that the consent of the Government is necessary (for the plaintiffs disposing of the said village), the Government have no right to withold their consent arbitrarily.

It may be convenient to dispose of the claim put forward in the last of the prayers above referred to. On the face of it, it is merely an alternative prayer and it is to the effect that if the Court should find that Cl. 3 is not invalid or illegal and that the same was binding on the plaintiffs' still it should be declared that the Government had no right arbitrarily to refuse to consent to any alienation that may be attempted to be made by the plaintiffs. The suggestion of the plaintiffs with regard to this matter must obviously be that the Government was under some sort of obligation to exercise a proper discretion in according or refusing the permission that might be applied for by the plaintiffs to alienate the property and that in declining to accord such permission as stated in paragraph 8 of the plaint without assigning any reasons the Government acted arbitrarily and, therefore, illegally. No arguments were addressed to us and no grounds advanced or referred on behalf of the plaintfffs-respondents for establishing that the Government was under any such obligation not to exercise its discretion arbitrarily or that they were bound to giva any reasons for declining to accord the permission applied for. The third issue in the case was :

"Whether the Government acted arbitrarily in not stating the reasons in refusing sanction for the alienation and if so what is the effect thereof."

This issue was found against the plaintiffs by the lower Court, and that finding was not attacked in the argument before us. The Subordinate Judge, however, found the other issues in the case in favour of the plaintiffs and granted a decree declaring the right of the plaintiffs to alienate the property without any previous permission of the Government. It is against this decree that the appeal has been filed on behalf of the defendant, the Secretary of State for India.

I have found some difficulty in understanding the judgment of the learned Subordinate Judge in the Court below. In paragraph 12 of his judgment he states thus :

"If the grant is to be considered as having been made by the Government, there is nothing illegal or invalid or void and inoperative in the conditions imposed by the Government."

This view would seem to be qualified by him in the next paragraph of his judgment where he states thus :

The village of Ravicherla was held under sarva mukhasa tenure by Venkamma. The mere resumption of that village by Government cannot alter its nature. In the hands of the Government it was an absolute estate, one on an absolute and permanent tenure. It was made over to the plaintiffs' ancestors under Exhibit "J" and the restrictions imposed were intended as a cloak to shield the properties from the fangs of the creditors at the time, but not to limit the nature of the estate given over. The plaintiffs hold the village on an absolute permanent tenure."

Two arguments would seem to be indicated in the above extract from the learned Subordinate Judge's judgment and these are (1) because the village had been granted on sarva mukhasa tenure, even in the hands of the Government the village was only sarva mukhasa and the Government had no right to re-grant it to any other person except as a sarva mukhasa, that is to say, according to the Subordinate Judge, on an absolute and permanent tenure, and (2) that the condition in respect of alienation was not really intended to be operative as between the grantors and the grantees, but was intended to be merely a cloak to shield the properties from the fangs of the creditors. There are obvious difficulties in the way of accepting either of these views. In fact I did not understand the learned vakil for the respondents to argue for either of these two positions. There is absolutely no warrant for supposing that even after resumption any conditions or characteristics of the tenure on which it had been previously granted continue attached to any property. And I further fail to see on what grounds the learned Subordinate Judge supposes that even after resumption, the absolute owner of

property, as he recognized the Government of the day to be, had no right to make a fresh grant of the property to some other person on a different tenure or on terms and conditions different to the previous grant. Sarva mukhasa tenure is supposed by the learned Subordinate Judge to be absolute property, but apparently it was of a resumable nature. I can see no principle or reason for any of the suppositions made by the learned Subordinate Judge with regard to this aspect of the case.

As to the second point above referred to, the view that the learned Subordinate Judge took would appear to be that Cl. 3 in the sanad restraining alienation by the grantee except with the permission previously obtained from the Government was not really intended to be operative as between the parties to the grant and was to be in the grant merely as a cloak to save the property from the fangs of the creditors. It is one thing to say that a particular clause in a document was put in with the object or purpose of saving the property from the fangs of creditors and another altogether to say that it was never intended to be operative or binding between the parties. Assuming that a condition was inserted in a grant with a particular object it does not follow that the condition is valid or operative only to the extent of securing or subserving the particular object had in view. It cannot be open to parties to a document to contend that in spite of the clear terms of a particular clause in a document such clear terms should be allowed to be controlled or modified by the avowed object with which the clause was inserted.

It is no doubt true that the clause appears to have been inserted in the sanad with the primary object of saving the property from the creditors of the grantees; but the restrictions imposed was not that it was incapable of being taken, sold or otherwise dealt with in execution of a decree or at the instance of creditors, but that the grantees should have no power to alienate the property. It is, therefore, clear that what was done was to secure the intended object only by restraining the power of voluntary alienation by the grantees and obviously, therefore, to protect the property not only from the creditors, but to protect the grantees against themselves. In these circumstances I cannot agree with the learned Subordinate Judge that the clause was not intended to be operative as between the grantors and the grantees.

As regards the theory of the clause being a mere cloak, I must take it that what the learned Subordinate Judge means is that the clause being void and inoperative was intended merely as a cloak, that is, as something calculated and designed to conceal the truth, namely, the real alienability of the subject-matter of the grant. It is only, therefore, if, as a matter of fact, the clause restraining alienation was invalid and the subject of the grant was really alienable that the explanation of the clause as a cloak would be of any value. The main question, therefore, for determination in this appeal is whether the condition against alienation contained in Cl. 3 of the sanad is valid and binding on the grantees and this indeed was the question with regard to which the learned vakil for the respondents addressed all his argument. It was put in two ways. The first contention might not inaccurately be described as an argument on the facts. It was said that though there was a formal sanad given by the United East India Company, the Government for the time being, to the grantees the ancestors of the plaintiffs, still the plaintiffs' ancestors did not obtain the property under or by virtue of the grant but the property was either their own, and if not, was obtained by them as the result of a family agreement made by and between their branch and the other branches of their family. Very able and ingenious was the argument advanced by the learned vakil for the respondents on this aspect of the case. The contention itself is formulated by the plaintiffs in paragraphs 4 and 5 of their plaint in the following terms:

Sree Raja Venkatadri Appa Rao Bahadur and Sree Raja Simhadri Appa Rao Bahadur, the father and uncle, respectively, of the first plaintiff herein were entitled to a share in the Nuzvid Zamindari. At the original partition of the said estate, which took place in or about 1770, they were excluded by mistake. The 1st plaintiff's father and uncle pressed their claims to the said zamindari. The then Government of Madras interceded and in or about 1835 a settlement was arrived at and in and by which it was inter alia agreed that the village of Ravicherla should be granted to the plaintiffs' father and uncle on an

absolute and permanent tenure. In pursuance of the said settlement in or about 1840 the said village was granted to the 1st plaintiff's father and uncle on an absolute and permanent tenure and put in their possession. Three years thereafter on or about 2nd May 1843 a sanad-i-milkiyat-i-istimrar was granted in respect of the said property.

The real import of this contention is, I take it to be, that the plaintiffs' family obtained the property not from the Government, that the Government had not the property in them to give it away, that it was property which was at any rate in the order and disposal of the other branch of the plaintiffs' family and that the plaintiffs' branch of the family obtained it not as the result of any grant by the Government, but as the result of a family arrangement between the different branches of their family and that therefore the sanad which was granted in respect of the village of Ravicherla subsequently by the Government and accepted by the plaintiffs' branch of the family was not the real source of the plaintiffs' title to the property, was a mere sham deed and should not be looked to for the purpose of determining the plaintiffs' rights.

If on the facts I should have been disposed to agree with the contention, it might become necessary to consider whether assuming that the plaintiffs' predecessors obtained the property as the result of a family arrangement between them and the other branches of their family, still the acceptance by them of the sanad in question from the Government could affect their rights to the village and if so in what manner and to what extent, and whether in that view the clause in question would or would not be binding on them. But in my view, it is unnecessary to consider that question, because after a careful consideration of all the documentary evidence in the case, that is to say, the only evidence before us, it is clear that even on the facts the contention put forward on behalf of the plaintiffs-respondents could not be accepted.

For some reason into which for the purpose of this appeal it is unnecessary to enquire, the Nuzvid Zamindari was at the time of the permanent settlement early in the last century settled by the then Government not on all the branches of the family but on two of its branches alone, excluding the branch to which the plaintiffs belonged. In consequence of this, the plaintiffs' branch of the family launched on a protracted but unsuccessful litigation for the purpose of recovering from the other branches of their family their share or alleged share in the zamindari. After, however, all this litigation was over, it appears to have been realized by some of the authorities of the Government at the time that the original settlement of the zamindari to the exclusion of the plaintiffs' branch of the family was due to some mistake and that something should be done to repair the injustice, if only in consideration of the helpless condition in which the plaintiffs' branch of the family then was. (His Lordship then reviewed the documentary evidence and continued.) All this mass of documentary evidence makes it abundantly clear that the village of Ravicherla was dealt with at the time of the sanad as property which had reverted to the Government and become vested in it, so as to be capable of being disposed of by the Government at their pleasure. When the question arises as regards the ownership of property in some ancient period the evidence afforded by some unimpeachable ancient documents should, it seems to me, be accepted beyond question.

I may indeed go further and state that the language of most of these documents is absolutely inconsistent with the contention put forward on behalf of the respondents that the village of Ravicherla did not belong to the Government but was property which still at the time of the grant vested in the other branches of the family and that all the documents including the sanad were elaborate devices for the purpose of effecting curious camouflage and making it appear that the property belonged to the Government in order that they may insert in the sanad restrictive provisions regarding the inheritance to and the disposal of the village. I am further satisfied that if what was intended was such an elaborate device, the language used would have been entirely different to that employed in the documents. I feel therefore bound to reject the contention that the village of Ravicherla was not a grant to the plaintiffs' family by the Government and that the plaintiffs' family acquired the property not as the result of any such grant from the Government, but as

the result of a family arrangement with the other members of the family. I also fail to see how, if indeed all the parties at the time agreed to the village of Ravicherla being treated as the property of the Government for the purpose of its being granted on the terms set out in the sanad to the plaintiffs' family, it could now be contended that there was no such title in the Government to impose any conditions.

However, as I have already observed, it is unnecessary, in view of the decision I have arrived at, that the grant was by the Government itself, which had the property vested in it at the time so as to enable it to make the grant, that there should be any further consideration of the legal effect of the plaintiffs' family having accepted a sanad in respect of the village from the Government and having purported to continue to hold it under the terms of the sanad till the other day when they applied to the Government for permission to alienate the property, a permission which was refused.

But this conclusion does not dispose of the case, because it is only a conclusion with regard to what may be said to be the argument based on facts. But assuming that the sanad should be deemed or regarded as the source of the plaintiffs' title to the village in question and that therefore the nature and extent of the rights with regard to the prayers in the plaint should be determined by the sanad itself and the terms therein set out, the contentions were even more ingenious and strenuous which were put forward by the learned vakil for the plaintiffs to establish that the plaintiffs' right to the village should be adjudged to be absolute and untrammelled by any conditions.

The first argument had reference to the Crown Grants Act, Act XV of 1895. It was not in its true nature so much an argument as an answer by way of anticipation. The learned vakil for the plaintiffs assumed that for the defendant the Crown Grants Act will be referred to and relied upon as enabling or justifying the alienation and began by assailing it in limine. But looking at the preamble and considering the purpose of the Act it cannot be doubted that the Act was rather declaratory in its nature than enabling or enacting. It had to be enacted, so says the preamble, because doubts had arisen as to the extent and operation of the Transfer of Property Act of 1882.

Prior to the Transfer of Property Act, there was no statutory enactment of the Indian Legislature regulating transfers of property. But after that Act was passed apparently doubts came to be expressed or entertained whether that was an Act governing transfer of property by act of parties who were subjects of the Crown or whether the provisions of the Act applied also to transfers of property by the Crown. Taking the terms of the Crown Grants Act, the inference seems to be irresistible that prior to the Transfer of Property Act there was no doubt whatever as to the power of the Crown to make a transfer of property in any terms, or under any of the conditions whatsoever.

Apart from one argument which shall be referred to hereafter, the learned vakil for the plaintiffs did not refer to any limitations on the power of the Crown to create or transfer estates previous to the passing of the Transfer of Property Act. The personal law of the Hindus or Muhammadans or other communities in India could not possibly affect the rights of the Christian sovereign power. If all Acts of Legislature owe their origin to the sovereign power whatever that may be, in the absence of clear indication to the contrary, the provisions of statutory law should be regarded as governing transactions only of the subjects of the sovereign power and not of the sovereign power itself. Further the rules of law whether statutory or otherwise, governing and regulating transfers of property as between subject and subject of the sovereign power, are based or should be deemed to be based on principles which cannot in any wise be regarded as applicable to a transfer by the sovereign power itself.

As I read the Crown Grants Act, it became necessary for the Legislature to pass such an Act altogether declaratory in its nature, merely because of the doubts which came to be entertained after the passing of the Transfer of Property Act. The meaning and significance of Crown Grants Act of 1895 is merely a re-statement of the principle underlying S. 3 thereof, namely, that the Crown is entitled to impose any restrictions, conditions or limitations over, whatsoever,

in any grant or transfer it may make whether such restrictions, conditions or limitations over, would be legal or valid or not in any grant or transfer made by one subject to another, and it became necessary for the Legislature to re-state and re-affirm the principle only because of the doubts that arose subsequent to the passing of the Transfer of Property Act.

I cannot, therefore, regard the Crown Grants Act as an enacting or enabling measure of the Legislature or even as a ratifying Act with retrospective effect making legal that which was not so. An explanatory and declaratory Act cannot be regarded or construed as if it were an enactment creative or regulative of rights or obligations. It seems to me therefore unnecessary to deal in detail with the very long and learned argument addressed to us for the plaintiffs with special reference to the Crown Grants Act. I am satisfied that the sanad in this case which was a grant by the State or sovereign authority would be binding according to its tenor. I shall therefore merely refer briefly to the other contentions of the learned vakil for the plaintiffs. His first contention was that S. 3 providing for Crown Grants taking effect according to their tenor refers merely to such grant or transfer as aforesaid, and therefore refers back to S. 2 and is confined in its operation to a grant or transfer here ofore made or hereafter to be made by or on behalf of Her Majesty the Queen-Empress, her heirs or successors or on behalf of the Secretary of State for India in Council. The Secretary of State for India in Council came into being only on the assumption, by Her Majesty Queen Victoria, of the government of India in 1858 and the title of Empress of India was conferred on Her Majesty only in 1876 and the argument founded thereon was that, therefore, the grants and transfer of property to which the Act is applicable are only grants and transfers made subsequent to 1858 or 1876. But I have already come to the conclusion that the Act, as such, is intended to be limited only to grants and transfers subsequent to the passing of the Transfer of Property Act.

When S. 2 lays down that nothing in the Transfer of Property Act shall apply or be deemed to have applied to any grant or transfer made before 1895 or to be made after 1895 I cannot regard the Act as intended to apply to the construction of any grant made previous to the year 1882. But at the same time I cannot accept the argument of the learned vakil for the plaintiffs that merely because the expression used is "Queen Empress" and that title was conferred on Her Majesty only in 1876 the Act must on that ground be confined in its operation only to grants or transfers made subsequent to 1876. The mere fact that a person is referred to in a document, albeit a statute of the Legislature, by his or her present title seems to me to be no reason, apart from the context, to hold that a limitation or definition of the time is thereby introduced impliedly, by referring only to the period of time subsequent to the adoption or conferring of the title and there seems also no reason for supposing that the expression was not used merely to indicate the sovereign bearing the title.

The next contention for the plaintiffs was that previous to the assumption of the sovereignty of India by the Crown in 1858 the sovereignty was in the United East India Company and that, therefore, the grant which was made in the year 1843 under the sanad issued by the Company could not be regarded as a grant by or even on behalf of the Crown. This condition has been to my mind conclusively answered by the learned Government Pleader who appeared for the Secretary of State. The Parliamentary Act 3 and 4 Will. IV Cl. 85 both in the preamble and in S. 1 provides, and declares that the territories revenues, etc. of India in the possession and under the Government of the Company shall remain and be vested in the Company in trust for His Majesty and even in the Government of India Act, 1853, similar words were used. In *Gibson* v. *East India Company* (9) the general principle of law is referred to that all conquests made by subjects necessarily belong to the Crown and in the case of *Advocate General* v. *Rechmond* (1) it is pointed out that the vesting of the territories and revenues in the United East India Company is in trust for Her Majesty for the service of the Government of India. See also *The Secretary of State* v. *Kamachee Boye Sahaba* (1).

(9) [1839] 5 Bing (N. C.) 262=7 Scott. 74—8 L. J. C. P. 193.

(10) [1845] Perry's O. C. 566.

It seems to me unnecessary to refer to all the cases that have been cited at the bar in connexion with this question, because the terms of the statute are to my mind perfectly clear.

It was also argued by the learned vakil for the plaintiffs that even assuming that the Government of the country was carried on by the Company in trust for Her Majesty it does not follow that the grant was a grant made on behalf of Her Majesty. The contention was that the expression "on behalf of" imports some sort of agency and that it cannot be said that a grant by a trustee is on behalf of the beneficiary. I cannot possibly agree with such a contention, and having regard to the context in which the terms have been used, I feel no difficulty whatever in holding that when a grant is made by an agency exercising delegated sovereign power the grant is properly described as made on behalf of the supreme sovereign power.

The next argument advanced on behalf of the plaintiffs was not on the construction of the Crown Grants Act but with regard to the entire Act on the footing that the Act itself was ultra vires of the Indian Legislature. It was said that under the English Common Law the Crown cannot create an estate unknown to law. It may well be asked, unknown to which law? Is it the Common Law of England or India or the Statute Law of England or this country, and what is the meaning of the expression "estate unknown to law"? An estate inalienable in its nature is not an estate unknown to law.

But after all I fail to see, how, assuming for the purpose of the argument that the contention is well founded that the Crown cannot create an estate unknown to law, that makes the Crown Grants Act ultra vires. The Indian Legislature is, while legislating within the limits imposed by Parliament in the same position as an independent and absolute legislature. Under S. 22 of the Indian Councils Act, 24 and 35 Vict., Ch. 67, the Governor-General in Council is empowered to make laws for all purposes and for all things whatever. There is however, in that section a proviso, that the Governor-General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of that Act and certain other Acts therein referred or which may affect the authority of Parliament or the constitution and rights of the East India Company or any part of the unwritten laws or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

Mr. Venkataramana Rao's argument, if I understand him rightly, was to the effect that it was part of the common law of the United Kingdom of Great Britain and Ireland that the Crown cannot create an estate unknown to law and the said proviso forbids the Governor-General in Council from making any law which will affect any part of the unwritten laws or the constitution of the United Kingdom of Great Britain. But he omitted from consideration altogether the qualifying clause beginning with the words "whereon may depend in any degree the allegiance of any person etc." I am unable, therefore, to accept the argument that the Crown Grants Act should be regarded as ultra vires for the reason that it enables the Crown to create an estate unknown to the law.

A further contention was also advanced to the effect that the Crown Grants Act was ultra vires also because it was calculated to affect the authority of the Parliament. I must confess I was unable to understand the argument of the learned vakil with regard to this contention. I cannot even imagine how, assuming that the Act enables the Crown to create an estate unknown to the law, the authority of the Parliament is thereby affected.

For all these reasons I have no hesitation in rejecting the contention of the learned vakil for the plaintiffs respondents that the Crown Grants Act is ultra vires of the Indian Legislature. But after all in the view I have taken, that the Crown Grants Act is not an enacting or enabling measure but for which the Crown could not make a particular kind of grant but is only an explanatory and declaratory Act and in terms refers only to grants made subsequent to 1882, it seems to me futile to examine more minutely the contention that it is ultra vires.

The learned vakil for the plaintiffs has not shown how otherwise the grant in this case should be regarded as void or illegal or not binding on the plaintiffs.

There is only one other contention on behalf of the plaintiffs which remains to be noticed, and that is the argument based on section 8 of Regulation XXV of the Madras Regulations. Under that section it is provided as follows :

Proprietors of land shall be at free liberty to transfer without the previous consent of the Government or of any other authority. to whomsoever they may think proper, by sale, gift, or otherwise, their proprietay right in the whole, or in any part of their zamindaries.

But this section and the Act itself apply only to lands for the revenue payable to the Government in respect of which an assessment is permanently fixed. In the case before us no such permanent assessment is fixed or made payable to the Government under the sanad. This argument also, therefore, fails.

In the result I agree with my learned brother in the conclusion that the judgment of the lower Court cannot be sustained and that, therefore, the appeal should be allowed and the plaintiffs' suit dismissed with costs both in this Court and in the Court below.

Appeal allowed.

A. I. R. 1926 Madras 720

PHILLIPS AND RAMESAM, JJ.

Walker & Co. — Defendants — Appellants.

v.

G. Abdul Aziz Sahib & Co.—Plaintiffs—Respondents.

Original Side Appeal No. 94 of 1923, Decided on 15th October 1925, from the judgment of Coutts-Trotter, J., D/- 30th August 1923.

Practice—Pleadings—Suit for recovery of goods consigned by the plaintiff with defendant—Defendant executing trust in favour of creditors—Impleading trustee as defendant does not amount to abandonment of claim against the original defendant.

The plaintiff sued 1st defendant for the value of goods consigned with him (the 1st defendant). Subsequent to the suit plaintiff hearing that the 1st defendant had executed a deed of trust in favour of creditors with certain creditor as trustee, applied to bring that creditor on record as 2nd defendant, alleging in his affidavit that any adjudication that may be made should bind the 2nd defendant also as trustee. The plaint was amended and a new paragraph added, stating inter alia that "the moneys realized by the 1st defendant are plaintiff's moneys in the hands of the 1st defendant firm, or, in other words, trust moneys payable to plaintiffs specially. The plaintiffs therefore submit that they are entitled to be paid even by the 2nd defendant firm preferentially and in full." The trust deed contained a clause making it lawful for the trustee to pay in full or otherwise by dividends any creditor who would decline to assent to the deed.

Held : that as the trust fund was not identifiable, plaintiff was not entitled to a decree against 2nd defendant. A mere attempt to obtain a payment of larger amount than the pro rata dividend under the clause in the trust deed in favour of creditors in respect of non-assenting creditors, not agreed to by the trustee and not coupled with any other conduct on the part of the creditor, will not amount to an acquiescence in the deed of assignment, and hence the plaintiff in impleading the second defendant as a party exercised no election and had not given up his against 1st defendant. [P. 720, C. 1]

King and *Partridge*—for Appellants.

V. C. Gopalaratnam—for Respondents.

Judgment.—This is an appeal from the original side. The suit was brought to recover the value of certain goods consigned by the plaintiffs with the 1st defendant firm of Messrs. Walker & Co., as a free consignment. The suit was filed on 24th August 1922 and the written statement of Walker & Co. was filed on 2nd October 1922. By that time Walker & Co. had executed a trust-deed in favour of the creditors with the firm of Messrs. Fraser and Ross as trustees. In the list of creditors at the end of the deed, the plaintiffs' name does not occur. We are informed that the written statement of Walker & Co., was signed by Mr. Fraser under Cl. II of the deed authorizing him to defend suits against Walker & Co. In December 1922 the plaintiffs having heard of the assignment applied by Judge's summons to make Frazer & Ross parties to the suit and their firm was impleaded as 2nd defendant.

The plaintiffs' contention that the 2nd defendant was liable on the ground that the consigned goods were held by Walker & Co. as trustees for the plaintiffs, the plaintiffs can follow the goods or their proceeds into the hands of the assignees, was disallowed by the learned Chief Justice on the ground that the trust fund was not identifiable. He relied on *In re Hallett & Co., Ex parte Blane* (1).

(1) [1893] 10 Morrell 250.

He also held that the plaintiffs did not give up their right of action against the 1st defendant by impleading the 2nd defendant. The 1st defendant appeals and the contention before the learned Judge has been repeated before us.

The principle has been stated thus by Lord Cranworth in *Forbes* v. *Limond* (2).

But this, I think, is perfectly certain, that no person can be considered to have impliedly acceded to a deed of this sort within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors as if he has executed it; the principle of the rule being that if you put yourself in the situation of having the benefit of a deed you must bear its obligations although you have not literally executed the deed.

In the case of *Re Brindley, Ex parte*(3) it was held that the creditor could not file the bankruptcy petition as he assented to the deed of assignment. Vaughen Williams, L. J., relied on two acts of the creditor: (1) he accepted payment for timber supplied to the trustee; (2) he attempted to obtain a sum of money which he could obtain effectually only under the deed, i. e., under the last clause of the deed which provided that, in the discretion of the 'trustee' or if a majority of the Committee of Inspectors directs, it shall be lawful for the trustee to pay in full or otherwise than by dividends under these presents, any creditor or creditors who shall decline to execute or assent to these presents. Stirling, L. J., expressly mentioned the first reason and not the second. But towards the end of his judgment he stated:

For these reasons and the other reasons stated by the Lord Justice, I think the appeal ought to be allowed.

Cozens Hardy, L. J., said:

I am of the same opinion and for the same reasons.

He then pointed out that the last clause of the deed was a most improper clause as it offers a bribe to non-assenting creditors. I doubt if a mere attempt to obtain a payment larger than the dividend under such a clause not agreed to by the trustee and not coupled with any other conduct on the part of the creditor (as in the case just cited) will amount to an acquiescence in the deed of assignment, and if it does not, there is nothing in the present case to show that the plaintiffs have "put himself in the situation of having the benefit" of the deed to use Lord Cranworth's language. But I will assume that a mere attempt to obtain payment from a trustee under a clause of the kind may amount to an acquiescence. In the present case, there is such a clause, Cl. (8).

But, what are the facts of the case before us? The plaintiffs never agreed to accept a payment pro rata. It is stated by the learned counsel for the appellant that Messrs. Fraser & Ross were and are willing to pay the plaintiffs pro rata. The plaintiffs would not have it but insisted on a decree for the full amount claimed and because of this, the suit was dismissed in toto against the 2nd defendant. Nor did the plaintiff make any reference to Cl. 8 of the deed either in the affidavit or in the plaint. In paragraph 4 of the affidavit, in stating the contents of the deed, they referred to the power of the trustee to pay either pro rata or the whole amount if the creditor is a secured creditor or if there are trust moneys due, but there is no reference to the power of the trustee to pay a larger amount to a non-assenting creditor in his discretion. In paragraph 5 they wind up by saying:

Leave should be granted to the plaintiffs to make the necessary amendments to the plaint alleging cause of action, against the trustees also, as it is necessary that any adjudication that may be made should bind Messrs. Fraser & Ross not merely as agents of Messrs. Walker & Co., but also as trustees.

Leave was granted and paragraphs 10 (a) and 10 (b) added to the plaint. Paragraph 10 (a) stated the summary of the contents of the deed of assignment. In paragraph 10 (b) the plaintiffs say:

The moneys realised by the 1st defendant are plaintiffs' moneys in the hands of the 1st defendant firm or in other words trust moneys payable to plaintiffs specially. The plaintiffs, therefore, submit that they are entitled to be paid even by the 2nd defendant firm preferentially and in full.

They did not refer to Cl. 8 of the deed, but alleged as the ground for 2nd defendant's liability that the proceeds of the goods were trust moneys. This is the only ground given for 2nd defendant's liability. The use of the word 'preferentially' in paragraph 10 (b) without referring to Cl. 8 of the deed cannot amount to more than is implied by the use of the words 'in full' following it and this is all what the learned Chief Justice must have meant in the last sentence of the paragraph in his judgment dealing with this question.

(2) [1854] 4 De. G. M. & G. 298=18 Jur. 33=2 W. R. 262.

(3) [1906] 1 K. B. 377=94 L. T. 116=54 W. R. 301=13 Manson 1=22 T. L. R. 155=75 L. J. K. B. 211.

Not only was 1st defendant not given up, but it is also expressly stated that the 2nd defendant's liability was to be in addition to the 1st defendant's by the use of the word 'even' in paragraph 10(b) of the plaint and 'also' in the affidavit.

If the trust fund was identifiable or the goods could be traced to the trustee's hands both the defendants would be fully liable and it is not a case where only one or the other can be liable. The claim paragraph 10 (b) is thus one founded on a legal basis and not on the terms of the trust deed. As the trust fund was not identifiable, the double claim failed, but because of this double claim the intention cannot be imputed to the plaintiff in the absence of clear and unambiguous words or acts amounting to abandonment of the 1st defendant. So long as the claim against the 2nd defendant is attributable to the ground that there were trust moneys and is coupled with the claim against 1st defendant there can be no election to give up 1st defendant nor acquiescence in the deed. Nor does the case of *Harland* v. *Binks* (4) help the appellant. There the creditor applied to the trustee for an explanation and when he received the trustee's reply expressed himself that "he was satisfied" and Lord Campbell held that this amounted to acquiescence. In the present case we have neither negotiations nor any act outside Court and all that can be relied on by the appellant is contained in paragraph 10 (b) of the plaint and paragraph (5) of the affidavit both making it clear that the 1st defendant was not to be given up. Though it turned out that plaintiff cannot make the 2nd defendant liable in the way he wished it is clear that he never wished to make him liable on a footing which involved the giving up of the 1st defendant. The appeal fails and is dismissed with costs.

If we had come to the conclusion that the plaintiff accepted the deed, it would involve a miscarriage of justice to dismiss the suit in toto. The plaintiff could be then entitled to a decree pro rata against the 2nd defendant. But this can be given under O. 41, R. 33 only after adding them as parties in the interests of justice—a course to which the appellant's counsel has no objection. But on the view we take, it is unnecessary. (*Appeal dismissed.*)

(4) [1850] 15 Q. B. 713=20 L. J. Q. B. 126=14 Jur. 979.

A. I. R. 1926 Madras 722

KRISHNAN, J.

Public Prosecutor—Appellant.

v.

Kalia Perumal Naicker—Accused—Respondent.

Criminal Appeal No. 336 of 1925, Decided on 18th November 1925, from the judgment of the 2nd Cl. Bench Mag., Shevapet, in Summary Trial No. 1126 of 1923.

Madras District Municipalities Act, Ss. 338, 249 and Sch. V, Cl. 2—Commission agent selling grain wholesale and not being a mere auctioneer is covered.

A commission agent, who is not merely an auctioneer or crier, selling grain wholesale on account of his customers for commission is also required to take out license. [P. 722, C. 2]

Public Prosecutor—for the Crown.

A. K. Balakrishna Menon—for Respondent. (*Amicus Curiae.*)

Judgment.—This is an appeal by the Government against the acquittal by the Bench Magistrate, Shevapet, of the counter-petitioner against whom a charge had been brought of failure to take out license for selling grain wholesale. Under S. 249 of the District Municipalities Act (V of 1920) read with Sch. 5, Cl. (c) of the same Act, any person who sells grain wholesale has to obtain license. If he fails to do so, he is liable to be punished under S. 338. The Bench Magistrate acquitted the accused on the ground that he was only getting commission for auctioning the grain. The question for decision is whether he is not even as a commission agent a person who sells grain. What he actually did was to sell by auction bandy-loads of grain wholesale. The grain belonged to his customers who sent it to him for sale and he effected the sale by auction and obtained a remuneration by way of commission. He is nevertheless the person who actually sold the grain. It is clear, therefore, that he is a person who comes within Cl. (c) of Sch. 5 and must take out a license. It is not a case of mere crier or auctioneer who auctions the goods of another person in the latter's presence and acts as a mere agent for the purpose. The accused is, as I understand from the records, a commission agent, who sells other people's goods, and receives remnueration by a commission he being

treated as the actual seller of the goods.

In these circumstances the acquittal must be set aside and the accused convicted under S. 338 of the District Municipalities Act. He is fined Rs. 5 and will undergo simple imprisonment for two days in default of payment of the fine.

Acquittal set aside.

A. I. R. 1926 Madras 723

ODGERS AND MADHAVAN NAIR, JJ.

(*Kijanar*) *Sheshappa Shetty*—Defendant—Appellant.

v.

Kijanar Devaraja Shetty—Plaintiff—Respondent.

Second Appeal No. 787 of 1923, Decided on 2nd November 1925.

(a) *Malabar Law—Maintenance is not carrect equivalent of "chilavu."*

The English word "maintenance" is not, a correct equivalent of the Malayalam word "chilavu" of which it is generally understood to be a transalation. The term means "expenses" and is comprehensive in its significance.

[P 725 C 1]

(b) *Aliyasanthana Law—Marriage expenses of junior member should be defrayed by ejaman.*

The marriage expenses of a junior member of a tarwad or Aliyasanthana family should be defrayed by the the karnavan or ejaman, provided that the family has adequate funds; and the karnavan or ejman has no valid and proper objections to the marriage (*Case Law reviewed.*).

[P 725 C 2]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondent.

Judgment.—We are invited in this second appeal to set aside a decree by which the Court of appeal below in concurrence with the Court of first instance gave the plaintiff a sum of Rs. 182-9-3 on account of expenses incurred by him for performing his marriage. The plaintiff is a junior member of a family of which the ejman is the defendant. The parties are Jains of South Kanara governed by the Aliyasanthana Law. In reply to the plaintiff's claim, the defendant pleaded that he is not the ejaman, that the plaint property is not family property that the marriage was not arranged or performed with his consent and that, in any event, the ejaman of an Aliyasanthana family is not bound in law to contribute to the marriage expenses of a junior member.

The lower Court overruled all these pleas. As regards the want of consent alleged by the ejaman, it is conceded for the appellant that the lower Courts should be deemed to have found that the ejaman withheld his consent for the marriage perversely and on no justifiable grounds. In these circumstances, Mr. Sitharama Rao argues that the lower Court's decree is contrary to law because (1) the law does not recognize the union between a man and woman following the Aliyasanthana law as a valid and binding marriage and (2) this item of expenses should not on any account be included within the rule making maintenance a proper charge on the revenue of the family. The important question for our decision is whether the plaintiff, a junior member of an Aliyasanthana family, is entitled to claim his marriage expenses from the ejaman of the family.

The Aliyasanthana system is very similar in its incidents to the Marumakkathayam Law: see *Subbu Hegadi* v. *Tongu* (1) and *Muthu Amma* v. *Gopalan* (2). A karnavan in Malabar is the senior male member of a group of persons, all of them tracing their descent in the female line from a common female ancestor owning joint property under the absolute control and management of the karnavan. This group forms a Marumakkathayam tarwad see: *Kenath Puthen Vittil Shuppu Menon* v. *Narayanan* (3). The powers and rights of the karnavan, who corresponds to the ejaman of the Aliyasanthana family, have been laid down in various decisions of this Court. Large and absolute though his powers be over the administration of the tarwad property and its funds, the regulation of the tarwad's internal economy, and the protection, control and supervision of the junior members, it should never be forgotten that the tarwad property in his possession is not exclusively his own, but he owns it along with the other members only as a co-proprietor. As observed in *Narayani* v. *Gobinda* (4)

> although as a senior member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family.

The right of ownership is of overwhelming importance to the junior members as it clothes them with very valuable rights which they can enforce against

(1) [1869] 4 M.H.C. 196.
(2) [1912] 36 Mad. 593=16 I.C.895=23 M.L.J. 496.
(3) [1904] 28 Mad. 182=14 M.L.J. 415 (F. B.).
(4) [1884] 7 Mad. 352.

the karnavan. The status of a member of a Malabar tarwad carries with it four distinct rights, viz., (1) a right to be maintained by the karnavan ; (2) a right to see that tarwad property is not alienated otherwise than in accordance with law (3); a right to become the tarwad karnavan, when he becomes the senior male member, and (4) a right to a share if a partition were made and the tarwad broken up by common consent *Moidin Kuthi* v. *Krishnan* (5), *Ibrayan Kanhi* v. *Komamutti Koya* (6) and *Muthu Amma* v. *Gopalan* (2). To these might be added another right, viz., a right to bar an adoption *Chandu* v. *Subbu* (7).

Of these rights obviously the most substantial one is the right to "maintenance," as such a right is the mode in which the right of ownership in the tarwad property is most effectively enforced by the junior members. The value of such a right in the case of persons living under a system of law which does not sanction compulsory partition, nor recognizes son's claims against the father cannot be overestimated. The nature of this right has been thus described by Seshagiri Aiyar and Bakewell, JJ., in *Ammani Amma* v. *Padmanabha Menon* (8) :

> The allowance claimed by an anandravan of a Malabar tarwad or by a junior member of a joint Hindu family is not as a dependent upon the owner of the property, but as one who, in his own right, is entitled to participate in the income. The common law in both cases having vested the management in the senior member, the claim for separate maintenance is an index of proprietorship and not founded upon moral or quasi-legal obligations or inability to maintain himself or herself ..... It is clear that the right of a member of a tarwad for an allowance is an incident of co-proprietorship in the property of the tarwad and that consequently that right cannot be denied unless circumstances show that the tarwad is not in a position to give a separate allowance.

See *Achutan Nair* v. *Kunjunni Nair* (9); *Maravadi* v. *Pammakka* (10) ; *Kunhi Krishna Menan Karnavan* v. *Kunhikav Ammal* (11) and *Govindan Nair* v. *Kunju Nair* (12).

(5) [1887] 10 Mad. 322.
(6) [1892] 15 Mad. 501=2 M.L.J. 255.
(7) [1889] 13 Mad. 209.
(8) [1918] 41 Mad. 1075=48 I. C. 104=35 M.L.J. 509.
(9) [1903] 13 M.L.J. 499.
(10) [1911] 36 Mad. 203=22 M. L. J. 309=14 I.C. 383=(1912) M.W.N. 109.
(11) [1918] 35 M.L.J. 565=(1918) M.W.N. 761.
(12) [1919] 42 Mad. 686=36 M. L. J. 565=51 I.C. 328=(1919) M.W.N. 302.

The term "maintenance," as has been pointed out, is often loosely applied. In its limited sense, as understood in Malabar it means the expenses required for food, raiment and oil ; in its more comprehensive sense, it includes what is usually called in Malazalam "menchilavu," which is treated as a part of maintenance: see *Govindan Nair* v. *Kunju Nair* (12). According to Sundara Aiyar, J., the word "menchilavu" is usud to designate a part of what is required for the support of a person and is distinguished from what is strictly necessary for food and raiment. Legally it may be taken to mean part of what would be included in the terms "maintenance and necessaries." Sadasiva Aiyar, J., states that "the literal meaning (of the term "menchilavu") seems to be 'excess expenditure'." I take it that it means that it is usually allowed beyond what is strictly required for food and clothing alone.

Under the expression, therefore, come the sums which are required for keeping up a respectable appearance consistent with the position and dignity of the family to which a person belongs, sums required for a reasonable amount of travelling to holy places in the case of a member of an aristocratic family, etc., for slight convenience and comforts, which though they might be called luxuries when indulged in by a low class individual, would come under the head of "necessaries" in the case of persons belonging to families which cannot be classed with the lower sections of the community : see *Valia Konikkal Edamkelu Achan* v. *Lakshmi Nettyar Ammal* (13). In *Ravanni Achan* v. *K. N. Karnavan* (14), Phillips, J., described "menchilavu" as "a luxurious form of maintenance" as distinguished from bare maintenance" and stated that "the claim to both must be treated as based on the same footing." Coutts-Trotter, J., as he then was, and Kumaraswami Sastri, J., observe that 'menchilavu' which has been translated as "maintenance" is said to be indistinguishable from maintenance of the members of a Hindu family." S. A. Nos. 2556 and 2557 of 1912. The loose application of the word, as pointed out above, is due to the fact that the

(13) [1913] M.W.N. 379=18 I.C. 234.
(14) [1919] 42 Mad. 789=37 M. L. J. 157=10 L.W.142=52 I.C. 918=(1919) M.W.N. 571.

English word "maintenance" is not, strictly speaking, a correct equivalent of the Malayalam word "chilavu" of which it is generally understood to be a translation. The term means "expenses" and is comprehensive in its significance. The right to maintenance is the right to claim one's "expenses" which obviously must be of various kinds.

By the enforcement of this right which, as already mentioned, is 'given to a member of a Malabar tarwad or an Aliyasanthana family by reason of the proprietary interest possessed by the member in the family property, the junior members have been able to secure legal recognition of their claims not only for the cost of the "bare necessaries of life," but also for the expenses legitimately incurred for "medical treatment" *Kelu Achan* v. *Umala Achan* (15), and also for arrears of "menchilavu" (for instance, expenses "for clothes oil, soup, tea, coffee and confectionery) *Ravanni Achan* v. *Thankunni* (14) : see also *Valia Konikkal Edamkelu* v. *Lakshmi Nettyar Ammal* (13); assuming that there are adequate funds at the disposal of the family. The decision in *Krishnan* v. *Govinda Menon* (16) recognizing the obigation of the karnavan to educate the junior member, declared that it was not incumbent on him as part of his duties to " give the junior members education through the medium of the English language or on Western lines." Such a claim, if made now would for its decision, as suggested in the judgment itself, depend upon the question whether such education " has not' become essential." In *Neelakanta Thuruvambu* v. *Ananta Narayan Aiyar* (17), it was held that having regard to the circumstances of the family which was a well-to-do one

a contract by a karnavan engaging a tutor for the purpose of teaching the English language on reasonable terms as to remuneration for the members of the family is binding upon the succeeding karnavan and that the debt thus due is payable out the assets of the family.

If all these claims can be recognized as legal, whether they come under the strict designation of " maintenance" or not, the claim for the allowance being based on the junior members' co-proprietorship of the joint family property, we fail to see why the marriage expenses of a junior member of a tarwad or Aliyasanathana family should not also be defrayed by the karnavan or ejaman, provided that the family has adequate funds, and the karnavan or ejman has no valid and proper objections to the marriage.

The junior members of an Aliyasanthana family or a Malabar tarwad are not expected to live in a perpetual state of celibacy, and it is not denied that marriage is a necessary incident in the normal life of individuals in Kanara and Malabar as in other parts of the country. It has been held in *Srinivasa Aiyangar* v. *Thiruvenkathaiengar* (18) and *Gopalan* v. *Venkataraghavalu* (19), that the marriage of a male governed by Mitakshara Law is a necessary burden upon the family. We have been pressed with the argument that as under the Aliyasanthana law union of man and woman is. "in truth, not a marriage but a state of concubinage into which the woman enters of her choice and is at liberty to change when and as often as she pleases.

See *Subba Hagadi* v *Tongu* (1). There can be no legal obligation on an ejman or a karnavan to defray the expenses of the so-called marriage. In our opinion, this argument has absolutely no bearing on the decision of this question. The prevailing system of marriage is a well-recognized and time-honoured social institution sanctified by the long usages of the society to which the parties belong. The fact that the Courts have refused to consider it as a valid marriage in law is no reason why the family, if it can afford the means, should refuse to defray the expenses for the marriage of a junior member. In our opinion, the marriage expenses of a junior member of a Malabar tarwad or Aliyasanthana family form a part of his " right to maintenance."

The cases referred to above do not by any means exhaust the variety of expenses for meeting which an anandravan can make a valid claim against the karnavan of the tarwad. It has been held in *Subbu Shattithi* v. *Krishnacharya* (20)

(15) [1912] 17 I.C. 704.
(16) [1898] 8 M. L. J. 294.
(17) [1907] 19 M. L. J. 590=4 1. C. 724.

(18) [1912] 38 Mad. 556=25 M. L. J. 644=(1913) M. W. N. 1034=23 I. C. 264=(1914) M. W. N. 282.
(19) [1915] 40 Mad 632=31 I. C. 574=29 M. L. J. 710.
(20) [1910] 21 M. L. J. 159=11 I. C. 23.

though guardedly, that in certain circumstances a karnavan is entitled to raise money on the security of the family property for the defence of the members of the family charged with 'rioting' if the money could not otherwise be procured. The exact legal basis for the liability of the tarwad property is not stated in the judgment; but the observations of Miller and Krishnaswami Aiyar, JJ., in S. A. No. 359 of 1906 and earlier case that.

> there is some evidence that some money was borrowed for expenses of the defence of a member of the family who was prosecuted in a criminal case but the nature of the criminal case does not enable us to say that the defence was for a family purpose.

would suggest that the question to be decided would be whether the expenditure is for a family purpose though the judgment does not show the exact bearing of the nature of the criminal case on the question of family purpose. In a still earlier case, i. e., S. A. No. 28 of 1888, without referring to the nature of the criminal charge and its connexion with the question of family purpose (the available papers do not show what the charge was). Sir Arthur Collins, C. J. and Parker, J,, held that.

> the lower Court rightly decided that the money borrowed for the purpose of defraying the expenses incurred in a criminal charge against the karnavan and two senior anandravans was a debt incurred for the tarwad purpose and binds the tarwad.

In our opinion, the cases discussed above are but illustrations of the rule that the junior member of a Malabar tarwad or Aliyasanthana family is entitled to claim from the karnavan or ejaman for his maintenance all his "necessary expenses," the justification for such a demand being his undoubted co-ownership of the tarwad property. Such expenses when defrayed by him would be expenses incurred by the karnavan for tarwad purposes and would bind the tarwad. What expenses are necessary may, in disputed cases, be safely left to decision of Courts. The principle is thus stated by Sundara Aiyar, J., in his treatise on Malabar Law:

> The rule of law is that the anandravan should be allowed for his maintenance what is reasonable and proper having regard to his needs and having regard to the position, affluence and status of the family. What is reasonable and proper will depend upon the circumstances and the times and would be a pure question of fact.

There is nothing in the conclusion we have reached, contrary to the principle of the Malabar or Aliyasanthana law.

We are fortified in our conclusion that the junior member is entitled to claim his marriage expenses by the decision in *Parvathi* v. *Kamaran* (21). It was held in that case that in North Malabar the male members of a Nayar tarwad are by custom entitled to receive from the karnavan an allowance for the maintenance of their consorts and children while living in the tarwad house. In the present case the junior member does not pitch his demand so high. He claims only the expenses incurred for the performance of his marriage. It is well known that the Aliyasanthana people in South Kanara have advanced further towars the paternal family than have the Marumakkathayam people in Malabar. It is the recognized practice in South Kanara for the woman and her minor children to live with her husband: see *Subbu Hagadi* v. *Tongu* (1). It is a common practice in North Malabar and a growing practice in South Malabar: see *Parvathi* v. *Kamaran* (21), and *Muthu Amma* v. *Gopalan* (2). As this decision is based upon the custom in North Malabar which exists in an intensified form in Kanara, it follows that a junior member under the Aliyasanthana system also would be entitled to claim such expenses. If so, his right to claim the expenses of his marriage should be undoubted and, as we have shown, there is nothing in the principle of Aliyasanthana law against the recognition of such a right.

We are asked not to place much reliance on the decision in *Parvathi* v. *Kamaran* (21) as its authority is alleged to be somewhat shaken by the observations of the learned Judges. who decided the case reported in *Pavanni Achan* v. *Thankunni* (14). In that case Phillips and Napier, JJ., held that an anandravan of a Malabar tarwad is not entitled to claim maintenance from his tarwad for his wife, who belongs to another tarwad, and much less is he entitled to claim for her any "menchilavu." The learned Judges think that to allow such a claim put forward by the anandravan would be to uphold the claim of the wife for maintenance from her husband's tarwad and then they refer to *Parvathi* v. *Kamaran* (21) and point out that even

(21) [1883] 6 Mad. 341.

in that case the proposition contended for was described as inconsistent with the principle of Marumakkathayam law.

With due deference it seems to us that the true significance of the claim advanced on an andravan's behalf has not been correctly appreciated by the learned Judges. By asking for an allowance for the maintenance of his wife the junior male member of a Malabar tarwad is not asking the Court to hold that his wife has a right to recover maintenance from his tarwad. In so doing, he is only asking the Court to give effect to his right to recover from the karnavan expenses for his own maintenance of which "bharyachilavu" (wife's expenses) as it is called in Malabar is a necessary part. As observed in *Muthu Amma* v. *Gopalan* (2) by Sundara Aiyar and Sadasiva Aiyar, JJ., *Parvathi* v. *Kamaran* (21) held that a male member of a Marumakkathayam tarwad is entitled to an allowance for his consort and children living with him, that is, in computing the amount to which he is entitled for his own maintenance, the fact that he has to maintain a wife and childern should be taken into account.

The claim of a junior member of a Malabar tarwad to receive from the karnavan an allowance for the maintenance of his wife and children, though described as inconsistent with the principle of Marumakkathayam law, was still allowed in that case as the custom was found to support such a claim. In our opinion, the effect of the decision in *Parvathi* v. *Kamaran* (21) cannot be minimised by the observation

that the finding in that case (as regards custom(based on the evidence of two witnesses was not objected to.

This case has been referred to apparently with approval in *Marudevi* v. *Pammakka* (10) and explained as shown above in *Muthu Amma* v. *Gopalan* (2) and has always been looked upon by the community following these systems of law as enunciating a well-known and correct principle of customary law.

In this connexion it may be interesting to note the following observations occurring in the Malabar Marriage Commission Report as regards this custom.

But so well established is the custom that the High Court has held that the maintenance of the 'wives' and children of the junior members (residing with their 'husbands' in the husband's tarwad) is a charge which the karnavan of the junior members is bound to meet. The High Court allows that the ruling would seem inconsistent with the principles of Marumakkathayam law, but the answers to the interrogatories and the evidence taken by the commission show that *the ruling is really and truly in accordance with existing usage.*

The italics are ours.

For the above reasons, we hold that the lower Court's decree awarding the plaintiff the expenses for his marriage is correct. It has not been argued before us that the amount is excessive. This second appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 727

JACKSON, J.

Dewasikhamani Asari — Accused — Petitioner.

v.

The Crown—Opposite Party.

Criminal Revision No. 701 and Cr. Rev. Petition No. 590 of 1924, Decided on 27th August 1925, from the judgment of the S. J., West Tanjore, in Criminal Appeal No. 6 of 1914.

Penal Code, S, 409—Court Amin collecting money but not paying in Court for five months is guilty.

Where a Court Amin collects a large sum of money and does not pay it into Court until five months have elapsed, it is a fair presumption that he has misappropriated the amount, unless he can explain his action. [P 728 C 2]

Watrap S. Subramania Aiyar and *A. S. Srinivasa Aiyar*—for Petitioner.

J. C. Adam—for the Crown.

Order.—Appeal against the judgment and sentence of the Sessions Judge of West Tanjore in Crl. A. No 6 of 1924.

The appellant was convicted by the Sub-Divisional Magistrate, Pattukottai, and sentenced to undergo rigorous imprisonment for nine months under S. 409, Indian Penal Code. The learned Sessions Judge confirmed the conviction and reduced the sentence to the amount of imprisonment already undergone.

The appellant was an Amin of the Sub-Court at Kumbakonam and, admittedly, on the 27th February 1923, he collected a sum of Rs. 190-4-0 in Papanasam. He did not pay this amount into Court until the 2nd of July 1923, and the lower Courts have found that he was guilty of criminal misappropriation. There is no evidence of what

exactly he did with the money ; but if an Amin collects a large sum of money and does not pay it into Court until five months have elapsed, it is a fair presumption that he has misappropriated the amount, unless he can explain his action. The case of the defence was that the appellant was too ill in the intervening period to pay the money, but his own doctor, D. W. 7 says that the appellant came to him on the 25th April 1923, to get a certificate for the purposes of leave ; and if he could do that, presumably the appellant could also have paid the money into the Subordinate Judge's Court. It is also not clear why, if, as he says the appellant was taken violently ill after collecting the money at Papanasam, he was next heard of at Negapatam. I find that the facts constitute an offence under S. 409 and the appellant was entrusted with the money. Other warrants which were entrusted to the appellant were returned by post, and both the lower Courts have assumed that the appellant himself was the real sender ; but they have not discussed the question and no doubt on the record, the warrants were returned by one Sadasivam Pillai. Had that been the only circumstance pointing to the sanity of the appellant, I should have felt constrained to allow this petition, but, as I said above, he was perfectly sane in April. The learned Sessions Judge refers to the argument that the appellant became ill and was mentally deranged at the time he collected the money and that he lost it, and this, of course, is based on the defence evidence which must have been referred to at the time. It cannot be said that the learned Judge wholly failed to take into consideration the defence in the case. No doubt, the appellant voluntarily surrendered himself, but it was long after the commission of the offence.

The appellate Court allowed that this was a case for lenient treatment and remitted a considerable part of the appellant's sentence. There is no ground for interference and the petition is dismissed.

Petition dismissed.

✻ ✻ A. I. R. 1926 Madras 728

Full Bench.

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

(*Pannala*) *Subba Rao* — Defendant — Appellant.

v.

(*Parupudi*) *Lakshmana Rao* and *another*—Plaintiffs—Respondents.

City Civil Court Appeal No. 67 of 1922, Decided on 27th October 1925, from the decree of the City Civil J., Madras, in O. S. No. 487 of 1921.

✻ ✻ *Easements Act, S. 15—Mere assertion of ownership in litigation is not bar to acquiring easement ; exercising acts of ownership is fatal to claim for easement.*

The mere putting forward of a claim of ownership in legal proceedings is not conclusive against a right of easement, but if the acts done by the person claiming easement in respect of the property during the statutory period are only referable to a purported character of owner they cannot validate a subsequent claim to an easement in respect of the property. The question of animus is one of fact : 38 *Mad.* 1, *Overruled* ; *Lyell* v. *Hothfield*, (1914) 3 *K. B.* 911, *Foll.*

[P. 732, C. 2]

S. Doraiswami Aiyar and *A. Raghunatha Rao*—for Appellant.

P. Satyanarayana—for Respondents.

Order of Reference.

Phillips, J.—In this case there are two houses, Nos. 19 and 20, adjoining one another and apparently they both originally belonged to the same family. For many years past, and certainly for 20 years, the inhabitants of No. 20 have been using a privy situated in No. 19 and for that purpose have been enjoying the right of way over portions of No. 19. The plaintiff in this case originally brought a suit in 1917 for recovery of house No. 19, but that suit was dismissed. He has now brought the present suit for a declaration that he is absolutely entitled to the latrine marked 'C' in the plan and to the use thereof, and, in alternative, as a right of easement. Although the plaintiff's suit to recover house No. 19 has been dismissed, yet, in his plaint, he persists in asserting his right to it inclusive of the latrine marked 'C', and he pleads in the alternative that he is entitled to the use of the latter as an easement. The learned City Civil Judge has found that this right has been established and has given a decree accord-

ingly, and this decision is in accordance with a decision of this Court in *Konda* v. *Ramasami* (1). There it was held that the mere claim of the higher right of ownership would not prevent a person from acquiring a lessor right of easement, provided he can show that he asserted certain right of enjoyment over the land in question for the benefit of another land belonging to him. This case purports to follow a Full Bench decision in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (2). A similar view was taken in this Court in *Vekataratna Dikshitar* v. *Subbaroya Pillai* (3). It is now urged for the appellants that this view is opposed to the decision of the Judicial Committee in *Attorney-General of Southern Nigeria* v. *John Holt and Co., Liverpool Ltd.* (4) and also to decisions in *Jalaluddin* v. *Asad Ali* (5) and *Chunilal Fulchand* v. *Mangaldas Govardhandas* (6), the two latter decisions being under S. 26 of the Limitation Act, the Easements Act not being applicable in those provinces. I think it must be conceded that the contention that the decision in *Attorney-General of Southern Nigeria* v. *John Holt and Co., Liverpool Ltd.* (4) is opposed to the decisions of this Court is correct. There their Lordships say :

> In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted is the right over the property of that other. In the present case this was not so. For these reasons their Lordships are of opinion that the grounds upon which the judgment appealed from are put cannot be maintained.

The question is not discussed at any length, and the case being one from South Nigeria, it is obviously not based upon the provisions of the Indian Easements Act and it is upon the language of S. 15 of that Act that this Court based its conclusion. In addition to the decision of the Judicial Committee, we have been referred to a case in *Lyell* v. *Lord Hothfield* (7) which distinguishes two earlier cases, *Earl De La Warr* v. *Miles* (8), *Dawson* v. *McGroggan* (9). In the former case it was held by Brett, J., that the user having been established, the fact that the user was based upon a right which was found not to exist was not material. Cotton, L. J., came to the same conclusion. Nor do I think that the leading judgment of James, L. J., takes any different view. This case and the Irish case were considered in *Lyell* v. *Hothfield* (7) by a single Judge and were distinguished on the ground that in those cases the acts of user were done in pursuance of an alleged right in *Alieno Solo* although the claim was made under a mistaken belief, but where the acts were acts attributable to a claim of the ownership of the soil itself there can be no question of obtaining an easement. This is the view taken in *Attorney-General of Southern Nigeria* v. *John Holt and Co., Liverpool Ltd.* (4). The question appears to be one of some difficulty ; for it is not quite clear to me why a person using a right of way on another's land as of right uninterruptedly for over 20 years should be allowed to establish a permanent right to the easement, whereas if that same person says that he used this right of way because he was the owner of the land he should by that mere assertion be deprived of the right which would otherwise be held to have accrued to him. It must also be observed that if the acts are done in pursuance of a mistaken belief of ownership or such belief is known to the real owner an absolute title by prescription would be acquired in 12 years whereas a lesser right of easement is not acquired even after 20 years of the very same enjoyment. Such a conclusion hardly seems to be logical. As the decision of the question must depend upon the interpretation of S. 15 of the Easements Act, I think that possibly the judgment of this Court may have to be modified in view of the decision of the Judicial Committee which was based not on the Indian Easements Act but on the English Law on the point which is very similar. I think, therefore, that it is desirable to refer to a Full Bench the question whether the decision, *Konda* v. *Ramasami* (1), is correct.

Odgers, J.—In this case the plaintiffs sued as owners of house and ground No. 20 Singarachari Street, Triplicane

(1) [1915] 38 Mad. 1=17 I. C. 112=6 L. W. 564.
(2) [1907] 34 Cal. 51=11 C. W. N. 20=4 C. L. J. 437 (F. B.).
(3) [1911] 1 M. W. N. 95=8 I. C. 502.
(4) [1915] A. C. 599=84 L. J. P. C. 98=112 L. T. 955.
(5) [1883] A. W. N. 66.
(6) [1892] 16 Bom. 592.
(7) [1914] 3 K. B. 911=84 L. J. K. B. 251=30 T. L. R. 690.
(8) 17 Ch. D. 535.
(9) [1903] Irish Reports 92.

and they also alleged that they were the owners of No. 19 in the same street, by right of inheritance as reversioners to the last male holder. As to this latter house they have brought a suit, C. S. No. 222 of 1917, which was tried on the original side of this Court and Mr. Justice Coutts-Trotter (as he then was) decided that No. 19 was not the property of the plaintiffs but of the defendants, and this judgment was confirmed in appeal, O. S. Appeal No. 52 of 1919. The right in dispute in the present case is the right of using a latrine which is in the compound of No. 19 and plaintiffs' suit was for a declaration that they are absolutely "entitled to their" latrine marked 'C' in the plan and to the use thereof as hithertofore. They claim user for more than 70 years. The prayer in the plaint was amended on the 25th September 1922, the suit having been begun on the 17th August 1921, by an alternative prayer that they are entitled to the use of the said privy 'C' as hithertofore as a right of easement. The learned City Civil Judge found that the plaintiffs were entitled to an easement and on appeal to this Court it is contended that no right of easement can be acquired on or over land which the acquirer believes to be his own. It is perfectly clear from the definition of an easement in S. 4 of the Easements Act that no man can acquire an easement in land which is his own. The question is whether the belief or allegation that the land is his own, when it is not really so, makes any difference. In other words, has a man under S. 15 of the Easements Act to prescribe for an easement with a certain animus or not? The part of the Easements Act which will have to be considered is S. 15, paragraph (3).

And where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto, as an easement, and as of right, without interruption, and for twenty years.

S. 5 of the English Prescription Act, 2 and 3, Will. IV, Ch. 71, which corresponds to S. 15 (3) of the Indian Easements Act runs:

The right of way must have been actually enjoyed by any person claiming right thereto without interruption.

The provisions of this Act have been the subject of many decisions. For instance in *Bright* v. *Walker* (10) the words "as of right"—which S. 15 reproduces in the Indian enactment—have been considered, and it was laid down that under the Prescription Act the claimant must prove enjoyment for statutory period as of right. This would be impossible for instance if there were unity of possession of both the tenements during all or part of the time; compare the remarks of the same Judge (Martin, B.) in *Onley* v. *Gardiner* (11). In Gale on Easements, page 238, it is laid down that one of the essentials for an acquisition of easement is that the enjoyment must have been an enjoyment of the easement in the character of an easement distinct from the enjoyment of the land itself; and in Goddards on Easements, page 16, the author says that:

Where a man exercises his right in his capacity as owner of the soil the right he exercises is not an easement but a proprietary right incident to the ownership of the land.

In *Gardenar* v. *Hodgson's Kingston Brewery Company* (12), Lord Lindley says:

"I understand the words 'claiming right thereto' and the equivalent words 'as of right' which occur in S. 5 (of the Prescription Act) to have the same meaning as the older expression. *Nec VI. Nec. Clam, Precario*,"

and adds

"A title by prescription can be established by long peaceable open enjoyment only; but in order that it may be so established the enjoyment must be inconsistent with any other reasonable inference than that it has been as of right in the sense above explained. . . . If the enjoyment is equally consistent with two reasonable inferences, enjoyment as of right is not established."

In *Attorney-General of Southern Nigeria* v. *John Holt & Co., (Liverpool) Ltd.* (4) the respondents had built stores and sheds upon certain land reclaimed from the sea and for a long period had used it for purposes of their business and had had exclusive possession. The Crown appealed to the Privy Council against the Colonial judgment in so far as it declared that the respondents were entitled to an easement to place stores, etc. on the reclaimed land; and it was argued that as the respondents were in exclusive possession of the servient land they could not acquire an easement over it by prescription. Their Lordships held that the respondents thought they were making proper use of their rights as owners of property abutting upon the sea and say:

An easement, however, is constituted over a

(10) [1834] 1 Cr. M. & R. 211=3 L. J. Ex. 250 =4 Tyr. 502.

(11) [1838] 4 M. and W. 496.

(12) [1903] A. C. 229=72 L. J. Ch. 558=88 L. T. 698=19 T. L. R. 458=52 W. R. 17.

servient tenement in favour of a dominant tenement. In substance the owner of the dominant tenement throughout admits that the property is in another and that the right being built up or asserted is the right over the property of that other.

They refer to *Lyell* v. *Lord Hothfield* (7). In this case the learned Judge found that for 60 years there have been disputes between certain bodies of shepherds each asserting their own rights on the ground that the land belonged to the lord of their own manor and not to the lord of the other manor. The judge points out that

the feeding of sheep on the part of the manor in question was not done with the consent or acquiescence of Lord Hothfield and it is the consent or acquiescence which lies at the root of a claim for prescription.....Here the acts were acts attributable to a claim to the ownership of the soil itself.

and again at the end of the judgment he says :

Here the enjoyment, such as it was, was attributable to a mistaken claim to a right to the soil.

As against this body of authority the respondents quote *Konda* v. *Ramaswami* (1), the decision of Sundara Ayyar and Sadasiva Ayyar, JJ., where it is held that

there is no reason why a person who walks along a certain land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription.

It is pointed out that in the 3rd paragraph of S. 15 of the Easements Act title need not be claimed as an easement and that enjoyment is required to possess two properties, viz.; (1) that it must be as of right without interruption and (2) that it must be as an easement. The first quality is intended to show that enjoyment by licence or under a contract which would not amount to a grant of an easement would be ineffectual to create a right by prescription. Then the other quality is that the enjoyment should be as an easement and they quote illustration (b) to the section to explain what is meant by the words "as an easement," and they go on to say :

That the words mean that unity of title or possession during the period of the twenty years or a portion thereof, makes the possession useless to create a right of easement."

The learned Judges in a previous part of their judgment consider what is meant by adverse enjoyment and they say that

the animus possidendi of the adverse enjoyer would determine the title which he would acquire by prescription.

And that it might be open to the real owner to say that only an easement right was so asserted by the person in adverse enjoyment :

"it being the adverse enjoyment or enjoyment without a lawful right that gives right to a title by prescription.

In considering the case in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhga* (2) the learned Judges say:

It is of course impossible to prove an animus to hold the land as owner and at the same time in virtue of a right of easement.

It appears to me, therefore, that the learned Judges in *Konda* v. *Ramasami* (1) must be taken to hold that the animus by or under which a person exercises his right in the case of a prescriptive right must be taken into consideration. The same observation may be made with reference to another case quoted by the respondents, namely, *Venkata Varahia Dikshitar* v. *Subbaroya Pillai* (3) where it was held that a false belief of ownership does not necessarily preclude the acquisition of a right of easement. The learned Judges in sending down the case for a finding on the question whether the plaintiff has enjoyed the way as an easement as of right for the prescriptive period, with reference to the circumstances they adverted to, say :

They are material for determining quo animo did the plaintiff enjoy the way.

The facts of the case are not reported, but it would appear probable that the right of easement had been established previously and that this right was used to support a claim to ownership.

Another case cited by the respondents was *Earl de La Warr* v. *Miles* (8) and a passage was relied on to the effect that if enjoyment is proved for the time requisite under the Prescription Act as of right and not by permission it does not matter on what ground the claimant rests his alleged title. A careful perusal of the judgment will, I think, show however, that it is confined to one of the three grounds, custom, grant or prescription. There was, I think, no claim to a right of ownership in the case and it may further be said that this was not a case of easement at all but of a profit a prendre. As in the case in *Dawson* v. *Mc Groggan*. (9) where it was held that the defendants were entitled to presume

a legal origin for an absolutely uninterrupted assertion of rights to profits a prendre extending over 70 years. Reference was made to a case in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (2) where a Full Bench of that Court held that a suit was not liable to be dismissed in limine because it contained alternative claims of ownership and easement. This is a matter of pure pleading and all that the Court held was that they are alternative claims and not so necessarily inconsistent that the plaintiff ran the risk of having his pleading struck out. In this state of authorities, speaking for myself, I am of opinion that the ruling in *Konda* v. *Ramasami* (1), with great deference to the opinion of the two eminent Judges who decided it, is wrong and that if a man exercises a right with the animus or consciousness that he is exercising a proprietary right in his own land and not a right over another's land he cannot acquire a right of easement by prescription. The question in this case is : if that premise is sound, with what animus did the plaintiff here assert his right to use the privy 'C.' As already pointed out he asserted his ownership to No. 19 in a previous suit which went to appeal. That was in 1917. That was found against in 1920. In 1921 he presented the plaint in the present case insisting on his absolute title to the privy marked 'C' and continued to assert it for 13 months thereafter until he amended his plaint, and even then the claim to an easement is only inserted in the alternative. The state of a man's mind can only be judged by his outward acts and it is certainly a question of fact. If one has to judge the state of the plaintiff's mind in this case, I do not see how the conclusion can be avoided that he presisted in his claim to this latrine as owner. I agree in the order proposed by my learned brother.

Opinion of the Full Bench.

We think that some of the expressions of opinion in *Konda* v. *Ramasami* (1), cannot be supported. They are clearly in conflict with the English cases of *Lyell* v. *Lord Hothfield* (7) and the *Attorney General of Southern Nigeria* v. *John Holt & Co. (Liverpool) Ltd.* (4). There is nothing inconsistent with these two decisions to be found in *Earl De La Warr* v. *Miles* (8) because in that case the right was exercised as a right of a dominant over a servient tenement even though the owner of the dominant tenement was in error as to the exact origin of the right he possessed and exercised. Though the English cases are of course decisions either under the English Prescription Act or the common law, we are satisfied that their principles apply to S. 15 of the Indian Easements Act. It is clear that a man is not finally precluded from claiming the benefit of an easement merely because in the course of legal proceedings he made an unfounded claim to be owner however strong evidence such a claim might be against him. The learned judges in *Konda* v. *Ramasami* (1) seem to imply that the assertion of ownership during the period of user is not fatal to the success of a claim to an easement. To this proposition we cannot assent. Our opinion is that while the mere putting forward of a wider claim in legal proceedings is not conclusive against a right of easement, yet the question *quo animo egerit* to what purported character are the acts of user to be ascribed is one which the Court must answer, and if *Konda* v. *Ramasami* (1) implies the contrary we think it is wrongly decided. We agree with the conclusion of Shearman, J., in *Lyell* v. *Lord Hothfield* (7) that acts done during the statutory period which are only referable to a purported character of owner cannot validate a subsequent claim to an easement. The question of animus in this case is one of fact which must be determined in the light of these observations by the Division Bench to which the case will be sent back.

Reference answered.

A. I. R. 1926 Madras 731

KRISHNAN AND VENKATASUBBA RAO, JJ.

Collector of Chingleput District, Saidapet—Appellant.

v.

Kadir Mohideen Sahib—Respondent.

Appeals Nos. 58 and 59 of 1923, Decided on 22nd February 1926, from the award of the Dist. J., Chingleput, D/- 8th August 1922, in Compensation Ref. Nos. 3 and 4 of 1916.

(a) *Land Acquisition Act, S. 25 (3)—Notice issued under S. 9 defective—Notification also defective—Omission to claim is justified.*

Where the notification of the Government was defective as therefrom it was not possible to locate the portion and no facilities were given to the claimant for identifying the land, and where the notice issued under S. 9 was defective in that it did not give 15 days time :

Held : that applicant's omission to claim was for sufficient reason within S. 25 (3). [P. 736, C. 1]

(b) *Land Acquisition Act, S. 23—Every element of the land must be considered.*

In awarding compensation, any and every element of value which the lands possess to the owner must be taken into consideration in so far as it increases the value to him. In other words, not the land alone but the land with all its potentialities must be considered in assessing the value, but the claimant is not entitled to the hypothetical profit which in certain events he is likely to make. [P. 737, C. 1, 2]

Government Pleader—for Appellant.

Nugent Grant and *A. C. Sampath Aiyangar*—for Respondent.

Krishnan, J.—I have had the advantage of reading the judgment of my learned brother and as I agree with him generally I shall deal with the case only briefly.

The objection based on S. 25, cl. (2) of the Land Acquisition Act (I of 1894) is clearly untenable. Cl. (1) says that the claim to compensation has to be made "pursuant to the notice given under S. 9" and this makes a proper notice a prerequisite. Now, as shown by the District Judge and by my learned brother, such a notice was not given in this case, the notices all being defective in one way or another., The claimant's omission, therefore, to make a claim before the Deputy Collector was not "without sufficient reason" and he escapes the application of the stringent provision of Cl. (2) to his case.

As regards the value of the land acquired, which is the most important item in the total valuation, it is conceded that the claimant is entitled to have his land valued with reference to the most profitable use it can be put to. The land is very suitable for a brickfield as shown by the evidence ; in fact the Government is acquiring it for the very purpose of using it as a brickfield. It is also suitable as a building site as proved by witnesses like Mr. Namberumal Chetti, a well-known citizen and building contractor of this city. The claimant is, therefore, entitled to have his land valued in both ways and given the higher value, whichever it may be.

The claimant asked us to value his land in the first instance as a clay-producing land for making bricks. We were taken through a body of evidence about the profits made by brickmakers in the neighbourhood and the learned counsel for the claimant, relying on the case of *Rugby Portland Cement Co.* v. *London and N. W. Ry.* (1), argued that in assessing compensation regard must be had to such profits. We cannot accede to this argument. The case cited is a peculiar one ; there the arbitrator had to assess the market value of limestone which was quarried by the Cement Co. and used by it in making cement, but which had no market and, therefore, no market value could be directly deduced. What the learned Judges held was that though there was no market for the limestone it still had a market value which had to be ascertained indirectly by estimating what value it had to the claimant company itself and that for this purpose the total profits of that company which included the price of the limestone as the company paid no price for it, should be kept in view. They make it clear, however, in their judgments that the profit of the company was not a proper measure of compensation at all, but was only an indication as to what the proper compensation payable in that case was. The method adopted was a purely hypothetical one for ascertaining the value of the limestone as no other methods were available. That case is not applicable to the present case as clay seems to have, according to the claimant's own evidence, a market and a market value, but unfortunately for the claimant he has taken no trouble to give us the necessary details to enable us to calculate that value. The evidence of his 19th witness, who is the only witness who speaks to the market value, shows that a cartload of clay of 20 c. ft. was worth 12 as. to Re. 1-4-0 in 1914 in and near Madras. To deduce the value of the clay in situ one must know the cost of the labour required for mining the clay and the costs of carrying it to Madras or places near for sale ; without such details the value of the clay itself cannot be ascertained.

I agree with my learned brother that it is too late now to ask us to send the case back to take further evidence. No

(1) [1908] 2 K. B. 606=77 L.J. K.B. 1096=98 L.T. 880=24 T.L.R. 561=72 J.P. 245.

affidavit has been filed and no proper reasons have been given why such evidence was not given in the lower Court.

The learned District Judge has attempted to value the land as a brick field by taking the royalty that may be properly obtained from this land if leased out to a brick-maker. The valuation on the basis of royalty is, as shown by my learned brother, not altogether a proper method in this case as it only gives the compensation payable to the lessor where lease rights have been created and lessees have also to be compensated in addition. Here the claimant is the sole owner of one piece of the land acquired and the kudivaramdar of the other. No interest of brick-making lessees are involved. If, however, in the absence of other methods a royalty basis is to be taken as was done in *Mohini Mohan* v. *Secretary of State* (2) I agree that a 4 as. rate per 1,000 bricks is quite a fair rate, and that an acre may be expected to yield a royalty of Rs. 2,500 in all. The mistake that the learned Judge has made in taking that as a basis for compensation at Rs. 2,000 an acre is that he does not make a sufficient deduction for the length of time that will be required to realize the royalty from the whole of the land acquired. The evidence on claimant's side itself shows that it would take about 50 years to work the whole of the clay on the land, which is about 55 acres in extent ; that means that it will take some 30 years at least to exhaust the clay on the land acquired. The proper compensation will thus be only the capitalized present value of the clay or such a sum as would, when invested say in 6 per cent. bonds, enable Rs. 2,500 a year to be drawn for 30 years and be exhausted by the end of that time. This is so as the taking of the clay will reduce the land to a pit 12 to 15 feet deep at the end of the period, of practically no value. That land may have a title value, but it is comparatively small being less than Rs. 100 an acre. It may be that that value should be added to the total sum arrived at. Taking the royalty method of valuation then, the present total value of the 33 acres and odd will not exceed Rs. 35,000 or Rs. 40,000 when worked out mathematically ; that is Rs. 1,000 to Rs. 1,250 an acre. Even if we add something to this amount to represent the excess value of the land to the owner over and above the royalty he may get, the price will not exceed Rs. 1,500 an acre. The value so calculated is smaller than the value one gets by treating the land as a building site.

In what I have stated above I have treated the valuation of a clay field as governed by the principle stated by Lord Atkinson in the case of *Eden* v. *North Eastern Railway Co.* (3) that the true measure of compensation is the price the minerals would fetch as and when won and raised less the costs of working the mine and winning and raising them To the same effect is the ruling of this High Court in *Raghunatha Rao* v. *Secretary of State* (4) where the case of compensation for a stone quarry had to be considered.

What S. 23 of the Act requires us to do is to ascertain, in the case of land acquired, its market value, and that is made the criterion even in the case of mines and minerals by the Land Acquisition Mines Act (XVIII of 1885), S. 6. Market value has been defined in various cases as the price a willing purchaser is prepared to pay to a willing seller for the property in the open market. No purchaser will pay the calculated full value of the minerals existing in a mine when buying a mine ; for he would get no profits out of his purchase as every purchaser expects to make. It is therefore contended that the full value of minerals in a mine should not be calculated and treated as the market value of the mine itself but only that value less a reasonable percentage deduction to represent the buyer's profit. There is force in this argument in my opinion, but it is not necessary to decide it in this case, as even without such a deduction the compensation does not work out at a higher figure than if the land were valued as a building site.

Taking next the value of this land as a building site : it must be remembered that it is not very far from Madras and people will have houses to live in in places quite adjacent. The various sales in the neighbourhood have all been referred to by my learned brother and I need not therefore again refer to them. Some of them are useless for ascertaining the value of the

(2) [1921] 34 C.L.J. 188=67 I.C. 25=24 C.W.N. 1002.

(3) [1907] A.C. 400=76 L.J.K.B. 940=97 L.T. 254=23 T.L.R. 685=71 J.P. 450=51 S.J. 623.

(4) [1921] 44 Mad. 264=39 M.L.J. 623=13 L.W. 11=60 I.C. 187=(1920) M.W.N. 759.

land as the properties sold included houses whose values have not been proved. The rates at which sales took place seem to vary very greatly. Nevertheless from these sales and the oral evidence we have to fix the market value. Taking the evidence as a whole, and making all due allowances, I agree with my learned brother that if we allow a sum of Rs.2,000 an acre (of 18 grounds) the valuation will be fair. It is true the claimant purchased the whole plot of 55 acres and odd for Rs. 50,000 about two years before this acquisition. But this transaction was one between near relations and not an ordinary sale in the market. Half the price had already been allotted as a gift to the claimant and it is evident from the circumstances of this sale that the claimant got the property at a very favourable rate. The price he paid cannot therefore well be treated as the basis of market value. It is not always possible to assess with mathematical accuracy the market value of any property ; a certain amount of margin will always exist. On the whole the value of Rs. 2,000 an acre is a fair and proper one in my opinion.

As regards the other headings of valuation I agree with the award as made by my learned brother.

Evidently the values given for the buildings and for the trees are quite inadequate. The evidence shows that the central building was a fairly large one ; after the acquisition it was not looked after and fell into ruins. At the time of the acquisition it was in quite a reparable condition and Mr. Namberumal Chetti says that by spending Rs. 4,000 it would have been put in thorough repair and the building would have been worth Rs 10,000. Mr. Sourinathan, the Government Engineer, has only valued the building as debris and not as a standing structure at all. I agree Rs. 4,000 is a fair value to give for all the buildings. The trees should be valued not as mere firewood but as standing trees yielding fruit ; except those like Korakkappali which is only useful as firewood. I think the amount fixed by my learned brother, Rs. 4,800, for all the trees is quite proper.

The total award of this Court in favour of the respondent thus comes to Rs. 6,111-8-0 over and above the award of the District Judge in his favour. The fact he is only the kudivaramdar in one of the plots acquired does not really make any difference in this case as the melwaramdar has accepted what was awarded to him and has not appealed. The increase we have granted is in the interest that belongs to the kudivaramdar.

I would, therefore, dismiss the Appeals Nos. 58 and 59 with costs of the respondent and allow the memorandum of objections in part and modify the award of the lower Court as proposed by my learned brother. In the memorandum I would direct the parties to bear costs.

Venkatasubba Rao, J.—The Government have filed Appeals Nos. 58 and 59 of 1923 from the award under the Land Acquisition Act of the District Judge of Chingleput and the claimant, Kadir Mohideen Sahib, has filed memorandum of objections in both these appeals. The Deputy Collector, who in the first instance enquired into the value of the property under S. 11 of the Act, made an award granting as compensation, Rs. 6,677-13-8. The claimant was dissatisfied and on his application a reference was made under S. 18 to the District Judge of Chingleput who by his award has increased the compensation to Rs. 81,609-12-0. The Government in their appeals urge that the amount awarded by the District Judge is too high, whereas the claimant in his memorandum of objections contends that he is entitled to more.

The claimant did not appear before the Deputy Collector who proceeded with the enquiry ex parte and a preliminary objection based upon this fact was taken on behalf of the Government before the District Court. That objection was disallowed and was again raised before us. S. 25 (2) says that when the applicant has omitted without sufficient reason to make a claim to compensation the amount awarded by the Court shall not exceed the amount awarded by the Collector. Under S. 25 (3) however, the omission to apply will not operate as a bar if the Judge finds that it is due to a sufficient reason. Under the section the sufficiency is to be found by the Judge and the question we have to decide is whether there are grounds for our interfering with the Judge's discretion.

The original notification in respect of the intended acquisition was published in 1914 (Ex. 2). The Government then

proposed to acquire 52·19 acres. The claimant was unwilling to part with his property and this led to some correspondence between him and the Government. Nothing definite happened till October, 1915 when the Government published another notification (Ex. 3) stating that they withdrew from the acquisition of a part of the property, namely 15·94 acres. This notification was dated the 19th October, 1915 and was published in the Gazette issued on the 26th October. Defective as the notices issued between Exs. 2 and 3 are, as the District Judge observes, we are really concerned with Ex. 3 and notices issued in pursuance thereof. The District Judge has held that the notification and notices did not clearly define the property and that it was not capable of identification, and his view appears to be correct. Ex. 2 describes the property originally intended to be acquired and Ex. 3 the property withdrawn from the acquisition. From a perusal of these two documents with the aid of the map that appears to have been available, it is impossible to locate the exact portion which the Goverment ultimately intended to acquire and no particulars were furnished to the applicant although he applied for them : See Ex. 4-M, dated the 30th October 1915. At the time of the Deputy Collector's enquiry all that was known therefore was the extent of the land that was to be acquired, but it was not possible to locate the portion and no facilities were given to the claimant for identifying the land. The District Judge has rightly held that this constitutes a sufficient reason under S. 25 (3).

There is still another ground. The notice given to the claimant subsequent to Ex. 3 is Ex. C. This was apparently intended to be a notice under S. 9. This notice purports to have been issued in October and bears no date. Ex. C contains the revised extent and it may therefore be presumed to have been issued only subsequent to Ex. 3 which is dated the 19th October. S. 9 requires that the claimant shall be given at least 15 days' notice. Ex. C (granting that it was issued, on the 19th), which calls on him to appear on the 30th October, is therefore clearly defective. The Government have not shown when that notice was issued, but the most favourable assumption from their point of view, namely, that it was issued on the 19th of October, does not help their case. The claimant cannot be said to have committed default in having failed to appear in compliance with this notice. I agree with the District Judge that this is again a sufficient cause under S. 25 (3).

The enquiry was apparently adjourned from the 30th October to the 23rd November and on the day previous to that fixed for the hearing, the claimant sent Ex. 4-P (dated the 22nd November, 1915) to the Deputy Collector requesting him to grant an adjournment. This request was not heeded, and on the 23rd the Deputy Collector proceeded with his enquiry and made his award. The claimant might have with impunity quite ignored the notice in view of the defects to which I have adverted. But his request for the adjournment, in the circumstances, was reasonable and the Deputy Collector ought not to have proceeded with the enquiry ex parte. I am clearly satisfied that the District Judge has soundly exercised his discretion and I see no reason to interfere with his decision on this point.

Having disposed of the preliminary objection I shall now proceed to consider the merits of the case. The property acquired consists of two contiguous plots of land in the ryotwari village of Arambakkam and the zamindari village of Chinnakudal, including certain buildings, trees and wells on the land. The land in Arambakkam village measures 19·51 acres, and that in the Chinnakudal village 13·55 acres, thus making a total of 33·06 acres. These two parcels form one block and for purposes of valuation the appeals have been argued on the footing that they have to be treated alike. The lands are situated on the Poonamallee High Road, a part of which lies within Madras and the rest outside its limits, and are 4 miles 2 furlongs distant from the Fort St. George or a mile beyond the Madras Municipal Toll Gate. The lands abut on the High Road with a frontage of a furlong. They are bounded on the north by the Cooum River, the southern boundary being the Poonamallee High Road itself. If the land in question had not been severed from another bit belonging to the claimant, the Cooum would then have been also the western boundary as the river takes a bend at that place. But as it is,

between the Cooum on the west and the claimant's land, there intervenes this strip that has not been acquired. On the east there is a brick-field belonging to Mr. Saminatha Pillai, claimant's 10th witness. It is shown in the map as Plot No. 16.

The first question that arises is whether the value is to be assessed on the footing that the land is agricultural or that it is fit for building purposes, or thirdly that it is land producing clay useful for making bricks. It is a well-established rule that the correct principle to apply is to assess the market value of the land as put to its most lucrative use. See *Thareesamma* v. *Deputy Collector of Cochin* (5). The learned District Judge has held that as building site the land would be worth Rs. 1,500 an acre, but as clay producing land Rs. 2,000 would be a fair price. As in his opinion the most advantageous way of enjoying the land is to use it as a brick-field, he has awarded compensation at the higher rate. The learned District Judge has summarily rejected the theory, and very rightly, that the land is to be treated as agricultural land. I shall proceed to consider the two uses to which this land can be put, first as building site and then as a brick-field. (The judgment here dealt with the question as to fair market value of the land being regarded as fit for building sites, and the question as to the compensation the claimant will be entitled to if the land be regarded as a brick-field, and proceeded to discuss the methods of valuation suggested by the claimant.) It has been urged on his behalf that he is entitled to compensation on the basis of the profit which he is likely to make by converting clay on his land into bricks and selling bricks in the open market; in other words, we have been asked to award him an amount that will represent his profit in the event of his establishing a brick factory and carrying on business on a large scale in bricks. This contention seems to be unsound. It is undoubtedly true that in awarding compensation, any and every element of value which the lands possess to the owner must be taken into consideration in so far as it increases the value to him: *Lucas and Chesterfield Gas and Water Board, In re* (6). In other words, not the land alone, but the land with all its potentialities, must be considered in assessing the value. In *Commissioners of Inland Revenue* v. *Glasgow and South-Western Ry. Co.* (7) there is no authority, however, for holding that the claimant is entitled, in such circumstances as exist in the present case, to the hypothetical profit which, in certain events, he is likely to make. The claimant has not made out—indeed he has not even attempted this—that he cannot acquire for a proper price another brick-field enjoying similar advantages if he really wishes to manufacture and sell bricks. It is open to him if he is so minded to purchase clay land and establish a brick manufactory and there is nothing to prevent him from investing his money in such a concern and making such profit as he can. In these circumstances it is impossible to accede to his contention that he must be awarded compensation on the basis of loss of possible profit. How excessive the claim is on this footing is shown by the fact that making a calculation on the basis of figures given by Mr. Pattabhirama Rao, the claimant can realize a profit of 7-1/2 lakhs of rupees, although the amount may be spread over 72 years. The amount which he has really claimed falls far short of this, as he himself shrinks from claiming the full amount to which he may become entitled if his theory is sound.

The claimant next suggests that a method of valuation may be adopted based on the price of the total quantity of clay obtainable from the land. This seems to be the right principle, and if the necessary facts are before us the law can be easily applied. The rule applicable to cases of this kind is clearly laid down in *Eden* v. *North-Western Railway Co.* (3). This case was decided with reference to the Railways Clauses Consolidation Act, 1845, on which is modelled the Indian Act, the Land Acquisition (Mines) Act (XVIII of 1885). The object of the latter Act was to make provision for the grant of compensation to the owners of mines and minerals situated under the land sought to be acquired by

(5) A. I. R. 1924 Mad. 252.

(6) [1909] 1 K. B. 16=77 L. J. K. B. 1009=99 L. T. 767=6 L. R. 1106=72 J. P. 437=24 T. L. R 858.

(7) [1887] 12 A. C. 315.

the Government. The Act enables the Government to exclude from the acquisition the minerals lying under the land, and if the minerals are intended to be excluded the Government, when making a declaration under S. 6 of the Land Acquisition Act, has to insert a statement that the minerals are not needed. The owner of the minerals, if desirous of working them, has then to give notice to the Government of his intention to do so. After receipt of that notice, if it appears to the Government that the working of the minerals is detrimental to its interests, it may stop the working and is in that event bound to pay compensation to the owner for the loss which he sustains. Under the Land Acquisition Act the Government may acquire the land which includes mines and minerals and it is then bound to pay compensation for the entire land. Under the Land Acquisition (Mines) Act the Government may acquire the land excluding the mines and minerals if it subsequently find that the working of the minerals should be prohibited, it is empowered to stop the working, paying to the owner the compensation for the loss, the method of ascertaining the amounts payable under both the Acts is the same: (see S. 6 of Act XVIII of 1885). The Mines Act is to be read as part and parcel of the Land Acquisition Act. (See S. 17 of Act XVIII of 1885). There is no doubt, therefore, that the law that is to be applied is to be found in the case already cited, *Eden* v. *North-Western Railway Co.* (3). As Lord Atkinson in his judgment says: "The true measure of compensation is the price the minerals would fetch as and when won and raised less the cost of working the mine winning and raising them." In that case the proprietor's rights were split up between the lessor and the lessee. If the coal had been worked, the lessee would be in due course have made, after deducting the royalty and cost, £730, and the lessor would have received £155. Lord Atkinson observes:

> Taking the test I have mentioned the value of the coal in situ therefore was this £730 plus the royalty, that this is, £855 (a slip for £885) in all and I think that value the company must pay.

Again the learned Lord observes:

> It would seem to me that a fair way of dividing the value of the coal in situ between the lessor and the lessee is to give the lessor the royalty he would have been entitled to had this coal been won and raised and sold and to the lessee who was entitled to win and raise them, the balance of this sum of £855 (again a slip for £885), namely, £730.

No question of the splitting up of rights arises in this case and therefore if we can determine what the value on the spot of the total quantity of the clay is, the claimant will undoubtedly be entitled to that value. But the evidence is unfortunately extremely deficient on this point. (The judgment here dealt with that meagre evidence and proceeded.) The learned District Judge has attempted to arrive at the value of the land on a royalty basis. Swaminatha Pillai pays four annas for thousand bricks for the neighbouring land on which he manufactures bricks. There is some conflict of evidence regarding the rate of royalty, but the learned District Judge has taken four annas as representing a fair rent. Having regard to the fact that the claimant's land is superior to that of Swaminatha Pillai, it may be assumed that it would fetch a higher rate of royalty. The learned District Judge's method of valuation is as follows: On the evidence he comes to the conclusion that an acre of land yields about 100 lakhs of bricks and the royalty in respect of them at four annas per thousand would be Rs. 2,500. An acre of land, he thus argues, would be worth Rs. 2,500. Making allowance for the fact that to realize the full value of bricks in respect of the entire 33 acres will take a long time, the District Judge in the end assesses the value of an acre at Rs. 2,000.

I think he is quite justified on the evidence in estimating 100 lakhs of bricks to an acre. Mr. Pattabhirama Rao says that to work 3 acres to a depth of 10 feet took him three years. The calculation of the District Judge is made on the footing that the clay can be worked to a depth of 15 feet. At that rate it will take about 72 years to complete the 33 acres. On the District Judge's figures his conclusion is somewhat wrong. An investment of about Rs. 42,000 in 6 per cent. bonds will fetch an annual income of Rs. 2,500. It must be remembered that it is unnecessary to make an investment of such a large sum; for the whole of the capital must get exhausted by the end of the stated period, whether it is 72 years or whatever else

that may be. On the District Judge's calculation he has given Rs. 2,000 × 33 or Rs. 66,000 odd. A sum considerably less even than Rs. 42,000 would be sufficient to enable the claimant to draw annually for a stated period Rs. 2,500. Even if the royalty be taken at 5 or 6 annas per one thousand bricks the amount to be invested would be considerably less than Rs. 66,000 odd which the District Judge has given.

I have gone into this matter a little closely for the purpose of showing that, on the royalty basis, the valuation given by the District Judge at Rs. 2,000 per acre is wrong; but in any event that is not the correct principle to adopt and the claimant whose interest is not split up into that of lessor and lessee is entitled to more than the value to be assessed on the basis of royalty. In the words of Lord Atkinson, already cited, the method adopted by the District Judge gives the claimant that amount to which the lessor would have been entitled had the land in question been leased and there were two interests carved out, the interest of the lessor and the interest of the lessee. The conclusion to which I have come is that on the material before us it is impossible to assess the land on the basis that it is a brick-field.

The learned counsel for the claimant has asked us to send the case back to the lower Court for the purpose of enabling his client to give the necessary evidence. This request, it seems to us, cannot be acceded to. It is not explained why the claimant failed to place the necessary materials before the lower Court, and his excuse, so far as we can see, appears to be that he was not then aware of the law on the subject. The claimant cannot complain of want of time as the land acquisition proceedings commenced in 1914 and the District Judge delivered judgment in 1922. It was a feeble request that was made to us to send the case back, a request not based on any affidavit, and in the circumstances we are constrained to dispose of the case on the materials that are before us.

I have already said that as building land the claimant will be entitled to Rs. 2,000 acre. The District Judge has also come to the conclusion that it is the proper value though no doubt for different reasons. In our opinion this is the value that the claimant is entitled to. This disposes of the most important item of the claim. (The judgment then dealt with the amount of compensation payable for buildings, trees, and concluded as follows.) The claimant will be entitled to Rs. 87,721-4-0 with interest on Rs. 81,043-6-4 (Rs. 87,721-4-0 less Rs. 6,677-13-8 being the amount awarded by the Deputy Collector) at 6 per cent. per annum from the 14th February 1916.

I agree with the order of my learned brother as to costs.

Appeals dismissed.

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* A. I. R. 1926 Madras 739

PHILLIPS AND MADHAVAN NAIR, JJ.

P. Hajee Batcha Saheb—Petitioner—Appellant.

v.

M. Mahomed Ebrahim Saheb — Respondent.

Appeal No. 476 of 1923, Decided on 26th February 1926, from the order of the Dist. J., North Arcot, D/- 20th July 1923, in E. P. No. 3 of 1923.

* *Civil P. C., O. 21, R. 84—" Shall be resold " means "shall be put up for sale. "*

At a Court auction the purchaser defaulted and the property was put up for resale, but owing to absence of bidders it was not sold. The defaulting purchaser contended that it was " resold " and thus he was absolved from liability to pay the deficit.

Held; that the words "shall forthwith be resold" should be taken to include " shall forthwith be put up for sale ". The provisions of the section are complied with when the property is put up for resale and the conducting officer should adjourn the sale and continue it until he obtained a bid, and the decree-holder is entitled to apply for the recovery of the deficit, if any, from the defaulting purchaser. [P. 740,C. 2]

S. Duraisami Aiyar—for Appellant.

T. N. C. Srinivasavaradachariar—for Respondent.

Phillips, J.—The facts of this case are as follows: A certain property was sold by Court-auction in three lots on 4th September 1922. The first lot was put up and knocked down to respondent's bid for Rs. 1,850. The 25 per cent. deposit was not paid at once, but the sale of the second lot was proceeded with. While that was going on, the respondent wished to retract his bid for the first lot on the ground that he had been bidding under a mistake. The

officer conducting the sale refused to allow him to do so and this order was confirmed by the Court on a petition put in two days later, namely on the 6th of September 1922. The first lot was again put up for sale after Lots 2 and 3, but no bids were secured. The decree-holder then put in an execution petition (with which we are now concerned) dated 27th November 1922. He asked (1) that the respondent should be directed to pay the purchase money of Rs. 1,850 into Court ; (2) that in default of such payment the said Lot No. 1 should be ordered to be resold and (3) that any deficit on such resale should be recovered from the respondent by issue of a warrant of arrest.

The District Judge has dismissed this petition on the ground that the property should have been resold forthwith on failure to deposit the 25 per cent. of the purchase money, and that, therefore, the petitioner should put in a fresh execution petition for the sale of the property. When the respondent failed to make the deposit, the officer conducting the sale put up Lot No. 1 after Lots 2 and 3 had been sold. No bids were received and the matter was reported to the Court. The question that arises now is whether there has been resale of the property as directed in O. 21, R. 84. It is not disputed that the property was put up for sale and that if there had been any bids it would have been sold ; but it is contended for the respondent that inasmuch as no bids were received the property cannot be deemed to have been resold. The point is not free from doubt ; for in the strict meaning of the word " resold " it would appear that there must be an actual sale of the property, but what is to happen if it is impossible to resell the property ? Under O. 21, R. 71, any defficiency of price which may happen on a resale by reason of the purchaser's default shall be recoverable from the execution of a decree for the payment of money. If the property had realized one rupee, the defaulting purchaser would have been liable to pay the balance of Rs. 1,849. In the event of there being no bids at all, is he to escape this liability ? It is, certainly, not the intention of the Act that he should escape scot free in such circumstances, and it only remains to be determined whether the words " shall forthwith be resold " can be taken to include " shall forthwith be put up for sale." It is undoubted that on principle the words should have this meaning and I should feel inclined to hold that the provisions of the section had been complied with when the property is put up for resale.

In the present case, however, I think this appeal may be decided on other grounds. The appellant had put in an alternative prayer that the property should again be resold. When the resale failed for want of bids, the conducting officer should have adjourned the sale and continued it until he had obtained a bid. His petition, therefore, to resell the property should have been ordered.

The objection is taken that if a resale is not ordered more than two years after the original sale, the conditions of the section that the resale should be held forthwith would not be complied with, but it must be remembered that a resale was held and failed, and that appellant within a reasonable time put in an application to hold the sale again. The fact that the prayer was refused by the District Court with the result such resale has been postponed for two years can hardly affect the question. An application was made within a reasonable time and we must take the date of the application as being the date on which the fresh resale should have taken place. Although then I should be prepared to say that the respondent was liable to make good the deficit of Rs. 1,850, yet, in view of what has taken place, I think it is advisable in the interests of justice that the property should again be resold and if there is any deficit it should be recovered from the respondent.

The appeal is accordingly allowed and the property directed to be resold at once. After the sale has been held and confirmed, it will be open to the appellant to apply for the recovery of the deficit, if any, from the respondent in pursuance of the prayer in his petition.

The respondent will pay the appellant's costs of this appeal.

Madhavan Nair, J.—I agree. It is difficult to say that property is " resold " when there are no bidders at the auction and consequently the sale proves abortive. But I do not think the Legislature intended that the word " resale " should be so strictly understood. In this res-

pect the requirements of O. 21, R. 84 are sufficiently complied with when the property to be resold is actually put up for re sale. The defaulting purchaser should not be absolved from liability for want of bidders at the auction. In the circumstances of this case, I agree with the order proposed by my learned brother.

Appeal allowed.

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* A. I. R. 1926 Madras 741

DEVADOSS AND WALLER, JJ.

Mudurupayalagadu and *others*—Accused 2 to 10—Petitioners.

Criminal Revision No. 549 and Cr. Rev. Pet. 463 of 1925, Decided on 9th March 1926, from the judgment of the S. J., Cuddapah, in Criminal Appeal No. 21 of 1925.

* *Penal Code, S. 34—One member of unlawful assembly carrying deadly weapon—Other members are liable unless it is proved that the weapon was not carried in furtherance of common object—Penal Code, S. 148.*

A person who is a member of an unlawful assembly is guilty under S. 148 though he himself is not armed with a deadly weapon, when some other member of the assembly is so armed.

Where an act is committed by a person which is not an essential ingredient of the offence which is intended to be committed by a body of persons, no doubt the other persons composing the body would not be liable for the act of a single individual; he does it on his own account. But, where the carrying of a deadly weapon cannot but be in prosecution of the common object, it cannot be said that the other persons composing the unlawful assembly cannot be punished under S. 148 read with S. 149.

If a deadly weapon is carried without the knowledge of the other members of the assembly for the private ends of a particular individual, no doubt the other persons would not be guilty under S. 148. But where that fact is not made out, but it is shown that one or more of the members of the assembly carried a deadly weapon it cannot be said that the weapon was not carried in prosecution of the common object; and, therefore, all the members of the assembly are guilty under S. 148: 22 *Cal*, 276, *Expl.*

[P 741 C 2, P 742 C 2]

V. L. Ethiraj and *Chathukutti Nambiar*—for Accused.

The Public Prosecutor—for the Crown.

Devadoss, J.—The question of law raised in this case is whether a person who is a member of an unlawful assembly is guilty under S. 148 of the Indian Penal Code when he himself is not armed with a deadly weapon but some other member of the assembly is so armed; in other words whether a person who is a member of an unlawful assembly can be punished under S. 148 read with S. 149. The contention of Mr. Ethiraj is that S. 148 does not create a separate or new offence; it provides only for a heavier punishment in the case of rioters armed with deadly weapons or with anything which, used as a weapon of offence, is likely to cause death. He relies strongly upon *Sabir* v. *Queen-Empress* (1). Though the head-note of the case is in favour of Mr. Ethiraj's contention, yet the observations of the learned Judges do not go the length of head-note. What the learned Judges observe is:

> It is only the actual persons who are so armed who can be charged under that section (S. 148). The only way in which one person can be made liable for the act of another is under S. 149. There being no case under S. 148 we think that the conviction is wrong under the latter section and must be set aside.

In re Choitano Ranto (2) simply follows *Sabir* v. *Queen Empress* (1). "Offence" is defined in S. 40, Indian Penal Code, as "denoting anything made punishable by this Code" and in certain cases punishable under any special or local law. S. 148 does not merely provide for a heavier punishment in certain cases but actually deals with an aggravated form of rioting. Force is not an essential ingredient of the offence of being a member of an unlawful assembly. If any member of an unlawful assembly uses force in prosecution of the common object then it becomes rioting under S. 146, which runs as follows:

> Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.

A person guilty of rioting, if armed with a deadly weapon commits an offence under S. 148.

A good deal of argument has been advanced by Mr. Ethiraj on the wording of S. 148. His contention is that, if it is an offence, the wording would have been "whoever is guilty of the offence of being armed with deadly weapon shall be punished with imprisonment," etc. It is unnecessary that the words "is guilty of the offence" should be found in every

(1) [1895] 22 Cal. 276.
(2) [1915] 16 Cr. L. J. 446=29 I. C. 78.

section which defines an offence. Assault becomes hurt and is punishable under S. 323 if bodily pain is caused. If the hurt is grievous, it is punishable under S. 325, and if the grievous hurt is caused by a dangerous weapon it is punishable under S. 326. Similarly S. 148 provides for the punishment of a more serious offence than mere rioting. Mr. Ethiraj does not contend that if the weapon is used in prosecution of the common object of the assembly all of them would not be guilty by reason of S. 149, but says that if it is carried without being used, then only the person or persons carrying the deadly weapon are guilty under S. 148, and not others.

An unlawful assembly is defined as an assembly of five or more persons whose common object is, by means of criminal force or show of criminal force, to obtain possession of any property or to what he is not legally bound to do, etc. In order to show criminal force it is necessary to carry arms and if a deadly weapon is carried, though the weapon is not used, that weapon is carried in furtherance of the common object, and it cannot therefore be said that the person who carries the weapon carries it only on his account. Where an act is committed by a person which is not an essential ingredient of the offence which is intended to be committed by a body of persons, no doubt the other persons composing the body would not be liable for the act of a single individual ; he does it on his own account. But, where the carrying of a deadly weapon cannot but be in prosecution of the common object, it cannot be said that the other persons composing the unlawful assembly cannot be punished under S. 148 read with S. 149.

Reliance was placed upon *Arunachala Thevan* v. *Emperor* (3). In that case Ayling, J., held that S. 394 and not S. 397 will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon. It is not an essential ingredient of dacoity that grievous hurt should be caused nor is it an ingredient of the offence of dacoity that a deadly weapon should be used. Any person who causes grievous hurt or uses a deadly weapon is therefore punishable under S. 397 or S. 398. But if in order to the committing of dacoity a deadly weapon was necessary or grievous hurt was caused, all the dacoits would be equally guilty under S. 397 or S. 398. It is not necessary to discuss therefore the decision in *Emperor* v. *Ali Mirza* (4); *Emperor* v. *Dulli* (5) and *Emperor* v. *Nageshwar* (6).

Under S. 34 of the Indian Penal Code, when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. The Privy Council has applied this section in the well-known Post Office murder case. Where an assembly is an unlawful assembly, S. 149 makes every one of the members of the assembly guilty of any offence which is committed in prosecution of the common object of the assembly. If a deadly weapon is carried without the knowledge of the other members of the assembly for the private ends of a particular individual, no doubt the other persons would not be guilty under S. 148. But where that fact is not made out, but it is shown that one or more of the members of the assembly carried a deadly weapon, it cannot be said that the weapon was not carried in posecution of the common object ; and therefore all the members of the assembly are guilty under S. 148.

The next contention is that the common object has not been made out. The common object has been clearly made out in the evidence and we do not think that the petitioners have in any way been prejudiced by the common object not being explicitly stated. Mr. Ethiraj pleads for a lenient sentence. The petitioners have already undergone two months' rigorous imprisonment and taking all the circumstances into consideration we think that the period of imprisonment undergone by the petitioners would be sufficient punishment in the case. We therefore reduce the sentence to the period already undergone by the petitioners.

Waller, J.—I agree. The ruling relied on, *Sabir* v. *Queen Empress* (1), lays down no more than that only the person actually armed can be charged under S. 148, Indian Penal Code. What however, the Judges appear to have

(3) [1911] 22 M. L. J. 186=13 I.C. 282=(1912) M. W. N. 35.

(4) A. I. R. 1924 Cal. 643.
(5) A. I. R. 1925 All. 305.
(6) [1906] 28 All. 404=(1906) A. W. N, 61.

overlooked was that the man they acquitted had, as a matter of fact, been charged under S. 148, read with S. 149, Indian Penal Code. Had they not done so they would presumably not have acquitted him.

Sentence reduced.

A. I, R. 1926 Madras 743

DEVADOSS, J.

N. V. Nageswara Aiyar—Plaintiff—Appellant.

v.

Alagu Srinivasa Aiyangar (dead) and *others*—Defendants—Respondents.

Second Appeal No. 785 of 1923, Decided on 23rd October 1925, from the decree of the Sub-J., Chingleput, in A. S. No. 50 of 1921.

(a) *Transfer of Property Act, S. 59—Mortgage deed is not a title deed.*

A mortgage deed executed by the owner of a property in favour of a third person can never be deemed to be a title-deed of the mortgagor. It may be evidence of the fact that the mortgagor dealt with the property as his. [P 743 C 2]

(b) *Tranfer of Property Act, S. 59—Intention to create security is necessary.*

All that is required to create an equitable mortgage in depositing the title-deeds with the lender is the intention of the lender to hold them as security and the intention of the borrower to leave them as security with the lender. If there is any writing to evidence the transaction that would require registration, in the absence of registration any writing which embodies the transaction cannot be proved. *Shaw* v. *Foster*, (1872) *L. R.* 5 *E.* & I., 321, *Ref.* [P 743 C 2]

(c) *Transfer of Property Act, S. 59—Equitable mortgage—Letters relating to the transaction require registration.*

If a person writes a letter to another to the effect that he had already left with him certain documents as security for loans already made, that letter does not require registration. But a letter relating to a present transaction requires registration : *A. I. R.* 1924 *Mad.* 547, *Dist.* [P 744 C 1]

K. Jagannadha Aiyar—for Appellant.

K. Bhashyam Aiyangar—for Respondents.

Judgment.—The plaintiff sues upon an alleged equitable mortgage in his favour by Defendants 1 and 2. The other defendants are alienees from Defendants 1 and 2. The District Munsif gave a personal decree and declined to give a mortgage decree against the property covered by the equitable mortgage. The Subordinate Judge dismissed the suit on the ground that the equitable mortgage was not proved and that in consequence the suit was barred by limitation. The contention of Mr. Jagannadha Aiyar for the appellant is that the loans given by the plaintiff's father were covered by the deposit of title-deeds. Ex. C is a usufructuary mortgage deed executed by the defendant in favour of one Desikachariar for Rs. 200 on 13th July 1903. This document was deposited to cover the loan. Mr, Jagannadha Aiyar's contention is that this is a title-deed. I am unable to see how a mortgage-deed executed by the owner of a property in favour of a third person can ever be deemed to be a title-deed. A mortgage deed may be evidence of the fact that the mortgagor dealt with the property as his, but in no circumstances can it be considered that a mortgage-deed is the title-deed of the mortgagor. I, therefore, hold that there was no equitable mortgage created by Ex. C.

Ex. D is no doubt a title-deed and the evidence of P. W. 2 is that it was deposited on 15th January 1910. He has not been cross-examined on the point and the Subordinate Judge was not right in considering that the evidence did not make out a deposit of title-deed. An entry in the plaintiff's book, Ex. A5, shows, that the two loans of Rs. 350 were covered by the deposit of title deeds. From this evidence it is quite clear that Ex. D was deposited for the purpose of creating an equitable mortgage in respect of the loans already advanced.

The contention of Mr. Bashyam Aiyangar for the respondents is that there is no evidence as to under what circumstances Ex. D was deposited. But from the evidence and the circumstances it is clear that Ex. D was deposited to cover the loan already advanced. An equitable mortgage by deposit of title-deeds is created by the borrower depositing with the lender his title-deeds. All that is required to create an equitable mortgage in depositing the title-deeds with the lender is the intention of the lender being to hold them as security and the intention of the borrower to leave them as security with the lender. If there is any writing to evidence the transaction that would require registration, in the absence of registration any writing which embodies the transaction cannot be proved. Lord Cairns observes in *Shaw* v. *Foster* (1).

(1) [1872] 5 E and I 321=5 H. L. 121.

It is a well established rule of equity that a deposit of a document of title, without more without writing, or without word of mouth, will create in equity a charge upon the property referred to.

This passage is quoted with approval by their Lordships of the Privy Council in *Pranjivandas Jagjivandas* v. *Chan Ma Phee* (2). The gist of the transaction, therefore, consists in depositing the title-deed with the intention that it should be held as security. From the evidence of P. W. 2 it is quite clear that Ex. D. was deposited with the plaintiff's father to cover the loan already advanced,

The next question is whether the loan of Rs. 50 evidenced by the promissory note dated 2nd June 1910, Ex. G, is covered by the equitable mortgage. Ex. H is a letter written by Defendants 1 and 2 to the plaintiffs' father on 22nd June 1910. In that they say :

Please retain the title-deeds of our under-mentioned property in Koluthur North, Chingleput District, as equitable mortgage of title-deeds for the amount of promissory-note of this day Rs. 50.

I consider that this document contains the terms of the arrangement under which the loan was made and, therefore, this, as rightly held by the Subordinate Judge, requires registration and in the absence of registration is not admissible in evidence. Mr. Jagannadha Aiyar relied upon a recent decision of this Court in *Krishnayya* v. *Ponuswami Aiyar* (3) as supporting his contention that Ex. H does not require registration. In that case the expression used was :

Let it be known that for that I have retained with you as collateral security my document of the collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvattiswaranpet, Madras.

There the letter refers to a past transaction. If a person writes a letter to another to the effect that he had already left with him certain documents as security for loans already made that letter does not require registration. But Ex. H is not such a letter. It contains the terms on which the loan was advanced and says that the document should be kept with him as security. Therefore, as regards the loan of Rs. 50 the plaintiff is not entitled to get a decree as equitable mortgagee.

The Subordinate Judge's decree is set aside and the plaintiff will have a decree for Rs. 350 with subsequent interest in respect of the property covered by Ex. D. The appellant will pay and receive proportionate costs throughout.

Time for redemption will be three months from to-day.

Decree set aside.

(2) [1916] 43 Cal. 895=35 I. C. 190=43 I. A. 122 (P. C.)

(3) A. I. R. 1924 Mad. 547.

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* A. I. R. 1926 Madras 744

KUMARASWAMI SASTRI AND VENKATASUBBA RAO, JJ.

(*Kalakantharam*) *Rukmani Ammal*—Appellant.

v.

Ka Ki Ankama Naidu and *others*—Respondents.

Appeal No. 320 of 1923, Decided on 6th November 1925,

* (a) *Registration Act, S. 47—Registered document should be presumed to be written on the date it bears—Evidence Act, S. 101.*

In cases where a document has been executed and registered and the question arises as to the date it bears there can be little doubt that the presumption is that the document was executed on the date it bears, and the onus is on the contesting party to show that it was not. In all such cases lapse of time does strengthen the onus cast. [P 745 C 2]

(b) *Hindu Law—Ceremonies—Presumption.*

Where a ceremony is admittedly performed, the presumption is that it was performed in accordance with the Shastras. [745 C 2]

(c) *Evidence Act, S. 99—Third persons can show that mortgagors had no interest in the property mortgaged.*

In a suit on a mortgage the mortgagors are estopped from disputing that they have not got the interest which they said they had and which the mortgagees bargained for. But it is open to third parties to state and prove what that interest is and to say that the mortgagors have no interests or have lesser interests than those prescribed for in the mortgage. [P 746 C 1]

(d) *Civil P. C., O. 34, R. 1—Mortgage suit—Parties.*

In a mortgage suit it is not proper to join parties claiming a paramount adverse title. [P 746 C 1]

(e) *Hindu Law—Sanyasi — "Apath Sanyasi" described.*

Renunciation is considered meritorious, but a man renounces only what he may keep and gives up what he may retain. In the case of an Apath Sanyasi, the man is face to face with death and he makes a virtue of necessity and gives up earthly things when he cannot help doing so. He expects that he is dying and goes through the form of renouncing the world. [P 747 C 1]

K. S. Krishnaswami Aiyangar and *S. Rangachariar*—for Appellant.

C. V. Anantakrishna Aiyar and *T. E. Ramabhadrachariar*—for Respondents.

Kumaraswami Sastri, J.—The 3rd defendant is the appellant. One Venkatasubbayya died on 6th April 1904. He became a Sanyasi on 2nd February 1904, and it is alleged in the plaint that he left a Will, dated 2nd February 1904, making certain dispositions of his property. The plaintiff claimed under a mortgage deed, dated 14th April 1910, executed by Defendants 1 and 2 and the 3rd defendant's deceased husband. The 1st defendant was the sister's son of the testator and he also married the predeceased son's daughter of the testator. The 2nd defendant married the brother's daughter of the testator. The 3rd defendant's husband is dead. The main pleas of the defendants in their written statements, to be considered at present, are that Venkatasubbayya became a Sanyasi on 2nd February 1904, that the Will referred to in the plaint was executed after he became a Sanyasi, the exact date not being known, between the 9th and 12th of March and that it was antedated to 2nd February. Other contentions were raised which it is unnecessary to consider for the purpose of this appeal. The Will was registered on 17th March and so far as it appears from the evidence there was no dispute raised as regards this Will till we come to the present suit. The plaintiff filed the suit on 4th April 1922, so that we have to decide the question as to the exact date of Ex. B, the will, twenty years after its execution and registration. The District Judge was of opinion that, although Venkatasubbayya became a Sanyasi, he was not a true Sanyasi under the Hindu Law having renounced the world and gone through the necessary ceremonies and that he did not divest himself of all the properties as required, but continued to deal with them and that his professed Sanyasam would not prevent his willing away the properties, even though the Will was executed after he became a Sanyasi. In this view, he is of opinion whether the Will was executed on the 2nd February or subsequently it will not make much difference, even though he was inclined to the view that the will was executed subsequent to his becoming a Sanyasi.

The first question that arises in this case is what was the date of the will, whether it was executed on the 2nd or whether it was executed subsequently and ante-dated ? In cases where a document has been executed and registered, and the question arises as to the date it bears, there can be little doubt that the presumption is that the document was executed on the date it bears. If any authority were needed for this proposition I may refer to the decision of their Lordships of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (1). The onus, therefore, is on the 3rd defendant who is the contesting defendant to show that although the document was executed so long ago as 1904 and bears the date 2nd February, it was executed subsequently. In all such cases lapse of time does strengthen the onus cast. Venkatasubbaya is dead. His widow is dead, and so far as the evidence goes we have to rely mainly on the evidence of P. W. 2 who was the only attesting witness to the Will who has been examined. (The judgment then deals with the evidence of several witnesses and concluding that on the evidence it could not be held that Ex. B was ante-dated, proceeded further.) I think it is unnecessary to consider the question whether Venkatasubbayya was a Sanyasi in the strict sense of the term under the Hindu Law having undergone all the ceremonies and consequently civilly dead and unable to dispose of the property. If knowledge of the Mantrams and the understanding of the ceremonies are essential very few ceremonies now performed by Hindus could be upheld. I do not agree with the District Judge that knowledge of any mantram is necessary, repetition being sufficient in these days. All you have to see is whether a person performs his ceremony repeating the mantras. Where a ceremony is admittedly performed, the presumption is that it was performed in accordance with the Shastras.

Then the next question is whether the decree as passed by the learned Judge is correct. The plaintiff admits and bases the title of the mortgagors on the Will, Ex. B. The mortgagors under Ex. B are three out of the eight persons who are entitled to the properties bequeathed. The decree as it stands is a decree against the entire property irrespective of any shares of the mortgagors. I do not think that such a decree can be passed. The

(1) [1917] 44 Cal. 662 = 40 I. C. 242 = 44 I. A. 172 (P. C.)

decree ought to be limited to the interest of the mortgagors in the property under the Will. What that interest is it is necessary to determine in this case.

It is clear that in a suit on a mortgage the mortgagors are estopped from disputing that they have not got the interest which they said they had and which the mortgagees bargained for. But it is open to third parties to state and prove what that interest is. It is open to third parties to say that the mortgagors have no interests or lesser interests than those prescribed for in the mortgage. The position of the 3rd defendant in this case s peculiar. She is a daughter of the testator and she is also the widow of one of the executants of the mortgage. She could not as legal representative of the mortgagor set up any title adverse to the title which the husband prescribed for. But in her own right as daughter it is open to her to set up any title which she may have, but that is not possible in a mortgage suit where she is the legal representative of one of the mortgagors. It has been decided by their Lordships of the Privy Council that you ought not in a mortgage suit to join parties claiming a paramount adverse title. Therefore it is unnecessary to determine what her rights are as daughter of the testator. Though Mr. Krishnaswami Aiyangar invites us to discuss this question in view of the fact that according to him one of the legatees under the will has forfeited his right but in view of the fact that this circumstance is not admitted we cannot go into the question.

The question as to 3rd defendant's rights as daughter need not be determined in this case as her position is that of the legal representative of a mortgagor and as legal representative she cannot be allowed in this suit to contest the right of her husband who executed the mortgage. The decree will be only as regards the interests of the mortgagors in the property mortgaged without determining what that interest is in these proceedings. The appeal is dismissed. As the main contentions have not been substantiated the appellant will pay the respondents' costs. Time for redemption six months from this date.

Venkatasubba Rao, J. — I entirely agree ; and but for the fact I strongly feel that the defence put forward is unrighteous in the extreme, I should not take the trouble to deliver a separate judgment. The defence is strikingly ingenious and has the merits of being original. The suit is brought to enforce a mortgage executed by certain legatees under the will of Venkatasubbayya who died in April 1904. The mortgage was executed by Defendants 1 and 2 and the husband of the 3rd defendant. In 1910, the mortgage was effected and the present suit was brought in 1922.

The principal contesting defendant is the third and her defence is that at the time of the making of the Will her father was a sanyasi. The Will bears the date 2nd of February 1904 and was registered on the 17th of March 1904 ; the defence suggests that Venkatasubbayya became a Sanyasi on the 2nd of February and that the Will was not executed on that day previous to his having become a sanyasi, but that, as a matter of fact, it was made some time between the 9th and the 12th of March and that it was ante-dated to make it appear that the testator executed it while still a householder. It is then contended that as a sanyasi Venkatasubbayya would be civilly dead and that his Will would be invalid. If this contention succeeds, it would follow that the suit would fail, the mortgagee having acquired no right. The District Judge has dealt with two questions : 1. Was the Will ante-dated ? and (2). Did Venkatasubbayya become a sanyasi in the strict sense of that term ?

He has devoted a large portion of his judgment to a discussion of the second question and has come to the conclusion that the deceased did not become a sanyasi and that he was not, therefore, incompetent to make a Will. In regard to the other question, the learned Judge has not dealt with it quite as fully as he might have done, for, in his opinion, on his finding that the testator was not a sanyasi it was not necessary to consider very fully the plea of the ante-dating of the Will. All the same he has recorded a finding that the Will was ante-dated.

In the view I take of the case, it is unnecessary to decide whether the deceased did or did not become a sanyasi. But I wish to make one observation. The District Judge is perfectly justified in demanding the strictest proof possible of the fact that the testator did become a sanyasi. The Will is challenged 18 years after its execution. It was duly

executed, attested and registered. It was acted on and the mortgagee, a stranger to the family, was led to believe that it was perfectly valid. At this distance of time, the testator's daughter, the 3rd defendant, chooses to deny its validity. This is one aspect of the case. Then again, the suggestion made is that Venkatasubbayya became an "apath-sanyasi." This form of renunciation of the world is clearly not the approved form.

Renunciation is considered meritorious, but a man renounces only what he may keep and gives up what he may retain. In the case of an *apath* sanyasi, the man is face to face with death and he makes a virtue of necessity and gives up earthly things when he cannot help doing so. He expects that he is dying and goes through the form of renouncing the world. This is a sort of sanyasi which Venkatasubbayya is supposed to have become. That he did wear kashaya and change his name, there can be no doubt. But when the consequences of holding that the deceased became a sanyasi are so grave, the District Judge, in the circumstances, is entitled to demand a most rigorous proof of the fact alleged. Whether the District Judge's conclusion is right or wrong I need not pause to consider, because I am perfectly satisfied that the Will was not ante-dated and that his judgment must be supported on that ground.

As I have said the District Judge's discussion of the issue, was the Will ante-dated, has been somewhat scrappy, but after hearing Mr. Krishnaswami Aiyangar for the appellant, I have come to the conclusion that he has hopelessly failed to make out a case. (The judgment here deals with the evidence and concluding that the theory of ante-dating was resorted to by the third defendant in her desperate attempt to get rid of a just claim, proceeded.) In regard to the form of the decree, I agree with what has fallen from my learned brother. I do not think that the plaintiff has asked for more than what we are going to give him by our judgment. The first two defendants have been impleaded because they are mortgagors and the 3rd defendant because she is the widow and heir of the deceased mortgagor Rangiah. The mortgage decree can affect only the interest of the mortgagors, and in so far as the 3rd defendant represents Rangiah, she can have no answer. Any paramount right of the 3rd defendant, granting she has one, is not affected by the mortgage decree.

I, therefore, agree that the decree shall be modified in the way suggested by my learned brother.

The appeal otherwise stands dismissed with costs.

Decree varied.

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* A. I. R. 1926 Madras 747

PHILLIPS AND MADHAVAN NAIR, JJ.

Venkataswami Naidu—Appellant.

v.

Venkatasubba Naidu and *others* — Respondents.

Appeal No. 150 of 1924, Decided on 27th January 1926, from the order of the Sub-J., Vellore, D/- 21st November 1923, in C. M. P. No. 536 of 1923.

* *Limitation Act, Art.* 182 (4)—"*Date of amendment*" *is date of order for amendment.*

The "date of amendment" in Art. 182 (4) means the date of the order for amendment and not the date on which the decree is actually amended. [P 747, C 2]

Rangaswami Aiyangar for *K. R. Narayanaswami Aiyar*—for Appellant.

L. Venkatanarasiah—for Respondent.

Judgment.—The only question for determination is the meaning of the words "date of amendment" in Art. 182 (4) of the 1st Schedule to the Limitation Act. It is contended for the appellant that the 'date of amendment' must mean the date on which the decree is actually altered or corrected and not the date of the Court's order directing the amendment, and argument is advanced that an amendment does bear the same relation to the order as a decree bears to the judgment and that therefore the provision in the Civil Procedure Code which says that the decree shall bear the date of the judgment is not applicable here.

As a matter of fact, an order of amendment is itself a judgment and in accordance therewith, the original decree is altered and becomes a new and amended decree in accordance with the judgment pronounced. It seems, therefore, clear that the date of the amended decree must be the same as that of the judgment. To hold otherwise would be to put in the hands of the ministerial officers of the

Court the power to fix any date for the amendment of the decree quite regardless of the date on which the order was passed. The same view was taken in *Nirit Lal Jha* v. *Kalanand Singh* (1) and we see no reason to hold otherwise.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) [1916] 3 Pat. L. W. 447=36 I. C. 533.

A. I. R. 1926 Madras 748

PHILLIPS AND KRISHNAN, JJ.

(*Srilasri*) *Vythilinga Desika Pandara Sannadhi*—Petitioner.

v.

Arumuga Thambiran and *another*—Respondents.

Civil Miscellaneous Petition No. 1057 of 1925, Decided on 3rd February 1926, from the judgment of the High Court in Appeal No. 43 of 1921, reported in *A.I.R.* 1926, *Mad* 162.

Civil P. C. S. 109—*Scheme suit—Defendant trustee dying—Order holding the suit not to abate as regards settling of scheme is not final order.*

Pending a suit for the removal of the defendant trustee from his alleged trusteeship and for framing a scheme the trustee died and it was held that the whole suit abated. In appeal to the High Court it was held that so far as the removal of the alleged trustee was concerned the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme the suit did not abate and could be continued against the succeeding trustee.

Held: that the order was not a final order under S. 109: 47 *Cal.* 918 (*P. C.*), *A. I. R.* 1925 *All.* 263, and *A. I. R.* 1924 *Lah.* 571, *Rel on.* [P. 748 C 2]

C. S. Venkata chari for *T. Rangachariar*, *A. Srirangachariar* and *R. Gopalachari*—for Petitioner.

S. Srinivasa Aiyangar, *K. S. Jayarama Aiyar* and *V. N. Venkatavaradachari*—for Respondents.

Order.—In this case the Subordinate Judge held that the suit abated on the ground of the death of the defendant, the suit being one for the removal of the defendant from his alleged trusteeship and framing a scheme for the suit mutt. In appeal here it was held that so far as the removal of the alleged trustee was concerned the suit must abate on the death of that trustee, but in so far as the suit was for the framing of a scheme the suit did not abate and could be continued against the succeeding trustee, application has now been made for leave to appeal to His Majesty in Council against the order of this Court and the question with which we are now concerned is whether this is a final order within the meaning of S. 109. The petitioner relies upon two cases, *Meghraj* v. *Bidyabati Koer* (1) and *Lachmi Narain Marwari* v. *Balmakund Marwari* (2). The first of these two cases is distinguished from the prior case reported in *Krishnachandra Ghosh* v. *Maharajah Ram Narain Sing Bahadur* (3) on the ground that in the latter case the decree of the Court did not finally terminate the trial between the parties but left it open to the plaintiff to enforce his rights, if any, in a fresh suit. This remark would apply equally well to the facts of the present case and, therefore, even if the decision in *Meghraj* v. *Bidyabati Koer* (1) is correct in law, it is not applicable to the case before us. The case reported in *Lachmi Narain Marwari* v. *Balmakund Marwari* (2) differentiates the Privy Council decision in *Radha Kishan* v. *Collector of Jaunpur* (4), not so much on what is actually decided in the latter, but on an inference drawn from the Privy Council judgment as to what would have been the decision if the facts had been different. It must, however, be observed that both the cases relied on by the appellant appear to be opposed to the decisions of the Privy Council the latest of which is *Ramchand Manjimal* v. *Goverdhandas Vishandas Ratanchand* (5). There it was held that an order is only final if it fially disposes of the rights of the parties. These decisions have been discussed and followed by the High Court of Allahabad and Lahore *Muntaz-ud-daula Mukarram Ali Khan of Panasu* v. *James R. R. Skinner* (6) and *Sultan Singh* v. *Murli Dhar* (7). In the present case there has been no adjudication as to the rights of the parties. So far as the petitioner is concerned there has been no trial and no adjudication. The question as between him and the plaintiffs is as

(1) [1915] 21 C. L. J. 279=28 I. C. 567.
(2) [1921] 6 Pat. L. J. 116=60 I. C. 479=2 Pat. L. T. 155.
(3) [1913] 18 C. L. J. 124=21 I. C. 430.
(4) [1901] 23 All. 220=28 I. A. 28=5 C. W. N. 153 (P. C.).
(5) [1920] 47 Cal. 918=56 I. C. 302=47 I. A. 124 (P. C.).
(6) A. I. R. 1925 All. 263.
(7) A. I. R. 1924 Lah. 571.

to whether a scheme should not be framed and on that point there has been no adjudication at all and consequently the order of remand cannot be deemed to be a final order. The contention urged before us is that under the decree of the Subordinate Judge the petitioner obtained some sort of right i. e., that that particular suit should not proceed, and that that right has been taken away by the order of this Court. This is true but the right has not been taken away finally; it has been merely suspended pending further proceedings, and consequently the order taking it away temporarily cannot be said to dispose finally, of that right, there being no final order by this Court. The leave to appeal must therefore be refused on the ground that the order of this Court is not a final order within the meaning of S. 109, Civil Procedure Code.

It is further contended that special leave should be given as it is a fit case for appeal but we must refuse the application. If the allegations in the plaint are correct it is certainly desirable that the matter should be enquired into and that a scheme should be framed ; consequently there does not appear to be good reason for the grant of special leave, The petition is dismissed with costs.

Leave refused.

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* A. I. R. 1926 Madras 749

DEVADOSS AND WALLER, JJ.

Narayanaswami Naidu and *others*—Plaintiffs 2 to 4—Appellants.

v.

Rangaswami Naidu and *others*—Defendants 2 to 5—Respondents.

Appeal No. 272 of 1924, Decided on 5th February 1926, from the order of the Dist. J., Trichinopoly, D/- 18th December 1923, in E. P. R. No. 54 of 1922.

* (a) *Civil P. C., O. 21, R. 2—R. 2 covers a decree under which any money is payable and not to all kinds of decrees.*

Order 21, Rule 2 refers to a decree under which money is payable whether there are other reliefs or not, and if no money is payable under a decree, then R. 2 cannot be held to apply to such a decree. The words "payable under a decree" do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it.-*A. I. R*: 1922 *Bom.* 380, *Diss. from.*

A razinamah decree provided that in case the defendants were to pay to the decree-holders Rs. 17,000 within two years, certain property should be reconveyed to them, but if default be made in such payments the decree-holders themselves should enjoy the properties with absolute rights.

Held : the decree was not covered by O. 21, R. 2. [P. 749, C. 2, P. 751, C. 2]

(b) *Interpretation of Statutes—Headings and marginal notes of section indicate legislature's meaning.*

Though the headings and marginal notes should not be held to govern the clear text of a section. yet they can be taken as an indication of what the Legislature meant. [P. 751, C. 2]

S. T. Srinivasa Gopalachari—for Appellants.

L. A. Govindaraghava Aiyar—for Respondents.

Judgment.—A razinamah decree was passed on 22nd October 1914 in O. S. No. 11 of 1913 in which it was provided that in case the 1st defendant or the 4th defendant were to pay to the decree-holders Rs. 17,000 within two years the property should be reconveyed to the 1st defendant, but if default be made in such payments the decree-holders themselves should enjoy the properties with absolute rights. The plaintiff-decree-holders entered into an agreement on 19th April 1916 with the 2nd defendant whereby they relinquished their interest in the property for Rs. 7,000. The 2nd plaintiff applied to the lower Court for execution of the decree. The learned District Judge held that the decree had been adjusted by the arrangement of 19th April 1916, evidenced by Exs. A and B and that the 2nd plaintiff was not entitled to execute the decree. He also held that the 2nd plaintiff released his right to the property by another document, Ex. E dated 15th July 1922. Against his order Plaintiffs 2 to 4 have preferred this appeal.

The contention of Mr. Srinivasagopalachari for the appellants is that the decree was a money decree, and any adjustment out of Court not certified to the Court should not be recognized. The sole question in this case is whether the decree is a decree coming within O. 21, R. 2, Civil Procedure Code. The terms of the razi decree are such that the plaintiffs could not recover Rs. 17,000 from the defendants if the latter did not choose to pay the amount. There is no

decree in favour of the plaintiffs for Rs. 17,000. What is stated in the decree is that if the 1st defendant or the 4th defendant were to pay Rs. 17,000 to the decree-holders they should reconvey the property to the 1st defendant. It is open to the Defendants 1 and 4 not to pay the amount in which case the decree-holders will not be bound to reconvey the property. If the 1st defendant or the 4th defendant did not choose to pay the amount to the plaintiffs the decree did not empower them to realize the amount by execution. The decree is not one "where any money" is payable under a decree and therefore does not come within the provisions of O. 21, R. 2.

The next contention is that R. 2 applies to all kinds of decrees whatever may be the nature of the relief granted and reliance is placed upon *Gharry* v. *Gowrya* (1). In that case the learned Chief Justice and Mr. Justice Shah held that R. 2 applied to all kinds of decrees. With very great respect to the learned Judges we are unable to accept this view. There is no discussion in the case of the decisions bearing on the question. The learned Judges contented themselves by merely saying the words:

"Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted."

as justifying their view, that the words did not confine the provisions of the rule to money decrees and that any decree was provided for. The rule says "where any money payable under a decree of any kind is paid out of Court," i.e., where any money payable under a decree, whatever may be its nature, is paid out of Court, it has to be certified, or if the decree is otherwise adjusted, either in whole or in part that also has to be certified. The words "the decree" can only mean the decree under which any money is payable. The use of the definite article clearly indicates that the decree can only mean a decree where any money is payable, and the rule means any decree under which money is payable whether there be other reliefs or not if adjusted out of Court should be certified to the Court within the time allowed by law. But where no money is payable under a decree as, for instance in the case of recovery of immovable property or grant of injunction or any other relief in which the plaintiff is not entitled to enforce by execution payment of money, that decree does not come within the purview of R. 2.

In *Ramakrishna Rao* v. *Bala Krishna Rao* (2) it was held by Oldfield and Seshagiri Aiyar, JJ., that O. 21, R. 2, applied to partition decrees which provided for payment of money as well as other reliefs such as partition of immovable property and adjustments with regard to such property and that such adjustment could not be recognised unless certified or recorded as required by the rule. The learned Judges considered the previous cases on the point and came to the conclusion that if money was payable under a decree, and if there were other reliefs, any adjustment of that decree out of Court should be certified within the time prescribed and if not certified to the Court, then such an adjustment could not be recognized.

We may briefly refer to the history of the rule in order to understand what it really means. Under S. 206 of the Act 8 of 1859 all adjustments, whatever may be the nature of the decree, had to be certified to the Court and any adjustment not certified could not be recognised. The latter portion of the S. 206 was in these terms :

"No adjustment of decree in part or in whole shall be recognised by the Court unless etc."

In the Act of 1877, the chapter on execution of decrees was greatly expanded and in some respects altered and S. 258 of the Code of 1882 was practically the same as that contained in the Code of 1877. Under the Code of 1877 it was not necessary that all the adjustments of decrees, whatever may be the nature should be certified to the Court. In *Baba Mohamed* v. *Webb* (3) a Bench of the Calcutta High Court held that the rule contained in S. 258 was applicable to all decrees. The learned Judges observe at page 788 referring to S. 258 of the Code of 1877.

that section corresponds in all material respects, and carries with it the same meaning as S. 206 of the former Procedure Code (Act VIII of 1859) which manifestly deals with the adjustment of any decree.

Under S. 258 of the Code of 1882, which is a verbatim copy of the corresponding section of the Code of 1877 it was held that it applied only to money decrees. That was the view of the Madras High

(1) A. I. R. 1922 Bom. 380.

(2) [1920] 43 Mad. 476=56 I. C. 289=(1920) M. W. N. 261.

(3) [1881] 6 Cal. 786=8 C. L. R. 36.

Court in *Shankaran Nambair* v. *Kanara Kurup* (4). The learned Chief Justice and Mr. Justice Benson held that S. 258, Civil Procedure Code, referred only to the execution of decrees under which money was payable and was not applicable to decrees for possession of immovable properties. The section was further amended in the present Code by the addition of the words 'of any kind' in order to reconcile the conflicting views of the different High Courts. In *Abdul Latiff Sahib* v. *Bathula Bibi Ammal* (5) it was held by Wallis and Ayling, JJ., that where there was a decree for the delivery of certain immovable property and for the payment of money it was not open to the Court to recognize any uncertified adjustment under O. 21, R. 2, Cl. 3, Civil Procedure Code. This was followed in *Sethurama Sahib* v. *Chotta Raja Sahib* (6) where Mr. Justice Sadasiva Aiyar who held in *Kelu Nair* v. *Meenakshi* (7) that O. 21, R. 2, of the Civil Procedure Code did not apply to the relief of possession of immovable properties given by a decree, altered his view, and following the decision in *Abdul Latif Sahib* v. *Bathula Bibi Ammal* (5) held that where the decree provided for payment of money as well as other reliefs the adjustment of such a decree could not be recognized unless certified to the Court within the time allowed by law and observed that:

> the words "the decree" in the second sentence of that rule meant a decree of any kind under which money is payable including a complex decree under which possession is also marked, and that as regards execution of that portion also of the decree which relates to possession of immovables an uncertain adjustment cannot be recognized.

From the position of R. 2 in the present Code and from the heading and the marginal note, the, the intention of the legislature can be clearly gathered. Though the headings and marginal notes should not be held to govern the clear text of a section, yet they can be taken as an indicatian of what the legislature meant. Under the Code of 1859, S. 206 was in the chapter relating to execution generally. In the Code of 1877 and in the Code of 1882, S. 258 was in the chapter relating to execution under the heading 'Mode of Execution' and in the present Code, O. 21, R. 2 relates to execution of decrees and orders and the heading over R. 1 is 'Payment under Decree.' If the contention of Mr. Srinivasagopalachari is correct, the Legislature should have said in plain terms that the adjustment of any decree out of Court should not be recognized unless certified to the Court within the time allowed by law. That was the clear expression in the Code of 1859 and if the Legislature intended to re-enact that provision it would have done so in very simple language. The addition of the words 'of any kind' after the word 'decree' in the second line of O. 21, R. 2, was intended to set at rest the difference of view between the Madras High Court and the Calcutta High Court and the conflicting views as regards the meaning of S. 258 of the Code of 1882. By the addition of the words 'of any kind,' it cannot be said that the legislature intended that the adjustment of any decree, whatever may be the relief claimed, should be certified to the Court. We are clearly of opinion that O. 21, R. 2 refers to a decree under which money is payable whether there are other reliefs or not and if no money is payable under a decree then R. 2 cannot be held to apply to such a decree. The words 'payable under a decree' do not mean any money which the party may, if he chooses, pay, but money which is recoverable by a party in execution against the party liable to pay it. In this case, as already observed the plaintiffs could not execute the decree against 1st and 4th defendants.

First plaintiff died before the date of the razi decree and Plaintiffs 2 to 4 entered into the agreement evidenced by Ex. A. The recitale in the document is:

> As we have on this date got from you a note of bond executed in our favour for this sum of Rs. 7,000, stipulating interest at Rs. 0-6-0 per cent. per mensem, you yourself shall take the karar and all other properties and also you yourself shall take from the said properties the income including the old arrears and the new income.

A pro-note was executed on the same day by the 2nd defendant in favour of the plaintiffs which is Ex. B. A suit was filed in the Pudukkotta Court for the amount due under the pro-note and was realized by the plaintiffs. The arrangement evidenced by Exs. A and B is, therefore, an adjustment of the decree

(4) [1899] 22 Mad. 182=8 M. L. J. 175.
(5) [1914] M. W. N. 346=23 I. C. 530.
(6) [1917] M. W. N. 327=40 I. C. 820.
(7) [1913] 25 M. L. J. 586=21 I. C. 639.

passed in plaintiff's favour, and such an adjustment could be pleaded as the decree does not come within the purview of R. 2 of O. 21. The learned Judge has correctly held that the decree was adjusted by the arrangement evidenced by Exs. A and B and the plaintiffs therefore could not ask for execution of the decree which had already been adjusted. It is not necessary to consider in this view whether Ex. E amounts to a release of the plaintiffs' right in the property in favour of the sons of the 2nd defendant.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I R. 1926 Madras 752

WALLACE AND MADHAVAN NAIR, JJ.

(*Krotapalli*) *Gopalam*—1st Defendant—Appellant.

v.

Myneni Suryanarayana and *others*—Plaintiffs and 2nd Defendant—Respondents.

Appeal No. 167 of 1924, Decided on 27th January 1926, from the decree of the Addl. Sub-J., Bapatla, D/- 23rd February 1924, in O. S. No. 44 of 1923.

(*a*) *Civil P. C. Sch. 2, para. 1—Reference ambiguous as to matters referred—Construction—Arbitrator's belief as to what was referred is immaterial—Court is to finally decide as to what was referred.*

Before arbitrators get jurisdiction to decide a dispute, it must be clear that it is referred. Where the reference to the arbitration is not clear as to the matters referred, Courts should not be unreasonable or unduly technical in construing the document when it is drawn up by persons not familiar with law and legal phraseology ;. but at the same time the Court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed that a particular matter was referred, and the final decision as to whether the particular matter was referred or whether a particular party had consented to refer it lies not with the arbitrators but with the Court.

[P. 753, C. 2]

(*b*) *Civil P. C., Sch. 2, para. 15—Award based on personal knowledge of arbitrators is bad.*

Though personal knowledge does not of itself disqualify an arbitrator from acting as such and may even be a good reason for his being selected, but, unless the parties consent to such a course, no arbitrator has a right to decide the matter on his personal knowledge and the award based on such knowledge is vitiated : *A I.R.* 1923 *Mad.* 301 ; *A.I.R.* 1925 *Mad.* 1036 and 42 *All.* 185, *Ref.*; 38 *Cal* 143, *Dist.* [P. 754, C. 1]

T. V. Ramanatha Aiyar and *T. V. Venkatarama Aiyar*—for Appellant.

Ch. Raghava Row—for Respondents.

Judgment.—This appeal is against a decree of the lower Court confirming an award. The 1st defendant and Sriramulu, the husband of 2nd defendant, were brothers. It was alleged by the plaintiffs that 1st defendant's father, Venkayya, brought his sister's son, Nagayya, the father of Plaintiffs 1 to 3, into the family as illatom son-in-law, promising him a share in the family property sanctioned by usage to a person in his position ; that when Sriramulu died, early in 1923, the plaintiffs claimed their share from the 1st defendant and the 2nd defendant also claimed maintenance ; that these two disputes were referred to arbitration, the arbitrators being P. Ws. 1 to 4 and D. W. 1, and that the arbitrators passed an award, Ex. A, giving to the plaintiffs a third share of the family property and to the 2nd defendant certain land for maintenance. The 1st defendant refused to carry out the first part of the award and the plaintiffs sued to enforce it. The lower Court passed a decree in their favour and the 1st defendant appeals. The 1st defendant challenges the legal validity of the award on two main grounds : first, that the matter of the plaintiffs' claim to a share in the family property was never referred at all ; and secondly, that the award is vitiated because the arbitrators have relied on their own personal knowledge and not on evidence given before them for the decision of the case. We shall deal with these points in order.

The first point has to be decided on the terms of the reference which is Ex. B. It runs :

As first Nagayya, the father of one of us, Suryanarayana, and later my younger brother Anjayya were being kept in the house of the late Venkayya for conducting the duties of the house and as the wife and heir of the late Sriramulu, the elder brother of one of us, Gopalam, had claimed proper maintenance for her livelihood, etc., and so we are disputing about this affair, we both desire that you should act as panchayatdars and settle the above disputes between us.

It is signed by the 1st plaintiff, the 2nd defendant and the 1st defendant. It is evident that the only matter mentioned in it as a claim of any kind is the maintenance affair of the 2nd defendant. But the plaintiffs urge that the mention of

Nagayya and Anjayya being kept in the house was made because there was this other claim by the plaintiffs to a share and that, because of that mention of these facts, the Court is to infer that the other claim was not only advanced by them but was specifically referred for arbitration. It was also emphasized for the plaintiffs that the word 'disputes' is in the plural and therefore there must have been more than one dispute. It is further urged that if Ex. B is obscure because of ambiguity, it is permissible to take and consider extraneous evidence as to what was really referred ; and the plaintiffs urge that that evidence is wholly in favour of their interpretation of Ex. B. Now Ex. B is clear and quite intelligible as it stands. The fact that there is no very convincing reason appearing in it for inserting the statement about the 1st plaintiff's father and brother being kept in the house is not a ground for holding that the document considered as a reference is obscure. Nor is a Court entitled to speculate, as the lower Court has done, on what must have been the reasons for the insertion of this statement. As to the use of the plural: "disputes" even if the plural was designedly used—and that is a considerable assumption—the document itself says that the 2nd defendant was claiming livelihood, etc., so that the plural may legitimately be used of her claims alone. It is difficult to believe that if this was a deliberate document, as it is claimed to be, setting out what were the disputes to be settled, the statement of claim by the plaintiffs for a share in the family property, which was the more important of the two claims, should have been omitted altogether, if it really had been referred, unless the omission was deliberately made with intent to deceive the 1st defendant who is an illiterate man.

We further think it is a case where the language used is plain in itself and applies accurately to existing facts. Under S. 94 of the Indian Evidence Act extraneous evidence cannot be given to show that it was not meant to apply to such facts. Even if the extraneous evidence is considered, it does not seem to us to help the plaintiffs' case. (The judgment then examined the extraneous evidence and proceeded). To our mind Ex. B only mentions one person who wants or claims anything and that is the 2nd defendant, and we can see no good reason for holding that, when the 1st defendant put his mark to it, he was consenting to refer also the matter of the claim of the plaintiffs to a share.

The principle on which such cases have to be decided is clear. Firstly, it must be clear that the dispute has been referred before the arbitrators get jurisdiction to decide it. See *In re. Arbitration Act* (Indian) : *Atlas Assurance Company, Ltd.* v. *Ahmedbhoy Habibbhoy* (1). Courts no doubt will not be unreasonable or unduly technical in construing documents drawn up by persons not familiar with law and legal phraseology ; but at the same time the Court must be satisfied by the language used that a matter decided was in truth referred to the arbitrators for decision. It does not matter whether or not the arbitrators genuinely believed the matter was referred and therefore held an inquiry about it if in fact it was not, or that they genuinely believed that one of the parties had agreed to refer the matter if, as a matter of fact, he had not ; and the final decision as to whether the particular matter was referred, or whether a particular party had consented to refer it, lies, not with the arbitrators but with the Court. This is not a case in which the reference is wide enough to include in the matters referred the question whether or not this particular dispute was within the submission. There is no wide language used at all ; the language is restricted and definite. In such a case it is the Court which has to decide whether the matter in respect of which the suit is brought is one which was agreed to be referred. For the above reasons we must hold that this dispute about plaintiffs' share was not referred and therefore the arbitrators did exceed their jurisdiction in deciding it.

As to point (2) namely, whether the arbitrators disposed of the case on personal knowledge, we think that also is a good ground of attack on the award. It is clear from the evidence of P. Ws. 1, 2 and 3, all arbitrators, and from the wording of the award and the statement of reasons in the award which precedes the words " Therefore we decide accordingly " (that is, that the plaintiffs' family should have a third share in the property), that the decision of the arbitrators purports

(1) [1910] 34 Bom. 1=1 I.C. 14=11 Bom. L. R. 1.

to have been based only on their personal knowledge. It is clear further from P. W. 3's evidence that he had no personal knowledge of these matters at all and that he merely accepted his knowledge from P. Ws. 1 and 2. Thus the award was passed on the personal knowledge of P. Ws. 1 and 2 and the acquiescence of P. W. 3 in their opinion based on their personal knowledge. None of them decided on the evidence and P. W. 3 decided on what P. Ws. 1 and 2, who were not witnesses in the case, told him. This procedure also vitiates the award. It is true of course that personal knowledge does not of itself disqualify an arbitrator from acting as such and may even be a good reason for his being selected ; but, unless the parties expressly consent to such a course, no arbitrator has a right to decide the matter on his personal knowledge. That knowledge may be of use in enabling him to understand and appreciate the evidence ; but he is not entitled to use it to repudiate the case put forward before him by any of the parties and his decision must be on the evidence and not on his personal knowledge. Still less has any arbitrator a right to accept and adopt as his own the purely personal knowledge of other arbitrators. Such a course was the more flagrant misconduct in this case as the award was passed by a majority of one, the one being the arbitrator who took his knowledge at second hand, not from the witnesses, but from his fellow arbitrators ; that is, the decision was really only by two arbitrators and that on their personal knowledge only.

It is clear that the award was not passed on a consideration of the evidence in the case and that is enough to vitiate it: see *Chintalapudi Sanyasa Rao* v. *Chintalapudi Venkata Rao* (2) and the cases quoted therein, *Palavesam Chetty* v. *Narayana Aiyar* (3); and *Lakshmi Narain* v. *Sheonath Pande* (4). The case in *Ramdari Sahu* v. *Ram Charitter Sahu* (5) relied on by the plaintiffs is not on all fours. The case in *Maung Shwe Hpu* v. *U Min Nyun* (6) is relied on by the plaintiffs ; but if that decision means that, where arbitrators have held a private enquiry of their own, their award is not vitiated unless it can be shown that they have used the results of their enquiry in coming to their conclusion—a matter extremely difficult to prove—we are not prepared to agree. It would open a very wide door for misconduct and such a principle seems to us to be opposed to the principle laid down in *Dobson* v. *Groves* (7), which is that it is only by express agreement of parties that arbitrators are entitled to decide a case on their own personal knowledge. Here there is no such agreement, but rather one to the contrary since the parties in Ex. D expressly declared therein their consent to the decision being based upon their statements alone.

In conclusion, therefore, the award, in so far as plaintiff in this suit seeks to enforce it, is bad and cannot be supported, and we reverse the finding of the lower Court on this Issue (2). The award, so far as it decides the question of 2nd defendant's maintenance, being not attacked, will stand. The other issues now fall to be tried and the suit is remanded to the lower Court for this purpose. First defendant will get his costs in this appeal from the plaintiff. No costs to 2nd defendant.

Appeal partly allowed.

(2) A.I.R. 1923 Mad. 301.
(3) A.I.R. 1925 Mad. 1086.
(4) [1920] 42 All. 185=54 I.C. 443=18 A.L.J. 78.
(5) [1911] 38 Cal. 143=7 I.C. 333.
(6) A.I.R. 1925 Rang. 383.
(7) [1844] 115 E.R. 239.

A. I. R. 1926 Madras 754

WALLACE, J.

(*Kolluru*) *Venkataratnam*—1st Defendant—Petitioner.

v.

Pusapati Venkamma—Plaintiff—Respondent.

Civil Revision Petition No. 625 of 1925, Decided on 8th February 1926, from the order of the Dist. Munsif, Masulipatam, D/- 6th February 1925, in C. M. P. No. 103 of 1925.

Civil P. C., O. 6, R. 17—Plaintiff's right of suit jeopardised by a decision in another suit subsequent to filing of plaint—Plaint can be amended.

Amendent of the plaint can be granted on the ground that the plaintiff's right had been jeopardized by a decision subsequent to the filing of the plaint, although the amendment strengthens the plaintiff's claim which is not denied by the defendant. [P. 755, C. 1]

K. Venkataramarazu—for Petitioner.
Ch. Raghava Rao—for Respondent.

Judgment.—The amendment of the plaint was called for because the basis of plaintiff's right to sue had been jeopardized by a decision in another suit that a similar endorsement on a similar promissory-note was a forgery. This decision was passed after the plaint in this suit was filed and the application for amendment of the plaint was put in promptly. The amendment if allowed merely gives plaintiff another "string to her bow" in respect of her claim that the original liability of defendant under the suit note to Nagayya has now passed into a liability to herself. Defendant does not seem to plead that he is not liable under the note, provided the suit is in time. In these circumstances the ruling in *Naba Kumar Chowdhury* v. *Higheazany* (1) cited by the lower Court is in point and the amendment does not affect defendant's liability to pay though there is a change in the manner in which plaintiff claims the debt.

In the circumstances I am not prepared to hold that the lower Court has acted without jurisdiction or has exercised its jurisdiction irregularly in allowing the amendment.

The petition is dismissed with costs.

Petition dismissed.

(1) A. I. R. 1925 Cal, 419.

A. I. R. 1926 Madras 755

DEVADOSS AND WALLER, JJ.

Appu alias Subramania Patter—Petitioner—Appellant.

v.

O. Achuta Menon and *others*—Respondents.

Civil Miscellaneous Appeal No. 335 of 1922, Decided on 20th November 1925, from the order of the Dist. J., South Malabar, in Miscellaneous Petition No. 51 of 1921.

Civil P.C., O. 21, R. 66—Court cannot delegate its power to settlesale proclamation to Commissioner—If proclamation is not settled by Court, sale is invalid.

It is for the Court to settle the proclamation of sale and it cannot delegate that power to the Commissioner appointed by it. Even if a party is aware of the contents of the proclamation prepared by the Receiver, that would not relieve the Court of its duty of settling the proclamation, and if the proclamation is not settled by the Court, the sale would be invalid. [P. 755, C. 2]

K. Kuttikrishna—for Appellant.

Judgment.—The first point raised in this appeal is that the proclamation of sale was not settled by the Court but that the Commissioner appointed by the Court after the preliminary decree prepared the proclamation of sale and sold the property. It is for the Court to settle the proclamation of sale and it could not delegate that power to the Commissioner appointed by it. O. 21, R. 66, directs that when any property is ordered to be sold by public auction in execution of a decree the Court shall cause a proclamation of the intended sale to be made in the language of such Court and that such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale and specify as fairly and accurately as possible the property to be sold and a number of other things. It is also contended that no reserve price was mentioned in the proclamation of sale.

It is also urged that the appellant was not allowed to bid at the auction. The learned Judge relying upon the report of the Receiver has dismissed the appellant's application to set aside the sale. Even if the appellant was aware of the contents of the proclamation prepared by the Receiver, that would not relieve the Court of its duty of settling the proclamation. As the records stand at present, we are unable to say whether the allegation of the appellant is true or false. If the proclamation was not settled by the Court the sale would be invalid. As the learned District Judge has not taken evidence in support of the allegations in the petition and as the auction purchasers are not represented here, we think the proper course could be to set aside the order of the District Judge and direct him to restore the application of the appellant to file and dispose of it after taking such evidence as may be adduced by him and other parties to the suit. Costs of this appeal will abide the result and be provided for in the order that will be passed by the District Court.

Order set aside.

A. I. R. 1926 Madras 756

ODGERS AND VISWANATHA SASTRI, JJ.

Solai Pillai—Plaintiff—Appellant.

v.

A. Vedaji Baskara Tirumala Rao Sahib—Defendant—Respondent.

Second Appeal No. 475 of 1923, Decided on 25th September 1925, from the decree of the Dist. J., North Arcot, in A. S. No. 57 of 1922.

Madras Estates Land Act (1 *of* 1908)—*Ss.* 53 (1), 52 (3) *and* 112 — *Proceedings under Ch. VI — Suit for acceptance of patta is not condition precedent.*

All that a landlord has to do to justify proceedings under Ch. VI is to tender the ryot such a patta as the latter was bound to accept. S. 53, is confined to proceedings under Ch. VI and these proceedings are controlled by the conditions set out in S. 53.

There is no inconsistency between S. 52, Cl. (3) and S. 53 : 6 *L. W.* 108, *not Foll.*

[P 756 C 2 ; P 757 C 1]

M. Patanjali Sastri—for Appellant.

K. Kuttikrishna Menon — for Respondent.

Odgers, J.—This was a suit under S. 112 of the Madras Estates Land Act instituted by the plaintiff who was a tenant of a certain holding in the Arni Jaghir, from Fasli 1318 to 1326. The appellant and the Jaghirdar had exchanged pattas and in Fasli 1327, corresponding to 1917, and the Jaghirdar in Fasli 1328, tendered a patta with an altered rent and diminished acreage. The tenant refused to accept it. The landlord then, under S. 112 purported to bring the holding to sale. Hence, the tenant brought this suit under the same section. The land was brought to sale for rent due for Fasli 1328. Both Courts have held that the patta tendered by the Jaghirdar to the appellant is proper and correct, and it has been found that the previous pattas were wrong both as to rent and extent owing to the fraud and collusion of the karnam of the estate with the appellant. It is argued in second appeal before us that the sale of the holding by the landlord cannot be upheld unless he has brought a suit under S. 56 of the Act for the acceptance of a patta, and reliance is placed on the words of the Act in S. 52(3) that pattas are to remain in force until the commencement of the revenue year for which fresh pattas and muchilikas are accepted, exchanged or decreed. It is said in this case that none of those three things has taken place. On the other hand, it is said that the terms of S. 53, which, it is to be noted, applies in terms to Ch. VI of the Act under which these proceedings are taken, debar the landholder from proceeding against the ryot by distraint and sale of his moveable property or by sale of his holding under Ch. VI unless the patta or muchilika tendered to him was such as he was bound to accept or unless valid patta or muchilika continues in force. It has been held in both the Courts as a fact that the patta tendered is such a patta as the tenant was bound to accept and it, I may add, is extremely doubtful whether it can be said that a valid patta or muchilika continues in force, the previous pattas having been held to be vitiated by fraud though it is contended that they must be in full force and effect until they have been actually declared unenforceable or of no effect. I fail to see why we should accede to the argument put forward by the appellant which compels a landlord in every case of an altered patta to bring a suit for its acceptance. It seems to me, confining myself to the provisions of Ch. VI and S. 53, that all that a landlord has to do to justify proceedings under Ch. VI is to tender the ryot such a patta as the latter was bound to accept. There is undoubtedly some difference between the words in S. 52 (3) and those in S. 53 (1) ; but I think it is sufficient to say that S. 53 is confined to proceedings under Ch. VI and that those proceedings are controlled by the conditions set out in S. 53 (1). This suit is one under that chapter. There is no doubt that the Estates Land Act has for one of its objects to facilitate the recovery of rent in arrears by means of summary remedies such as distress. That will account for the insertion of S. 53 (2) which is not to be found in the old Rent Recovery Act where, unless the patta was entirely correct, all the remedies pursued by the landlord fall to the ground. In *Sreenivasa Aiyangar* v. *Abdul Rahim Sahib* (1) which was a suit for enhanced rent and heard by Ayling and Napier, JJ., Ayling J, decided the case on the short ground that a suit would not lie for an enhanced rent until the landlord obtained the order of the Collector under S. 42, sub-Cl. (2). He refused to decide the question as to whe-

(1) [1917] 6 L.W. 108=40 I.C. 82=(1917) M. W.N. 584.

ther a suit for enhanced rent (in this case before us, the rent is less than it was in the previous faslis) can be brought without first enforcing the acceptance of patta. Napier, J., was inclined to think that the terms of a new patta must be altered either by exchange of muchilika or by a decree under S. 56 before the landlord is entitled to sue for rent. He thought :

That the old patta remains in force fresh pattas neither having been accepted, exchanged or decreed.

This of course was not a suit for sale of the holding for arrears or for enforcing the landlord's right to distraint. For the reasons that I have given, I am of opinion that the dictum of Napier, J., is wrong. As pointed out, it was not necessary for the decision of the appeal before him which proceeded on another ground. I, therefore, think that the judgment of the learned District Judge was right. It may be mentioned that this point apparently was not raised before the Collector and it seems to me to have been not very strenuously argued before the District Judge. In paragraph 4 of his judgment, he expressed his inability to accept the contention largely on the ground of the circumstance under which the previous pattas had been brought about. There seems to have been no argument on the sections of the Act such as we have heard to-day. For these reasons, I am of opinion that the second appeal must be dismissed with costs.

Viswanatha Sastri, J.—I agree with my learned brother. In my mind there is no inconsistency between S. 52, Cl. (3) and S. 53. Even assuming that the two sections have to be reconciled, it appears to me that the word 'decreed' in Cl. 3 of S. 52 may be taken to include the decision on the validity of the patta in a contested suit like the present under S. 112 of the Act.

Appeal dismissed.

A. I. R. 1926 Madras 757

SPENCER, J.

(*Kunkalagunta*) *Venkiah* —Defendant—Appellant.

v.

Madlem Guraviah and *others*—Plaintiffs—Respondents.

Second Appeals Nos. 1803 and 1804 of 1922, Decided on 7th September 1925, from decrees of Dist. J., Guntur, D/- 22nd Feb. 1922, in A.S. Nos. 263 & 264 of 1921.

(*a*) *Part performance—Possession under contract for sale by father and right to specific performance is good defence in ejectment suit by sons—Joint Family—Hindu-Law.*

Part performance of contract by way of delivery of possession coupled with an enforceable right to specific performance is a good defence to an action for ejectment.

The defendant who is in possession of the property and has paid the price can successfully plead his possession and the contract for sale as a defence to a suit for possession by sons of the person agreeing to sell who claim under their father and who are born after the date of the contract to sell by their father, as they could not acquire at birth any interest in the property to which their father had already parted with his title. 1924 *Mad.* 271 (*F.B.*) *Fol.*

[P. 758, C, 2 P. 759, C. 1]

(*b*) *Hindu Law—Joint family—Family divided in status but property not divided—Alienation by one member—Alienee need not sue for general partition.*

Where a joint family is divided in status but the joint lands are not divided by metes and bounds, the members become tenants-in-common in respect of these lands and an alienee of such lands from one of the members need not sue for a general partition. [P. 759, C. 2]

(*c*) *Sp. Rel. Act S.* 27 (*b*)—*Specific peformance can be decreed against Legal representatives.*

The legal representatives of a party to the contract are bound by the contract, and under S. 27 (b) of the Specific Relief Act specific performance may be enforced against them.

Ch. Raghava Rao—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—These two appeals arise out of connected suits. O. S. No. 1440 of 1919 was a suit brought by M. Guravayya and the minor sons of his deceased brother Ramaguruvayya to recover possession of lands in the possession of the defendant. O. S. No. 199 of 1920 is a suit by the defendant in O. S. No. 1440 for specific performance of a contract to sell entered into by Ramaguruvayya, father of Plaintiffs 2 and 3, in O. S. No. 1440. In the first of these suits the plaintiffs alleged that the suit lands were taken on lease by one Nowloor Periah, that the defendant got into possession and was paying rent for some years but afterwards refused to pay

rent or to surrender possession. Both the lower Courts found against the truth of the alleged lease in favour of the defendant. The District Munsif found that the father of Plaintiffs 2 and 3, Ramaguruvayya, had purchased the suit lands under Ex. II from Nowloor Periah, to whom the family had previously sold the same property in discharge of debts and cash received at purchase. Afterwards Ramaguruvayya contracted to sell the suit property to the defendant and gave him a receipt (Ex. I) for payment of the purchase money. Exs. I and II were executed in 1911. After this the two minor plaintiffs were born. Both the lower Courts have taken it as proved that Ramaguruvayya became divided in status from his brother, the first plaintiff, before the minor plaintiffs were born and that they kept the suit lands undivided for future partition by metes and bounds.

The District Munsif dismissed the suit for possession on the finding that Ramaguruvayya entered into a contract to sell the property to the defendant. In the other suit he gave the plaintiff a decree for specific performance and directed the guardian of the minor defendants to execute a sale deed within four months.

The District Judge on appeal found that the suit lands formed part of the ancestral property of the joint family and that Ex. A. sale deed of 1903, formed the root of title in the joint family of plaintiffs. He also found that there was no satisfactory evidence that the first plaintiff and Ramaguruvayya had sold the property to Nowloor Periah, and, therefore, Nowloor Periah could not pass any valid title to Ramaguruvayya. Then, as regards the contract to sell, Ex. I, he held that this was only evidence of an agreement to sell and did not operate as a transfer of title. There is no discussion of the sections of the Transfer of Property Act or the Specific Relief Act in the judgment, but the District Judge was apparently referring to S. 54 of the Transfer of Property Act and the provision therein contained that contract for the sale of immovable property does not of itself create any interest in or charge on such property.

At the time when the District Judge gave his judgment the decision of the Full Bench of this Court in *Vizagapatam Sugar Development Co.* v. *Muthuramareddi* (1) had not been pronounced. That Full Bench dissented from the previous rulings of two Full Benches in *Kurri Veerareddi* v. *Kurri Bapireddi* (2) and in *Ramanathan* v. *Ranganathan* (3) and pronounced that part performance of a contract by way of delivery of possession coupled with an enforceable right to specific performance was a good defence to an action for ejectment.

In this view of the law the defendant who has been in possession of the property since 1911, and has paid the price, can successfully plead his possession and the contract for sale as a defence to the suit of the two minor plaintiffs who claim under Ramaguruvayya. As these two plaintiffs were born after the date of the contract to sell by their father, they could not acquire at birth any interest in the property to which their father had already parted with his title.

The respondents' vakil relies on some observations in *Ponnambala Pillai* v. *Sundarappayyar* (4) to the effect that a purchaser from a co-parcener of an undefined share takes subject to the chance of the vendor's share being diminished before the partition takes place. In that case the plaintiff's father and uncle contracted to sell certain properties as soon as they got possession of the same. Before they got possession the plaintiff was born and his father's brother, who was a party to the contract died. The learned Judges observed that there was no authority for the position that a contract to sell made by a Hindu before a son has been born to him is binding on the son who is born before the transfer of the property takes place. There was a suit for specific performance, to which the plaintiff was not made a party before he brought his suit for partition and it was held that he was not bound by the decree for specific performance obtained against his father. In their observations as to the binding character of a contract for sale made by a Hindu upon his after-born sons, the learned Judges make no direct reference to the provisions of the Specific Relief Act or to those of the Transfer of Property Act.

(1) A.I.R. 1924 Mad. 271 (F.B.).
(2) [1906] 29 Mad. 336=16 M.L.J. 395 (F.B).
(3) [1917] 40 Mad. 1134=6 L. W. 300=33 M. L.J. 252=43 I.C. 138=(1917) M.W.N. 757.
(4) [1897] 20 Mad. 354=7 M.L.J. 240.

In *Chinnu Pillai* v. *Kalimuthu Chetti* (5) the test applied to find the quantum of interest vesting in the alienee was to ascertain the state of the family at the time when the alienation was made. In the present case Plaintiffs 2 and 3 were born both after the contract to sell was entered into and after the possession was transferred.

In *Bappu* v. *Annamalai Chettiar* (6) the coparceners were apparently all born by the time that the contract was entered into by their father. The plaintiff, who sued after the father's death for specific performance of the contract to sell property in which the sons took an interest at birth, had to show that the transaction was for the benefit of the joint family. The fact that here the sons were not born at the time of the contract for the sale distinguishes this case from that : *Karaliar Nanu Bhai* v. *Mansuhkram* (7), *Ram Bakhsh* v. *Maughlani Khanam* (8) and *Salamat Zamin Begam* v. *Masha Allah Khan* (9) are all instances where S. 54 of the Transfer of Property Act is held to be inapplicable to cases where possession has been given and part of the purchase money has been paid. In *Venkata Reddi* v. *Yellapa Chetti* (10) Abdur Rahim and Srinivasa Aiyangar, JJ., held that S. 54 of the Transfer of Property Act did not affect equitable rights arising under a contract of sale.

The contentions of the respondents' pleader (1) that the defendant cannot put forward the defence of part performance of the contract except against a party to the contract, (2) that possession has not been found to be referable to the contract, and (3) that the defendant as an alienee from a coparcener has no remedy except to ask for partition of the undivided share of his vendor may be answered briefly as follows : (1) The legal representatives of a party to the contract, such as plaintiffs 2 and 3 are, are bound by the contract, and under S. 27 (b) of the Specific Relief Act specific performance may be enforced against them. (2) Ex. 1 speaks of possession having been handed over. The possession thus is referable to the same contract under which the purchase money was paid. Even otherwise, possession, coupled with an agreement to sell and payment of the price, are good defences against an action for possession. (3) Ramaguruvayya, having become divided in status from the 1st plaintiff the defendant is an alienee from a tenant-in-common not from a coparcener. He has no equity to ask for a general partition of the family property against a tenant-in-common. This distinguishes *Subba Goundan* v. *Krishnamachari* (11) from the facts of the present case.

In the result, S. A. No. 1803 will be allowed in part and in modification of the lower appellate Court's decree, the 1st plaintiff will get a preliminary decree for the recovery of a moiety of the suit property the claim of Plaintiffs 2 and 3 being dismissed. Each party will bear their costs throughout as each side has only partially succeeded. S. A. No. 1804 is allowed. The defence of limitation was raised in this suit (O. S. No. 199 of 1920), but no issue was framed on the question whether the suit was in time ; there was no contest on the point, and the respondents cannot be allowed in second appeal to press the point when the appellant has not been called on during the trial to show that his suit was in time. The sale deed to be executed will of course pass only the interest of Defendants 1 and 2 who were directed by the decree of the first Court to execute it, as the suit was only against those two represented by their mother as guardian. The decree of the District Judge is set aside and the decree of the District Munsif is restored with costs throughout. Time for execution of the sale deed will be extended to four months from the present date.

Decree modified in S. A. 1803 *of* 1922.
Appeal allowed in S. A. 1804 *of* 1922.

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(5) [1912] 35 Mad. 47=21 M.L.J. 246=9 I.C. 596=(1911) 1 M.W.N. 238 (F.B.).
(6) A.I.R. 1923 Mad. 319.
(7) [1900] 24 Bom. 400=2 Bom. L.R. 220.
(8) [1904] 26 All. 266=(1904) A.W.N. 8.
(9) [1918] 40 All. 187=43 I.C. 645=16 A.L.J. 98.
(10) [1917] 5 L.W. 234=38 I.C. 107.
(11) A.I.R. 1922 Mad. 112.

A. I. R. 1926 Madras 760

WALLER AND MADHAVAN NAIR, JJ.

(*Mempu*) *Ramayya* and *others* — Petitioners.

v.

Zamindar of Mandasa—Respondent.

Civil Revision Petitions Nos. 1141 to 1147 of 1923, Decided on 11th December 1925, from the orders of the Board of Revenue, Madras, in S. R. A. 3 of 1922, and other connected appeals.

Madras Estates Land Act (1908), *S.* 40 (3) (*a*) *and* S. 168 (2)—"*Preceding ten years*" *in S.* 40 (3) (*a*) *means ten years preceding the year of determination and not of filing the suit, and years of famine are to be deducted.*

"Preceding ten years" in Cl. (a) of S. 40 (3) means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The "ten years" refer to the preceding ten years other than the years which the Local Government may notify to be or to have been famine years, thus excluding from the ten years any years which may have been so notified. The exclusion of any year or years from the ten years' period does not mean that the statutory term is thereby extended.

In settling fair and equitable rent under S. 168 (2) the average of ten years is only to form one of the considerations for the fixing of commuted rent, and the Court is at liberty to take other facts also into consideration where the circumstances are peculiar, such as where some of the ten years are extraordinary years.[P760C2,P761C1]

T. R. V. Sastri—for Petitioners.
S. Srinivasa Iyengar—for Respondent.

Judgment.—These Revision Petitions relate to the settlement of rent in seven villages in the Mandasa Estate and have been filed against the order of the Revenue Board which confirmed, with some alterations the order of the Settlement Officer, Ganjam.

The ryots put in an application for survey and settlement in fasli 1321. The order of the Settlement Officer was passed in fasli 1331. In determining the fair and equitable rent in respect of the lands, the Settlement Officer acted upon the principle embodied in S. 40, sub-S. 3 Cls. (a) and (b), as he was entitled to do, under S. 168 (2) of the Madras Estates Land Act ; and in calculating the average rental value, he took into consideration the ten years ending with fasli 1331. He also excluded fasli 1328 from his calculation as that had been declared to be a famine year by the Government. The Board of Revenue ordered that faslies 1329 and 1330 also should be left out of account in making the calculation.

The learned Advocate-General, on behalf of the ryots who are the petitioners herein argued before us three points : (1) That faslies 1328, 1329 and 1330 having been excluded, the Court below has in its final order taken only a seven-year average instead of a ten-year average and that, therefore, it should have taken into consideration the average rental value of of faslis 1319, 1320 and 1321 also to make the ten years required under S. 40 sub-S. (3) Cl. (a) ; (2) that the method of calculating the rent payable for each field adopted by the Revenue Officer and accepted by the Revenue Board is not correct ; and (3) that in determining the fair and equitable rent, the Revenue Officer has not paid sufficient attention to the rent paid by the occupancy ryots of the neighbouring lands.

Point No. 1. In settling a fair and equitable rent S. 162 (2) states that the officer * * * shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot. This entitled the officer to rely upon the provisions of S. 40 (3) dealing with the commutation by suit of rent payable in kind, and under Clause (a) the officer shall take into consideration :

the average value of the rent actually accrued due to the landholder during the preceding ten years other than the years which the Local Government may notify to be or to have been famine years in respect of any local area.

In *Sivanu Pandia Thevar* v. *Zamindar of Urkad* (1) it was decided that the "preceding ten years" in this clause means the ten years preceding the year in which the Collector determines the amount of the commuted rent and not the ten years preceding the year in which the suit is instituted. The argument in the lower Courts was that in calculating the average rental value the ten years previous to the date of the application for settlement of rents should have

(1) [1918] 41 Mad. 109=6 L.W. 412=43 I.C. 498=34 M.L.J. 139.

been taken into consideration by the Collector. This argument was rightly overruled in view of the aforesaid decision. The present argument that the three faslis 1328, 1329 and 1330, having been excluded, in order to make up the ten years mentioned in S. 40 (3) Cl. (a) the three faslis, 1319, 1320 and 1321, immediately preceding fasli 1322, should have been considered was not put forward either before the Settlement Officer or before the Board of Revenue. The argument is ingenious but is not warranted by the wording of Cl. (a) of S. 40 (3) which refers to the preceding ten years other than the years which the Local Government may notify to be or to have been famine years, thus excluding from the ten years any year which may have been so notified. The exclusion of any year or years from the ten years period does not mean that the statutory term is thereby extended. No authority is cited in support of the present contention. This argument is therefore overruled.

Point No. 2. The method adopted by the Revenue Officer was this: He calculated for each village the average annual value of the rent based on the value of rent which accrued due in kind for each of the ten years ending with fasli 1331, excepting fasli 1328, and then he divided this rent amongst the various fields by considering the nature of the soil, the irrigation facilities, etc., of these fields. The learned Advocate-General contends that instead of following this method, he should have first of all found out the rent for each field separately with reference to the condition of the land, the nature of the soil, etc. On the presentation of their appeals, the Revenue Board referred this matter to the Special Settlement Officer and he submitted a very careful and detailed explanation as to the method adopted by him which appears at page 85 of the printed papers. S. 168 lays down that a fair and equitable rent should be settled having due regard to the other provisions of the Act. Notwithstanding this limitation, S. 168 leaves a large discretion to the Settlement Officer as regards the actual method to be adopted by him in settling the question of fair and equitable rent on any holding or village. Neither S. 168 nor S. 40 prohibits the method adopted by the Settlement Officer in this case in fixing the rate of cash rent of each holding If the method suggested by the Advocate-General has been followed, the result would have been, as pointed out by the Settlement Officer, only a reduplication of work without the ultimate result being affected in any appreciable way. In following the method that he adopted, the Settlement Officer was mainly guided by considerations such as the condition of the land, the nature of the soil, the irrigation facilities, distance in the village of the various fields. We agree with the Board's opinion that the method followed by him was the best that could have been adopted in the circumstances of the case.

Point No. 3: We do not think that there is any substance in this argument. The Revenue Officer has given sufficient consideration to the rents of the neighbouring lands. No doubt, in the immediate neighbourhood of the Mandasa Estate the rents are rather low in certain villages, but the Revenue Officer has .... considered this point and has given reasons for not adopting these low rates. As stated in paragraph 10 of his order, taking various circumstances into consideration he has adopted a method which he considers fair to both parties, and this has been accepted by the Revenue Board as well. We see no reason to interfere with the Board's decision on this point.

These Revision Petitions must, therefore, be dismissed with costs.

Mr. Srinivasa Iyengar on behalf of the zamindar has filed a memorandum of cross-objections in each of these revision petitions. He argues that the Revenue Board was wrong in having excluded from computation of the ten years faslis 1329 and 1330. No doubt, the two faslis 1329 and 1330 were technically declared famine years, but, as the Board points out extra ordinarily high prices prevailed in those faslis. In dealing with commutation the High Court pointed out in *Sivanu Pandia Thevar* v. *Zamindar of Urkad* (1) that:

> the average of ten years is only to form one of the considerations for the fixing of commuted rent, that the Court is at liberty to take other facts also into consideration where the circumstances are peculiar (such as where some of the ten years are extraordinary years).

In view of the high prices in faslis 1329 and 1330, we think the Board cannot be said to have acted wrongly in excluding these two faslis from the

period of ten years endings with fasli 1331.

The other points raised, such as that the Mandasa prices and not the Sompeta prices should have been considered, etc., are minor questions of fact which cannot be urged in revision.

We may add that Mr. Srinivasa Iyengar on behalf of the respondent took a preliminary objection that the High Court has no revisional jurisdiction over the orders of the Board of Revenue passed under Chapter XI of the Madras Estates Land Act. It was recently held in *Sanka Rao* v. *Ryots, Kalagampudi* (2) to which one of us was a party that revision petitions under S. 115 of the Code of Civil Procedure would lie to the High Court against such orders. Mr. Srinivasa Iyengar argues that the Revenue Board is not a civil Court subordinate to the High Court, that S. 192 of the Estates Land Act does not apply to proceedings contemplated by this Chapter, that these proceedings did not fall within parts A and B of the schedules to the Estates Land Act, that orders passed under this Chapter are in the nature of proceedings passed by Revenue Officers purely in their capacity as Revenue Officers and as such their decisions are not decisions of any civil Court. It is contended that these considerations which specially apply to orders passed under Chapter XI of the Madras Estates Land Act were not brought to their Lordships's notice in the above decision. As we have decided to dismiss these revision petitions and the memoranda of objections we do not think it is necessary to discuss the validity of these objections.

We dismiss the Memoranda of Objections also with costs.

Petition dismissed.

(2) A.I.R. 1926 Mad. 480.

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* A. I. R. 1926 Madras 762

ODGERS, J.

Ratna Mudaliar and *another*—Defendants 5 and 6—Appellants.

v.

C. Vijiaranga Mudaliar—Plaintiff—Respondent.

Second Appeal No. 971 of 1923, Decided on 6th January 1926, from the decree of the Dist. J., Chingleput, in Appeal Suit No. 91 of 1922.

* *Hindu Law—Partition—Family with no property—Some members leaving the family—Others living joint and earning property—Property is joint only of those living jointly.*

If members of a Hindu family with no nucleus of family property choose to live together, work jointly together, throw all their earnings into common stock and have one food, in such a case the presumption is that they must have intended their property to be joint family property: (1912) *M. W. N.* 972 and 25 *Mad.* 149, *Rel. on.* The first requisite for a joint family is the family unit and the second requisite is the possession by it of property.

Two brothers out of four belonging to a family with no property left home for service elsewhere and the rest two began a joint business together and continued to live together. After the demise of one of these two the other brought a suit on a mortgage in favour of the deceased brother.

Held, that the suit was maintainable.

[P. 763 C 1]

C. S. Venkatachariar—for Appellants.

N. Chandrasekhara Aiyar—for Respondent.

Judgment.—The point in this appeal is the status of the four brothers, plaintiff, 5th defendant, 6th defendant and the deceased brother, Parthasarathy. The District Munsif held that there was no evidence of any division between them and that, therefore, the plaintiff had no right to bring this suit on the mortgage bond executed to the deceased Parthasarathy by Defendants 1 to 4. The District Judge differing from him held that there was no nucleus of family property, that the 5th defendant went away to Madras to earn a living by brokerage, etc., and that the 6th defendant commenced a contracting business while the deceased Parthasarathy and plaintiff remained in the family house and started a cloth shop, built up a business and acquired property, and that the plaintiff and Parthasarathy by combining money, brains and labour and living together and having everything in common "became a joint family." It appears to me that this expression of the learned District Judge "became a joint family" has given rise to this second appeal.

Assuming that the four brothers were joint in the first instance though with no nucleus of family property, that is to say, assuming, as has been held in *O. S. A. No.* 38 *of* 1924 that there is nothing in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family the allegation in the plaint is that defendants 5 and 6 became divided from the family 25 years ago and the plaintiff and Partha-

saratby continued to live jointly. What the learned Judge means by using the expression "became a joint family," I think, is that though technically undivided in status, they began to combine their earnings, industry, etc., in the way set out by Bakewell J., in *Madhavaiah Chetty* v. *Damodaram Chetty* (1). In that case there were four undivided brothers with no nucleus of family property, and the learned Judge, on a consideration of the authorities, held that if members of a Hindu family choose to live together, work jointly together, throw all their earnings into common stock and have one food, in such a case the presumption is that they must have intended their property to be joint family property. That is, I think, exactly what happened here. The expression of the learned Judge might possibily be justified by saying that the conception of of a Hindu joint family was perfected by this acquisition or combination which resulted in joint family property. Bashyam Aiyangar, J., in *Sudarsanam Maistri* v. *Narasimhulu Maistri* (2) says that the first requisite for a joint family is the family unit, and the second requisite is the possession by it of property.

In this view the appeal fails and must be dismissed with costs.

Appeal dismissed.

(1) [1912] M. W. N. 972=17 I. C. 347.
(2) [1902] 25 Mad. 149=11 M. L. J. 353.

A. I. R. 1926 Madras 763

DEVADOSS AND WALLER, JJ.

Ramachandra Chetty—Accused—Petitioner.

Criminal Revision No. 707 and Cr. Rev. Petition No. 580 of 1925, Decided on 25th February 1926, from the judgment of the 1st Cl. Sub-Divl. Mag., Salem, in Criminal Appeal No. 49 of 1925.

Madras District Municipalities Act (1920) S. 347—*First notice not obeyed—Second notice issued—Failure to obey second is punishable—Prosecution within three months of the second notice but beyond three months of first is not barred.*

Where no steps have been taken to enforce the first requisition issued by the Chairman under Ss. 146 and 149, a Chairman is entitled to make a second and to institute a prosecution for failure to comply with it; and a prosecution launched within three months of second notice but beyond three months of the first is not barred: *Jackson, J., in Cr. R. C. No.* 164 *of* 1925, (*Madras*) *Foll*; *A. I. R.* 1925 *Mad.* 1067, *not Foll.* [P 764 C 1]

V. L. Ethiraj and *A. Rangaswami Aiyangar*—for Petitioner.

J. C. Adam—for the Crown.

Waller, J.—The question raised in this case is whether the prosecution is barred by limitation under S. 347 of the Madras District Municipalities Act. A notice was served on petitioner under Ss. 146, 149 and 313 of the Act in June 1924. On July 4 he put in a petition to the Chairman asking him to inspect the latrine. In reply an endorsement was sent on August 11, informing him that he would be prosecuted if he did not obey the notice in one week. At the same time the Chairman directed the Health Officer to report further. That Officer's report was unfavourable to petitioner. On 22nd October a fresh notice was sent to petitioner, which was served on November 6. He failed to comply with it and a prosecution was launched. It was launched within three months after the second notice, but more than three months after the first.

Mr. Ethiraj contends that the offence was committed on the expiry of the first notice and that the prosecution is barred by limitation. His contention is supported by a decision of Srinivasa Aiyangar, J., which is reported in *Ramanujachariar* v. *Kailasam Aiyar* (1). Jackson, J., in Cr. R. C. No. 164 of 1925, took a different view. The same point was raised before Madhavan Nair, J., and myself in Cr. R. C. No. 122 of 1925, but was not considered by us. We held that the prosecution was within time as the first notice had been kept in abeyance while the parties were negotiating. It is possible that, in this case also, petitioner's representation of July 4 might be regarded as an attempt at negotiation, but Mr. Adam does not press the point. The question, then, for consideration is whether there is anything in the Act that prohibits the issue of a second notice, when no action has, for some reason or other, been taken on the first. I can myself see nothing that does so. The offence consists in the failure to obey a requisition issued by the competent authority. If a particular requisition is not enforced, I can find nothing in the

(1) A. I. R. 1925 Mad. 1067.

Act that prevents the Chairman from issuing another. If a prosecution had been instituted on the first requisition and had failed or not been pressed, other considerations might come in, but that question does not arise here.

I agree in the view taken by Jackson, J., that where, as here, no steps have been taken to enforce the first requisition, a Chairman is entitled to make a second and to institute a prosecution for failure to comply with it. The Criminal Revision Case is therefore dismissed.

Devadoss, J.—I agree.

Revision dismissed.

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* A. I. R. Madras 764

JACKSON, J.

N. K. Govindan Nayar—Petitioner.

v.

Kanhirathotikayil Ithaletty—Respondent.

Civil Miscellaneous Petition No. 3199 of 1925, Decided on 8th October 1925, for review of the judgment of Jackson, J., in Civil Revision Petition No. 30 of 1925, D/- 8th September 1925.

* (a) *Civil P. C., O. 47, R. 1—"Any other sufficient reason" means reason analogous to those just preceding—Where rights of parties only are not to be affected but the matter is of procedure of general importance, review should be allowed.*

R. 1 of O. 47 must be read as in itself definitive of the limits within which review is permitted and words "any other sufficient reason" in that rule mean a reason on grounds at least analogous to those specified immediately previously. If after exercise of due diligence, a pleader fails to lay his hand upon certain material rulings which are not to be found in the authorized reports, the situation is certainly analogous to one where new and important matter was not within the knowledge of the party. But this would not conclude the question and there is good authority for holding that a Judge should not review his judgment merely because a party has found fresh rulings on the matter. There must, generally speaking, be finality, but where it is not a question of right between the two parties, being a mere matter of Court-fees, and the matter is of general importance, review is justified: 7 *Mad.* 507 [P 764, C 2, P 765, C 1]

Rel. on.

(b) *Malabar Compensation for Tenants Improvements Act* (1 *of* 1900), *S*, 6 (3)—*Words "or otherwise in respect of the tenancy" include damages —Court Fees Act, S.* 7 (1).

The words "any sum of money accruing due for rent or otherwise in respect of the tenancy" are wide enough to include damages. Therefore when plaintiff sues for redemption of Kanom and also prays for a deduction of certain amount claimed as damages, he is entitled to pay the Court-fee after the amount recoverable, by way of damages, has been ascertained and set off against the amount payable by way of improvements. *A. I. R.* 1926 *Mad.* 542 *Reversed.* [P 765, C 2,]

K. P. Ramakrishna Aiyar—for Petitioner.

A. Parameshwara Aiyar—for Respondent.

Order—The petitioner applies for review of my judgment in Civil Revision Petition No. 30 of 1925. [Reported as 1926 *Mad* 542 Ed.]

Most of the grounds set forth in his application are clearly unsustainable. There is no error on the face of the judgment and the best proof that my previous judgment was based on no misapprehension of the argument and vitiated by no omission of material points lies in the fact that at the second hearing no fresh argument and no fresh points have been adduced. What happened was that the learned vakil built up an argument on behalf of petitioner which appeared to me to be well founded, but lacking the copping-stone. Appraised of this defect by my judgment, he has searched the Reports and has found what was previously wanting. The first question is, whether in these circumstances this Court should allow a review.

As pointed out by the Judicial Committee in *Chhaju Ram* v. *Neki* (1), R. 1 of O. 47 must be read as in itself definitive of the limits within which review is permitted and words "any other sufficient reason" in that rule mean a reason on grounds at least analogous to those specified immediately previously. If after exercise of due diligence, and no one accuses Mr. Ramakrishna Aiyar of want of diligence in this case, a pleader fails to lay his hand upon certain material rulings which are not to be found in the authorized reports, the situation is certainly analogous to one where new and important matter was not within the knowledge of the party. But I hasten to add that this, in my opinion would not conclude the question, and there is good authority for holding that a Judge should not review his judgment merely because a party has found fresh rulings on the matter because there are further considerations of prime importance. A Judge cannot ordinarily give and take

(1) A. I. R. 1922 P. C, 112

away in the same proceeding. After he has given one party his decree, only the most exceptional circumstances would justify a Judge in depriving him of it. And merely that a Judge has altered his mind would not, in my opinion, constitute such justifying circumstance. There must, generally speaking, be finality. But it so happens that these considerations do not apply to this particular case. The respondent has opposed the Civil Revision Petition and was fully entitled to do so, since a defendant can make every legal defence, but it is not a question of right between the two parties, being a mere matter of Court-fees. The order sought to be reviewed gave nothing to the respondent, except such advantage as he might hope to reap through his antagonist being heavily taxed. Review therefore involves no deprivation. And there is no question here of the Court altering its mind. I was prepared to accept the petition's argument if authority on the culminating point was forthcoming and now that it is produced to find in his favour would not be to go back, but to go forwards, upon the previous argument.

Moreover, this is a matter which transcends the interests of the actual parties before me. It governs the procedure in a very common form of suit in Malabar and the effect of a wrong decision will be far-reaching.

The Court then of itself must consider the validity of its judgment and *Vellaya* v. *Jagannatha* (2) is authority for holding that in such circumstances, review is justified. Accordingly I allow the petition for review, but only, be it understood with regard to the particular circumstances of this case. In most cases, the predominating principle to be considered is finality.

To turn to the merits. It has been held that a mortgagor suing in redemption in Malabar is not bound to value his suit according to the amount he may have to pay for improvements, *Zamorin of Calicut* v. *Narayana* (3). This ruling is based on the opinion of three out of the five Judges forming the Bench, the other two dissenting, which shows how evenly the question is balanced. Now, if it could be shown that damages are in pari materia with improvements, the same reasoning would apply and damages cannot be taken into account in ascertaining the amount for the purposes of jurisdiction. If the plaintiff does not know the amount, how can he fix it for jurisdiction? It was argued at the previous hearing that damages and improvements were on the same footing, because in S. 6 (3), Madras Act I of 1900, there is provision for improvements, money accruing due for rent, or otherwise in respect of the tenancy, and this latter phrase included damages. It seemed to me remarkable that if the legislature had intended damages to come within the category, it should not have said so in terms, and to describe damages as money accruing due in respect of a tenancy is very circuitous. And as I remarked, I was impressed by the circumstance that no ruling which sanctioned such interpretation was produced. It seemed that the question must have arisen and the very absence of rulings was an argument ab silentio in favour of respondent's contention that the phrase did not refer to damages. Therefore, I rejected the argument. Now petitioner has produced two rulings of this Court. In *Abdulla Koya* v. *Kallumpurath Kanaran* (4), Spencer, J. finds in terms that the words

> any sum of money accruing due for rent or otherwise in respect of the tenancy

are wide enough to include damages and Sadasiva Aiyar, J., concurs. The latter Judge sitting with Napier, J., found to the same effect in *Pumpaliya Vengaliya* v. *Kanhamina* (5).

I find, therefore, that the petitioner is entitled to pay the Court-fee after the amount recoverable, by way of damages, has been ascertained and set off against the amount payable by way of improvements.

The petition is allowed and this finding supersedes my former judgment except in respect of costs.

Review allowed.

(2) [1884] 7 Mad. 307.
(3) [1882] 5 Mad. 284 (F. B.)

(4) [1917] 33 M. L. J. 463=43 I. C. 6=(1917) M. W. N. 822=6 L. W. 696.
(5) [1914] 25 I. C. 704.

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* A. I. R. 1926 Madras 766

DEVADOSS AND WALLER, JJ.

Chinnappa Tharakan—Appellant.

v.

Kannor Puthen Veettil Ittichi Amma and *others*—Petitioners—Respondents.

Appeal No. 24 of 1924, Decided on 3rd February 1926.

✲ (a) *Civil P. C., O. 21, R. 89—Proclamation specifying amounts to be realized from several items—Those items can be released on payment of that sum only.*

When there is specific mention in the proclamation of sale that a certain amount only is realizable from the sale of certain items, it cannot be reasonably contended that in order to redeem them the whole of the decree amount should be paid. [P 766 C 2]

(b) *Civil P. C., O. 21, R. 89—Decree against several persons severally—Each is liable to the extent specified.*

When a decree is passed against two different persons separately, each person is only liable to the extent of the decree against him and if his property is sold to satisfy the decree he can have the sale set aside by paying the amount due from him alone. 39 *Mad.* 429, *Dist.* [P 766 C 2]

T. R. Ramachandra Aiyar and *A. Vasudeva Menon*—for Appellant.

K. P. M. Menon and *P. Govinda Menon*—for Respondent.

Judgment.—A mortgage decree was passed in O. S. No. 17 of 1920 against the karnavan, anandravans and other members of a Malabar tarwad. It was found that only a portion of the mortgage amount was binding on the tarwad and the rest was payable by the karnavan alone. A direction was given in the judgment in the following terms :—

In the case of sale items 1 to 21 will be liable only to the extent of Rs. 3,309-9-2 and three-eighths of the subsequent interest and costs and the balance of the decree amount will be realized from items 22 to 29.

In the decree it was worded as follows.

If such payment is not made on or before the said 14th day of December 1921, items 1 to 21 of the mortgaged property described below be sold for the realization of Rs. 3,855-11-3 and subsequent interest thereon.

Items 1 to 21 were brought to sale and were purchased by the appellant. The anandravans deposited Rs. 5,300 in Court and applied under O. 21, R. 89 to have the same set aside. The Subordinate Judge held that the amount paid covered more than the amount charged on the items and set aside the sale. The auction-purchaser has appealed against his order.

The contention of Mr. Ramachandra Aiyar for the appellant is that the decree was for Rs. 11,000 odd and the whole amount of the decree should be paid before the sale could be set aside under O. 21, R. 89. From the judgment and decree it is clear that the liability of the tarwad was only to the extent of Rs. 3,309-9-2 and subsequent interest and costs.

The argument of the appellant is that in the proclamation of sale the amount of Rs. 11,000 odd was mentioned and therefore, that should be taken as the amount of the decree for the satisfaction of which the property was sold. In the preamble of the proclamation the amount of Rs. 11,000 odd was mentioned but in the remarks column it was specifically mentioned that items 1 to 21 should be sold for the amount of Rs. 3,885-11-3 and interest as directed by the decree. When there is a specific mention in the proclamation of sale that a certain amount only is realizable from the sale of certain items, it cannot be reasonably contended that in order to redeem them the whole of the decree amount should be paid. Supposing in this case the respondents paid the amount mentioned in the remarks column before the sale, could the mortgage decree-holder have insisted upon their sale for the satisfaction of his decree. The burden on items 1 to 21 was specifically mentioned in the proclamation of sale and anyone interested in redeeming the items could not be asked to pay anything more than the amount of the burden imposed upon them. The wording of Cl. (b) of R. 89 (1) of O. 21 is :—

The amount specified in the proclamation of sale as that for the recovery of which the sale was ordered.

This expression could only mean the amount mentioned in the proclamation of sale as that which is to be realized by the sale of the property. The amount mentioned in the preamble cannot be held to control the clear statement in the remarks column that items 1 to 21 should be sold only for so much.

The Subordinate Judge treated the decree as two decrees one against the tarwad and the other against the karnavan personally. Though the mortgage decree was one, the relief was against two sets of persons, one the tarwad as represented by the anandravans and others, and the other the karnavan in his individual capacity.

When a decree is passed against two different persons separately, each person is only liable to the extent of the decree against him and if his property is sold to satisfy the decree he can have the sale set aside by paying the amount due from him alone. In this case, the liability of the tarwad was only to the

extent charged on items 1 to 21, and the tarwad was entitled to redeem the property on payment of the amount before sale, and after sale it cannot be said that it was not entitled to have it set aside on payment of the amount charged on it together with 5 per cent. of the purchase money. The contention of the appellant if pushed to its logical conclusion, would mean that the mortgagee decree-holder was entitled to sell the properties for the full amount of his decree. This is against the clear terms of the decree and the specific direction in the proclamation of the sale.

Mr. Ramachandra Aiyar relies upon *Karunakara* v. *Krishna* (1) and contends that R. 89 ought to receive a strict interpretation and that the amount specified in the proclamation should be taken as Rs. 11,000 odd. That case does not help the appellant. The facts were: A certain amount was paid into Court by one of the defendants. Another defendant whose property was sold applied to have the sale set aside under R. 89 without paying the full amount. He contended that the amount paid by another judgment-debtor which was in Court should be added to the amount paid by him. The learned Judges held that that could not be done. Under R. 89 credit could be given to the defendant for any money received by the decree-holder. So long as the decree-holder had not received any portion of the decree amount the defendant is not entitled to be given credit for any amount which may be in Court in order to make up the amount payable under the decree when he applies for setting aside the sale under R. 89. If the amount was paid by him to the credit of the decree-holder that would be different but where a portion of the decree amount was paid into Court by another judgment-debtor, and when that amount was not received by the decree-holder, a person who says an amount less than the decree amount is not entitled to have credit for the amount in Court so as to make up the deficit.

Reliance is also placed upon *Subramania Pillai* v. *Corera* (2). In that case the decree directed the sale of items in the first schedule to a limit of Rs. 20,000 and the sale items in the second schedule up to a limit of Rs. 10,000. A sum of Rs. 10,000 was paid into Court and one of the defendants wanted the amount to be allocated between the two sums of Rs. 20,000 and Rs. 10,000 recoverable by sale of two different sets of properties. The learned Judges Ramesam and Jackson, JJ., held that that could not be done.

When certain properties are made liable for a certain amount, a decree-holder is entitled to have the decree executed against them to the extent of the amount recoverable by their sale and a judgment-debtor is not entitled to have any amount paid into Court by another to be allocated towards the different sums charged on different properties. If the mortgagor is the only defendant in the case, there would be no difficulty, for his property could only be sold for the amount due to the mortgage after deducting the amount paid by him, but where different persons have interest in different items and when the decree directs that certain items are liable to a certain extent, the persons interested in those items are not entitled to insist that any amount paid by the mortgagor should go towards reducing the amount charged on the items belonging to them or in which they have an interest. That case also has no application to the present case. We are clearly of opinion that in this case the proclamation of sale specified the amount due on items 1 to 21 as that for the recovery of which their sale was ordered, and the respondents therefore were not bound to pay the whole of the decree amount but only that for which the items were sold together with 5 per cent. in order to get the sale set aside under R. 89 of O. 21. The judgment of the Subordinate Judge is right and we dismiss the appeal with costs.

Appeal dismissed.

(1) [1916] 39 Mad. 429=28 M. L. J. 262=27 I. C. 952=2 L. W. 196

(2) A. I. R. 1925 Mad. 457

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* A. I. R. 1926 Madras 767

COUTTS-TROTTER, C. J., AND KRISHNAN AND BEASLEY, JJ.

A. V. P. M. R. M. Murugappa Chettiar —In re.

Civil Application, Decided on 28th September 1925.

** Income Tax Act* (1922), *S.* 10—*Remittances from abroad to a firm are presumed to be profits.*

Where money is remitted from abroad to the headquarters of a firm in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary is shown by the assessee: *Scottish Provident Institution* v. *Allen*, (1903) *A. C.* 129, *Foll.*

M. Subbaraya Ayyar—for Assessee.

M. Patanjali Sastri—for the Commissioner.

Judgment. — The difficulty in this case has entirely arisen owing to the ambiguity in the language used by the Commissioner in passing his order on the petition. The second paragraph of his order was, on the face of it, capable of the construction that he had held in the circumstances of this case, that where any sum of money passed from a foreign business to the headquarters of the firm in British India, it must be regarded as profits and that no evidence was admissible to show that in fact it was something else. We are satisfied that the Commissioner did not mean to say that, but merely meant to say that, he thought that where money was remitted from abroad to the headquarters in British India, the natural inference would be that such remittances came out of profits rather than capital until the contrary was shown by the assessee. The claim here was that a large portion of the amouut remitted from Seranda to Karaikudi was a re-payment of capital lent long years before, or at any rate was profits outside the three years' limit which would not under the law be assessable in British India. The Commissioner heard this contention and was not satisfied that the assessee had made out his case, and he was entitled to take that view. That the onus of proof rested upon the assessee appears to be amply borne out by the case of *Scottish Provident Institution* v. *Allan* (1). That was a case of a Scottish Insurance Company, with branches in Australia; and in dealing with the question whether remittances from Australia to the head office in Scotland were assessable to income-tax, Lord Halsbury uses the following language:

The next question is whether or not, though earned abroad, the profits have been brought to this country. Here is a large sum sent back. Putting these two items together, they must iuclude, and obviously do include, a large amount of profits. It is for the company to show, if the fact be so, that that remittance ought to be subject to a certain amount of deduction, because a good deal of it was repayment of that which was, in truth, capital and not profit at all.

The presumption that the Commissioner made in this case, viz., that prima facie all remittances were to be regarded as profits, and that the burden of proof was cast upon the assessee to show the contrary, seems to be amply warranted by the authority of that case. As the Commissioner did not misdirect himself the only questions in the case that remain are purely questions of fact and so long as he has approached them without any misconception in his mind as to how they should be dealt with, his findings are conclusive.

The application will be dismissed with costs, Rs. 150.

Application dismissed.

(1) [1903] A. C. 129=88 L. T. 478=67 J. P. 341=4 Tax. Cas. 591=19 T. L. R. 432=72 L. J. P. C. 70.

A. I. R. 1926 Madras 768

PHILLIPS, J.

Acha—Plaintiff—Petitioner.

v.

Sankaran and *others* — Defendants—Respondents.

Civil Revision Petition No. 522 of 1924, Decided on 18th January 1926, an order of the Sub-J., S. Malabar, D/- 8th April 1924, in O. S. No. 2 of 1924.

Civil P. C., S. 115—*Order directing payment of additional Court fee is not revisable.*

No revision will lie from an interlocutory order directing the payment of an additional Court fee: 5 *Pat. L. J.* 400 and 51 *I. C.* 581, *Rel. on.* [P 769 C 1]

K. Kuttikrishna Menon — for Petitioner.

B. Sitarama Rao and *N. Govindan*—for Respondents.

Judgment.—This is an application to revise the order of the Subordinate Judge of South Malabar directing the plaintiff to pay additional Court-fee.

The first question for determination is whether this Court will interfere with such an order under S. 115 of the Civil Procedure Code. No doubt in *Sudali Muthu Pillai* v. *Sudalimuthu Pillai* (1) Oldfield, J., held that such a case did

(1) A. I. R. 1923 Mad. 270.

come within S. 115 and he accordingly passed an order under that section. It may be observed however that in that particular case the order demanding additional Court-fee was coupled with an order dismissing the appeal in case of default. In the present instance, we have no such conditional dismissal but time was granted for the payment of the fee. In the Patna High Court it has consistently been held that the Court would not interfere in such a case [vide *Mt. Lachmibati Kumari* v. *Nand Kumar Singh* (2).] and the same view was taken by a Bench of the Calcutta High Court in *Gobindu Das Nath* v. *Nitya Kali Dasi* (3). With all respect it appears to me that this is the right course to follow. Even if the plaint is rejected on the ground that the Court-fee has not been paid the plaintiff will have a right of appeal and if he pays the extra fee and has a trial of the suit and the suit is dismissed the question can again be raised by him in appeal. This being so, it seems useless to interfere in revision with what is in effect an interlocutory order which can be questioned hereafter. The mere admission of this petition has led to nearly eighteen months delay in the trial of the suit. Taking this view, I must dismiss this petition with costs. Plaintiff will have another month within which to pay the extra Court-fee.

Petition dismissed.

(2) [1920] 5 Pat. L. J. 400=56 I. C. 649=1 Pat L. T. 268.
(3) [1919] 51 I. C. 581.

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* A. I. R. 1926 Madras 769

DEVADOSS AND WALLER, JJ.

Rama Reddy—Appellant.

v.

Ranga Dasan and *others*—Respondents.

Letters Patent Appeal No. 158 of 1924, Decided on 28th October 1925, against the judgment of Madhavan Nair, J., reported in *A. I. R.* 1925 *Mad.* 822.

* (a) *Hindu Law—Religious endowment—Head of Mutt and trustee of idol—Distinction.*

In the case of a religious institution the property is vested in the idol and the trustee is only a manager for the time being. In the case of a Mutt the head of the Mutt for the time being is entitled to use the income of the Mutt property subject to the maintenance of the Thambirans and the ascetics attached to the Mutt. In the case of a trustee of a temple he is not entitled to use any portion of income for himself. In the case of a wakf, if the deed of trust make provisions for the maintenance of the Muttavalli or the trustee for the time being, he may use the income for himself as allowed by the deed of trust, but in the case of Hindu religious institutions no trustee of any institution is entitled to use any portion of the income for himself if the property is vested in the idol. [P. 770, C. 1]

* (b) *Limitation Act, S. 10 and Art. 134—Improper alienation by trustee—Suit is not barred by 12 year's rule.*

A trustee cannot convey a valid title to the transferee and, therefore, Art. 134 does not apply to a suit for the recovery of the temple property, improperly alienated by the trustee: *A. I. R.* 1922 *P. C.* 123 (*P. C.*), *Foll.*; 37 *Cal.* 885 (*P. C.*) and 23 *Mad.* 271 (*P. C.*), *Diss.* [P. 770, C. 2]

T. R. Ramchandra Aiyar and *N. P. Narasimha Aiyar*—for Appellants.

T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar*—for Respondents.

Judgment.—This is an appeal against the judgment of Madhavan Nair, J., giving a decree to the plaintiff. The 3rd defendant has preferred this Letters Patent appeal. The question for determination is whether the suit is barred by Art. 134 of the Limitation Act. The plaintiff is the trustee of a temple. The finding is that the property is the property of the temple. The contention of Mr. Ramachandra Aiyar is that the suit is barred under Art. 134 inasmuch as the suit was brought more than 12 years after the date of the alienation. Art. 134 gives a period of 12 years for the recovery of possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration. The argument advanced is that the suit is barred by Art. 134 if the transferrer is held to be a trustee and if he is not a trustee, then the suit is barred by reason of Art. 144 of the Limitation Act.

The finding that the transferrer is a trustee cannot be challenged now. The simple question is, therefore, whether Art. 134 applies to the case. It was decided in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1) that a permanent lease of mutt property granted by the head of the Mutt could not create any interest in the property to enure beyond the life of the grantor and

(1) A. I. R. 1922 (P. C.) 123.

consequently Art. 134 of Sch. I of the Limitation Act of 1908 did not apply to a suit brought by the successor of the grantor for the recovery of the property.

Mr. Ramachandra Aiyar tries to get over this decision by contending that the transferee was only a lessee and that he did not deny the title of the Mutt, but only contended that he was entitled to be in perpetual possession of the property being a permanent lessee. Mr. Ameer Ali in delivering the judgment of their Lordships observed :

> It is also to be remembered that a trust in the sense in which the expression is used in English Law is unknown in the Hindu system, pure and simple.

With reference to the head of a Mutt or shebait he observed :

> In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him he is answerable as a trustee, in the general sense, for maladministration.

In the case of a religious institution the property is vested in the idol and the trustee is only a manager for the time being. In the case of a Mutt the head of the Mutt for the time being is entitled to use the income of the Mutt property subject to the maintenance of the Thambirans and the ascetics attached to the Mutt. In the case of a trustee of a temple he is not entitled to use any portion of the income for himself. In the case of a wakf if the deed of trust makes provision for the maintenance of the Muttavalli or the trustee for the time being, he may use the income for himself as allowed by the deed of trust, but in the case of Hindu religious institutions no trustee of any institution is entitled to use any portion of the income for himself if the property is vested in the idol. The decision in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (1) cannot be said to apply only to cases of leases. The remarks of their Lordships apply to cases of all alienations of property. A parmanent lease is as much an alienation as a sale. The mere fact that rent is payable by the permanent lessee does not make a permanent lease any the less an alienation than a sale. Has the trustee of a religious institution the right to alienate the kudivaram interest in the temple property ? Can it be said if he lets into possession tenants so as to enable them to acquire occupancy rights, that he does not alienate the kudivaram interest ? The mere fact that the tenants pay the melvaram to the temple cannot convert the transfer of the kudivaram into anything less than an alienation of it. A trustee, therefore, cannot convey a valid title to the transferee and, therefore, Art. 134 does not apply to a suit for the recovery of the temple property, improperly alienated by the trustee. The case in *Subbaiya Pandaram* v. *Mahamad Muthapa Maracayar* (2) has no application to the present case. In that case the property was vested in the trustees and it was sold in execution of a decree. It was held that the suit was barred by Art. 144. In that case it was distinctly found that the property was vested in the person against whom the decree was obtained and the property being vested in him he could by transfer give a title to the vendee and if the transaction is not set aside within 12 years the vendee gets a good title. The case in *Madura Devasthanam* v. *Samia Pillai* (3) does not touch the point under discussion. There the holder of a religious office was dismissed from the office, but he continued to be in possession of the property for more than 12 years after his dismissal and a suit by the successor was held to be barred. The property was vested in the person and he held the office for the time being and when he was dismissed from the office his possession became adverse to his successor and the successor not having sued within 12 years his suit was barred.

There were a few cases which may be said to support the contention of Mr. Ramachandra Aiyar that an invalid alienation of trust property should be set aside within 12 years and if not so set aside the vendee under the invalid sale gets a good title. The decision in *Gnanasambanda Pandaram Sannadhi* v. *Velu Pandaram* (4), *Damador Das* v. *Lakhan Das* (5), support this view. In *Gnanasambanda Pandaram Sannadhi* v. *Velu Pandaram* (4) the hereditary managers of the property with which a religious foundation was endowed had purported

(2) [1917] 32 M. L. J. 85=40 I. C. 50=5 L. W. 690.
(3) A. I. R. 1922 Mad. 406.
(4) [1900] 23 Mad. 271=27 I. A. 69=10 M. L. J. 29=7 Sar. 671 (P. C.).
(5) [1910] 37 Cal. 885=37 I. A. 147=7 I. C. 240 (P. C.).

to sell and assign the management and lands of the endowment to the representative of another institution. It was held that the possession delivered to the purchaser was adverse to the vendors, and after 12 years the successor of the vendor could not recover possession of the property conveyed.

Their Lordships observed at p. 279 :

" There is no proof of any custom in this case, and consequently, these deeds of sale are void and did not give any title to the purchaser. The title remained in Chockalinga and Nataraja and the possession which was taken by the purchaser was adverse to them ....

Their Lordships are of opinion that there is no distinction between the office and the property of the endowment. The one is attached to the other, but if there is, Art. 144 of the same schedule is applicable to the property. That bars the suit after 12 years adverse possession.

In *Damodar Das* v. *Lakhan Das* (5) the Privy Council held that where two chelas divided two institutions and the property among themselves, one chela could not recover the property on the death of the other. Sir Arthur Wilson, who delivered the judgment of their Lordships, observed at p. 894. (37 Cal.).

It follows from this that the learned judges were further right in holding that from the date of the ekrarnama the possesion of the junior chela by virtue of the terms of that ekrarnama was adverse to the right of the idol and of the senior chela as representing that idol and that, therefore the present suit was barred by limitation.

There is no discussion in *Vidya Varuthi* v. *Balusami Ayyar* (1) of *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* (4) and *Damodar Das* v. *Lakhan Das* (5). In view of their Lordships' decision in *Vidya Varuthi* v. *Balusami Ayyar* (1), *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (4) and *Damodar Das* v. *Lakhan Das* (5), cannot be considered to be good law. The principle underlying these decisions seems to be this : That where the trustee of a religious institution who is only a manager for the time being, alienates any property belonging to the trust he cannot give a valid title to the alienee, for he himself has no interest in the property and the alienee can only get what the manager himself possesses, namely, the right of being in possession of the property. The principle of adverse possession would apply to cases where a person who could assert his title does not assert his title within the period fixed by Art. 144 of the Limitation Act. In the case of a minor whose property has been improperly alienated by the guardian he has the right of suit within three years, after his attaining majority. The legal fiction is that an idol is a minor for all time and it has to be under perpetual tutelage, and that being so, it cannot be said that the idol can ever acquire majority ; and a person who acquires title from a trustee of a temple cannot acquire any title adverse to the idol, for the idol is an infant for all time and the succeeding trustee could recover the property for the idol at any time.

Though the language has been loosely used, as if the trustee occupies a position similar to that of the karnavan of a Malabar tarwad, or the managing member of a joint Hindu family, or the guardian of a minor, yet his position is different from that of any of these.

It is contended by Mr. Ramachandra Aiyar that a trustee can alienate the property for certain purposes. In order to preserve the trust or with the sanction of the Court he could alienate the property, but such alienation is under exceptional circumstances. But where he purports to convey the title to the property which is vested in him the vendee cannot be said to derive title from a man who could never give a good title to him. If the vendee buys knowing that the trustee has no right to convey title to the property which is vested in the idol, he cannot set up Art. 144 in answer to a suit by the trustee for the recovery of the property. His possession is that of the trustee and a trustee's possession can never be adverse to the idol. No doubt if a person takes possession of the immovable property belonging to a temple and keeps the trustee and the persons connected with the temple out of possession and is able to assert such possession adversely to the trust for over 12 years, he could acquire a valid title under S. 28 of the Limitation Act. But where such person acquires possession from the manager his possession can only be with the consent of the trustee for the time being and, therefore, his possession can never become adverse to the temple. The observations of one of us in *Jagga Row* v. *Gori Bibi* (6) apply to the present case :

(6) A. I. R. 1923 Mad. 545.

If the properties are trust properties any person claiming from a trustee cannot acquire a prescriptive title against the trust. Whether the document is valid or invalid, it would not give a right to anybody claiming under that document to prescribe for a title against the trust.

Madhavan Nair, J., held similarly in *Lakshminarayana Kulluraya* v. *Rajamma* (7). In the recent case Phillips, J. held that a permanent lessee could not set up the bar of limitation in a suit for recovery of possession of the property by the trustee. He held that Art. 134 did not apply to that case. As regards the contention that Art. 144 applied the learned judge observed :

This contention was negatived by their Lordships on the ground that the idol has no power to bring a suit except through the trustee and consequently there can be no question of the suit being barred unless it could not have been brought at an earlier date.

Reliance is placed upon *Ramrup Gir* v. *Lalchand Marwari* (8). In that case the Patna High Court held that the alienation by the Mahant did not give a good title to the alienee unless it is proved that the alienation was one which could bind the institution. In the course of the judgment Das, J., observed :

In my opinion the true rule is this, where the property is vested in a juridicial person, as it was in *Damodar Das* .v. *Lakhan Das* (5) and the Mahant is only the representative and manager of the idol, the act of alienation is a direct challenge upon the title of the idol, and the idol or the manager of the idol on behalf of the idol, must bring the suit within 12 years from the date of the alienation. But where the title is .in the Mahant or the shebait as it was in the two other cases to which I have referred, the act of alienation is not a challenge upon the title of the idol, though the property may be endowed property in the sense that its income has to be appropriated to the purpose of the endowment, and there is no adverse possession so long as the person making the alienation is alive, and the possession of the defendant becomes adverse to the plaintiffs only when a new title has come into existence capable of maintaining the suit and which has not approved of or acquiesced in the alienation.

With due respect to the learned Judge I am unable to follow his reasoning as regards the property vesting in an idol. Where a manager alienates property belonging to an idol his act cannot be said to be a challenge on the title of the idol. When the idol is incapable of asserting its will, except through its manager, how can it be said that the manager's act is a challenge on its title ? An idol, as I have already observed being under perpetual tutelage can never assert its will and, therefore, the manager or the trustee, who alienates its property, cannot by his act be said to challenge the title of the idol. He might as well as set up his own title against the idol. Can any express trustee or manager of a temple set up his own title against the trust or the temple ? If the manager cannot set up an adverse title to the property vested in the idol, can he by his act allow a person who derives title from him to assert a title which he himself could not assert against the idol. The case in *Ramrup Gir* v. *Lalchand Marwari* (8) is against the principle of the decision in *Vidya Varuthi* v. *Balusami* (1) and, therefore, it cannot be relied upon in support of the argument for the appellant.

In the result the appeal fails and is dismissed, with costs of the 1st respondent.

Waller. J.—I agree.

Appeal dismissed.

(7) A. I. R. 1925 Mad. 795.
(8) A. I. R 1922 Patna 243.

A. I. R. 1926 Madras 772

ODGERS AND MADHAVAN NAIR, JJ.

Appadurai Mudali and *another*—Plaintiffs—Appellants.

v.

Murugappa Mudali and *others*—Defendants 1 to 3—Respondents.

Letters Patent Appeal No. 133 of 1924, Decided on 28th September 1925, from the order of Devadoss, J., D/- 1st September 1924, in Second Appeal No. 390 of 1922.

(a) *Contract Act, S. 23—Money lent for carrying a partnership which was illegal, but not known to lender to be so—Money can be recovered.*

Where there is nothing illegal or opposed to public policy in the business itself and there is nothing which touches the conscience of the lender, the decisions as to illegal transactions have no application. [P 774 C 1]

(b) *Practice—New plea—Second appeal.*

It is not permissible to raise an issue in second appeal which had never been raised by the parties in the first Court and which the lower appellate Court had refused to raise on appeal. [P. 774, C. 1]

A. Krishnaswami Aiyar—for Appellants.

V. C. Seshacharriar—for Respondents.

Odgers, J.—This is an appeal from the judgment of Mr. Justice Devadoss

whereby he remanded an appeal for trial after raising a fresh issue as to whether the plaintiff is entitled to recover the suit amount as it was lent to a partnership which was illegal. The plaint sets up the promissory-note sued on. The Defendants 1 and 3 say that they (Defendants 1 to 3) took the contract of sale of arrack in certain shops in Vaniyambadi for the year 1916-17. They borrowed the money for the purpose of that business and they plead a discharge by payment, i. e., that under certain arrangements made between themselves and the plaintiff, the latter had a surplus sufficient to cover the amount of the promissory-note in his hands. The 2nd defendant pleaded that the arrangement was that the plaintiff should appropriate, to discharge the promissory-note, the sale proceeds which he received on behalf of the defendants for the last 80 days of of the year 1916-17. Two issues were framed, namely, (1) as to whether there was a discharge as pleaded by Defendants 1 and 3, i. e., by their deposit of the daily sale proceeds of the toddy with the plaintiff ; and (2), was the 2nd defendant discharged by reason of the plea raised by him that the plaintiff should pay himself up the sale proceeds of the last 80 days of the Abkari year ?

The District Munsif found the first issue in favour of the plaintiff and held that there was no evidence on the second issue. He, therefore, decreed the suit in favour of the plaintiff. In the grounds of appeal to the lower appellate Court the defendant for the first time set up that their partnership was illegal and opposed to public policy, and that the plaintiff, having admitted in his evidence that the abkari license stood only in the names of the Defendants 2 and 3 instead of all the three partners, must fail as he knew of the illegal nature of the business when he advanced the money on the promissory-note. That is a plea set up for the first time in the lower appellate Court and based on the so called admissions of the plaintiff in his evidence in which he said that the money was borrowed for the purpose of the abkari business and at the time it was borrowed, he, the plaintiff, knew that their object was to carry on this business. The learned Judge of this Court, from whose judgment this Letters Patent appeal is taken, on that alleged admission, holds that the business was illegal and that the plaintiff was according to the decisions *particeps criminis* in this illegal business that was being carried on. In my opinion, the business was not illegal at all. It was no doubt controlled by the conditions not only set out in S. 24 of the Abkari Act, to which we have been referred, but also by something in the Abkari rules to which we have been referred or in the conditions to the grant of the license itself. The license is not before us. But even supposing that the condition of the license is that all the names of the licensees or persons concerned in that particular business by way of partnership etc., must appear on the face of the license, it is a question whether on the evidence of the plaintiff he can be said to be *particeps criminis* in the carrying on of the illegal trade. As the Court of Queens Bench said in *Waugh* v. *Morris* (1), a contract lawful in itself is illegal when it is entered into with the object that the law should be violated, if it is done for the very object of satisfying any illegal purpose or for the express purpose of a violation of the law.

It is admitted by the learned vakil for the respondents before us that the onus is on him to show that the plaintiff was particeps criminis in this matter. In *Gajapathi Brahmayya* v. *Kuralla Ramiah* (2) the license to sell arrack contained a restriction. In the course of the judgment in a suit to recover a loan advanced to the partnership, the learned Judges say that the partnership is illegal by reason of the fact that the licensee took a partner without first obtaining permission. There, on the facts, they also held that the plaintiff had notice of the illegality of the partnership. The learned Judges there adopted a passage from Lindley on Partnership, 8th Ed., p. 127, which runs :

> The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by a person who, being aware of all the facts seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm, but the illegality of the firm does not per se afford any answer to a demand against it, arising out of a transaction

(1) 8 Q. B. 202=28 L. T. 265=42 L. J. Q. B. 57 =21 W. R. 438.

(2) [1920] 43 Mad. 141=38 M. L. J. 123=54 I. C. 46=10 L. W. 476.

to which it is a party and which transaction is legal in itself. Unless the person dealing with the firm is particeps criminis, there can be no turpis causa to bring him within the operation of the rule *ex turpi causa nonoritur actio* and he not being implicated in any illegal act himself, cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership,

and they conclude by saying:

Where there is nothing illegal or opposed to public policy in the business itself and there is nothing which touches the conscience of the lender, the decisions as to illegal transactions have no application.

As to the matter under consideration by the learned Judges in *Gajapathi Brahmayya* v. *Kuralla Ramiah* (2) they said:

It was a perfectly legal business which by the inclusion of the 2nd defendant became noperative as a partnership.

The plaintiff was held entitled to recover part of the amount he sued for.

I am, therefore, constrained to differ from the conclusion arrived at by the learned Judge in both respects, namely, that I do not think the issue should have been framed at all, nor do I think that the plaintiff can be said to have had a guilty knowledge such as would bring him within the purview of the case so as to make him particeps criminis in the transaction and that his so called admissions do not establish this against him. Assuming that there is a prohibition in the terms of the license, there is no evidence that the plaintiff ever knew of it.

It seems to me that the learned Judge was wrong in raising this issue in second appeal which had never been raised by the parties in the first Court and which the lower appellate Court had refused to raise on appeal. I, therefore, think that we must allow the appeal and set aside the order of remand and restore the decree of the Subordinate Judge with costs in the Letters Patent appeal and second appeal.

Madhavan Nair, J.—I entirely agree. In the absence of the license, it is impossible to say that the partnership between the defendants in this case was illegal. Prima facie there is nothing illegal in such a partnership under the Abkari Act, and no rule issued under the Act has been brought to our notice to show that the arrangement is illegal. The decision in *Gajapathi Brahmayya* v. *Kuralla Ramiah* (2) as regards the illegal nature of partnership in tha case, depended on the terms of the license issued to the parties.

The learned Judge quotes a passage from the evidence of the plaintiff to show that he knew that he was lending money to a contract which was illegal. With all deference, I think, that inference does not necessarily follow from the evidence unless in the first instance it is proved that the contract itself is illegal. As I have said, I am not satisfied that that has been done in this case. I do not think that the plaintiff can be said to have known about the illegality of the contract when he lent the money. In this view, the principle applicable to this case is what is contained in the passage quoted by my learned brother from Lindley on Partnership 8th Edn, p. 127.

I also think that the learned Judge, with due deference, was wrong in having allowed the parties to raise an issue which was not raised or argued before the District Munsif. The learned Subordinate Judge refused to allow arguments to be addressed on the new issue.

Under these circumstances, I agree with my learned brother that this Letters Patent appeal should be allowed and the Subordinate Judge's decree should be restored with costs throughout.

Appeal allowed.

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* A. I. R. 1926 Madras 774

DEVADOSS AND WALLER, JJ.

Kandaswami Udayan—Appellant.

v.

Velayutha Udayan—Respondent.

Letters Patent Appeals Nos. 49 and 50 of 1925, Decided on 5th February 1926, from the judgment of Orders, J., in Second Appeal No. 1700 of 1923, printed in *A. I. R.* 1925 *Mad.* 1160.

* *Hindu Law—Alienation by coparcener—Suit to set aside should not be converted into one for general partition—Alienee may file separate partition suit and both may be tried together to obviate possible plea of res judicata.*

It is not competent for the Court in a suit by a coparcener for setting aside an alienation of a certain item of family property to grant relief which it would grant on a general partition. The proper course for the alienee would be to sue for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other

coparceners would not be prejudiced by allotting to the alienating coparcener the specific property alienated by him the Court may allow the alienee to retain the property. His suit for partition is not barred by res judicata by reason of a previous suit for setting aside the alienation. If both the suits are tried together there would not be any difficulty at all, as the possible plea of res judicata can then be obviated; *A. I. R.* 1922 *Mad.* 112, *Affirmed*; 43 *Bom.* 17, *Rel. on.* *A. I.* R. 1926 *Mad.* 241, *Dissented from.*

[P 775, C 2; P 776, C 1; P 777, C 2]

T. M. Krishnaswami Iyer—for Appellant.

C. Krishnamachariar — for Respondent.

Devadoss, J.—The paintiff sued for a declaration that a certain alienation made by his father was not binding on him and prayed for possession of the property alienated and in the alternative that if the sale was good to the extent of his father's share, his share of the property should be delivered to him. The District Munsif held that the sale was a nominal transaction and that it was not binding upon the plaintiff and decreed the suit. On appeal the District Judge held that the sale was good to the extent of the father's share and decreed the plaintiff's share to him.

In second appeal it was contended that the alienee should be allotted the property alienated to him as there was other property belonging to the family which could satisfy the claim of the plaintiff. Mr. Justice Odgers who heard the second appeal, declined to uphold the contention and dismissed the second appeal. The alienee's representatives have preferred this L. P. appeal.

It is contended before us by Mr. T. M. Krishnaswamy Iyer for the appellant that the family property is more than sufficient to meet the claim of the plaintiff and that the alienee should not be deprived of the plaint property which is a house. It is urged that the appellants have an equity in their favour and that they should not be driven to a separate suit when the equities could be worked out in this case. The District Judge found that it would be unfair to allow the alienee to retain the property as the rest of the property which would devolve on the son consists entirely of outstanding debts which might or might not be good. The alienee, neither in his written statement nor in his evidence before the lower Court placed before the Court sufficient materials which would enable it to ascertain whether the plaintiff's share could not be met out of the other properties belonging to him and his father. In the written statement he did not care to put forward an alternative case that, in case the plaintiff was able to succeed to the extent of his share, he should be allowed to retain the property sold to him as the family property was sufficient to meet the plaintiff's claim and the plaintiff would not be prejudiced by his being allowed to retain the property sold to him. Without an opportunity for the plaintiff to show that the property of the family is not sufficient to meet his claim and in the absence of evidence as to whether the plaintiff has got another house which is fit for his occupation, and that he would not be prejudiced by allowing the alienee to retain the house sold to him the Court would not be justified in granting relief to the alienee in the manner asked for by him even if such relief could be granted in this suit.

Is it competent for the Court in a suit by a coparcener for setting aside an alienation of a certain item of family property to grant relief which it could grant on a general partition? Mr. Krishnaswamy Iyer relies strongly upon *Ramaswami Ayyar* v. *Venkatarama Iyer*, (1) as supporting his contention. In that case Mr. Justice Phillips and Mr. Justice Venkatasubba Rao held

that the alienee need not be directed to institute a separate suit to work out his rights by a partition. He was entitled in the coparcener's suit as a defendant to get a decree for partition and claim to be allotted the item purchased by him in respect of his vendor's share if that was consistent with the rights of the other coparceners.

It was held in *Subba Goundan* v. *Krishnamachari* (2) by Mr. Justice Kumarasami Sastri and one of us that in a suit instituted by the coparceners of a joint Hindu-family to set aside a sale of ancestral immovable property by their father or manager of the family on the ground that the sale was not for family necessity and to recover possession of the property from the vendees that

the latter were not entitled as defendants to insist in this suit on the plaintiffs submitting to a partition either of the items sold or of the entire family property but that they were entitled in this suit to a decree declaring that they are entitled to the share of the alienor but that

(1) A. I. R. 1924 Mad. 81.
(2) A. I. R. 1922 Mad. 112.

they should be left to work out their rights by a separate suit for partition.

A careful perusal of the judgment in *Ramaswami Ayyar* v. *Venkata Rama Iyer* (1) would show that there is no real conflict between it and the decision in *Subba Goundan* v. *Krishnamachari* (2) though the observation of Mr. Justice Phillips may appear to be so:

If any equity exists in the alienee and it can be enforced without a separate suit there seems to me to be no reason for restricting that equity to a mere right to sue, a limitation which cannot be supported on equitable principles.

He also observes:

No doubt in many cases it would not be easy to enforce the alienee's equitable right in a suit by one of the coparceners to recover the property because it would be necessary to add all the coparceners to the suit and ascertain the amount of family property available for division etc.

If the Court is prepared to convert a suit for declaration that certain alienation by a member of a joint Hindu family is not binding on the plaintiff into a suit for general partition at the instance of the alienee defendant then the suit becomes a suit for a general partition. The decision in *Ramaswami Ayyar* v. *Venkata Rama Iyer* (1) applies to cases where all the facts are before the Court which would enable it to allow an alienee to retain the property and such a suit is practically a suit for partition. What was held in *Subba Goundan* v. *Krishnamachariar* (2) was that there must be a separate suit for partition for in a suit where one item of property is sought to be recovered on the ground that the alienation of it is not binding on the plaintiff, the whole family should not be driven to be parties to a suit for partition. The proper course for the alienee would be to sue for partition and ask the Court to allot to his alienor the specific property conveyed to him and if the Court finds that the interests of the other co-parceners would not be prejudiced by allotting to the alienating coparcener the specific properly alienated by him, the Court may allow the alienee to retain the property. We adhere to the view expressed in *Subba Goundan* v. *Krishnamachariar* (2) and as pointed out in that case:

having regard to the provisions of the Civil Procedure Code which do not allow any wide rights of counter-claim it is difficult to see how a suit by the plaintiffs for possession and mesne profits can be converted at the instance of the defendants into one for a general partition which would involve the presence of other parties and an enquiry into the debts and liabilities of the family: if the claim of the defendants is to be treated as a cross-suit and if the written statement is to be stamped as a plaint in such cross-suit claiming a general partition there is no reason why the defendants should not file their own suit for a general partition and work out any decree which they may obtain in the decree in the suit by the coparceners. There is no special advantage in the defendants doing in their written-statement what they could easily do in a plaint filed by them. It is open to them as soon as a coparcener files a suit for possession, to file a suit for partition, and where proper grounds exist the Court would try the suits together so as to afford relief to all parties. On the point of view of hardship we think that the hardship would be greater if a simple suit for possession which the coparcener is in law entitled to file in cases of invalid alienations is converted into an elaborate enquiry as to a general partition of the family.

In *David Beevi Ammal* v. *Radhakrishna Ayyar* (3) it was held

that a purchaser from a member of a joint-Hindu family of property which that member has no right to sell, it being joint property, can enforce the sale only by partition of the entire family property and if in such partition the properties sold can, with due regard to the interests of the other sharers, to the debts due by the family, and to an equitable alienation of the various items of the family property, to shares of the several coparceners, be wholly allotted to the vendor's share the purchaser will be entitled to the whole of the property which the vendor professed to convey to him.

It is urged by Mr. Krishnaswamier that a separate suit would be barred by the principle of res judicata and therefore the Court should consider in this suit whether the alienee could be allowed to retain the property sold to him. In *Sourimuthu* v. *Pavadai Pachia Pillai* (4) Mr. Justice Phillips and Mr. Justice Ramesam held that

if a decree is obtained by a member of a joint Hindu family against an alienee for his share of the property alienated on the ground that the alienation was not binding on him in a subsequent suit by the alienee for a general partition and for the allotment of the alienated property to the share of the alienating coparcener, the property allotted to the plaintiff in the previous suit could not be allotted again to the alienating coparcener's share and therefore the second suit is barred by res judicata.

With very great respect to the learned Judges we are unable to agree with the view taken by them in that case. When a coparcener brings a suit for declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share if it finds that the alienation is not binding

(3) A. I. R. 1923 Mad. 467.
(4) A. I. R. 1926 Mad. 241.

on the plaintiff. But his share does not become absolutely his for the alienating co-parcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it. The matter is not different when the alienee himself brings a suit for a general partition and prays to be allowed to retain the property which was sold to him. When a member of a joint Hindu fámily sues to set aside an alienation made by another co-parcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family. All that is objected to is the alienation of the particular item, and if that alienation is not binding on the family it is not binding on the alienor's share as well; and the property is recovered for the benefit of the family. So long as the alienor is a member of the joint family, his right to partition subsists, and in a suit by him he can ask that the property alienated by him may be allotted to his share; and if the Court, on a consideration of all the circumstances in the case, thinks that it would be equitable to allot to him that property it might do so; for the plaintiff in that suit for setting aside an alienation cannot set up the plea of res judicata against any relief. If the principle of res judicata would not avail against the alienating coparcener it is difficult to see how it could avail against the alienee who stands only in the shoes of the alienating coparcener. To hold that a suit by an alienee for partition is barred by res judicata, by reason of a previous suit in which the alienation was held binding only to the extent of the alienor's share, would be to leave no option to the Court but to convert every suit for setting aside an alienation into a suit for general partition. Would it be equitable to enforce a general partition in a suit to set aside an alienation when the property alienated bears an insignificant proportion to the property owned by the family. It is neither reasonable nor expedient that a suit to set aside an alienation of a certain item of property should be converted into a suit for general partition at the instance of a vendee who bought the property knowing perfectly well his vendor was not exclusively entitled to the property and that even in a general partition that property might not be allotted to his share.

We, therefore, hold that a suit by the vendee would not be barred by the decree in the suit of a coparcener to have his share of the alienated property partitioned between him and the alienee.

The proper course of the alienee would be as pointed out by us in *Subba Goundan* v. *Krishnamachariar* (2), when the alienation of a particular item of property is challenged by a member of the joint Hindu family, to bring a suit for general partition so that the suit might be tried along with the suit for setting aside the alienation; and if the alienee is able to show that the alienation is binding on the whole family then he succeeds in both the suits; and if the alienation is not binding on the plaintiff's share but is only binding on the alienor's share, then in the suit for general partition brought by him the Court would be in a position to consider whether the property alienated to him should be allotted to the alienor's share or not. If both the suits are tried together there would not be any difficulty at all, and in this case, in order to obviate any possible plea of res judicata which might be raised on the strength of the decision in *Sourimuthu* v. *Pachia Pillai* (4), we would pass a decree as was done in *Hanumandas Ramdayal* v. *Valabhadas* (5). In that case a minor brought a suit against his father and decree-holders as well as auction-purchaser for a declaration that the plaintiff's half-share in the two properties sold did not pass to the auction-purchasers and for possession of his half share on equitable partition. He obtained a declaration that his share was not bound. It was held that his interests did not pass to the purchasers at the Court sale. The learned Judges upheld the decree of the lower Court and stayed the execution of the decree for three months directing that, if during that period of three months the present appellant filed a suit for partition against the plaintiff, the stay of the present decree should last until the disposal of the appellant's suit for partition: but if such a suit for partition be not brought within three months allowed then this appeal to be dismissed with costs. We

(5) [1918] 43 Bom. 17=46 I. C. 133=20 Bom. L. R. 472.

think such a direction should be given in this case.

We, therefore, dismiss the L. P. appeal with costs and direct that the execution of the decree in plaintiff's favour be stayed for three months and if before the expiry of that period the appellant brings a general suit for partition then the stay would continue till the disposal of the suit for partition; but if no such suit for partition is brought then the stay of execution will stand cancelled.

L. P. Appeal No. 50 *of* 1925. The only point urged in this appeal is that the acting District Judge did not consider the oral evidence in the case but based his decision entirely upon a comparison of the signature in Ex. I with the signatures in certain documents filed in the case. The question in the case is whether Ex. I was signed by the plaintiff's father or not. The District Munsif held that it was a genuine receipt. He did not discuss the oral evidence in detail. He stated: "The discharge is proved by Ex. I and defendant's witnesses 1 to 3." The acting District Judge on a consideration of the evidence, came to the conclusion that there was a strong conspiracy for defeating the rights of the present plaintiff-appellant. In paragraph 4 he considers the evidence in the case and when he came to consider the genuineness of the signature, he relied mainly upon the difference between the signature in the receipt and the signature in the admittedly genuine documents.

Seeing that he has considered the evidence, and come to the conclusion that there was a conspiracy for defeating the rights of the plaintiff, it cannot be said that the learned Judge has not considered the oral evidence in the case.

There is no other point in this appeal, and it is accordingly dismissed with costs.

Both appeals dismissed.

✻ A. I. R. 1926 Madras 778

SPENCER AND ODGERS, JJ.

Nannier and *another*—Defendants 2 and 3—Appellants.

v.

N. M. Rayulu Iyer, Nagasami Iyer and Co.—Plaintiffs—Respondents.

Second Appeal No. 572 of 1923, Decided on 28th October 1925.

✻ *Contract Act, Ss.* 120 *and* 39—*Refusal on the ground that goods when delivered would not be according to contract is wrongful—Remedies of the other party indicated.*

A buyer cannot justify his refusal of an offer to deliver goods under the contract, by proving that if he had not refused, the goods, when delivered, would not have been in accordance with the contract. But this principle does not apply where wrong goods are actually presented for acceptance to the buyer and refused by him without the knowledge of their defects for an untenable reason: *Taylor* v. *Oakes Roncoroni Co.*, (1905) 2 *K. B.* 543, *as explained in* (1922) 127 *L.T.* 267, *Rel. on.* (1923) *A. C.* 48, *Expl.* [P. 780, C. 2].

Two courses are open to the promisee when the promisor repudiates. He may either treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, or he may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance but in the latter case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it. [P. 781, C, 1]

C. V. Ananthakrishna Iyer and *C. V. Harihara Aiyar*—for Appellants.

A. Krishnaswamy Iyer—for Respondents.

Odgers, J.—This is a suit for damages for breach of contract. The defendants contracted with the plaintiffs for the purchase of 25 bales of yarn of certain quality, orders for which had already been placed by the plaintiffs' Bombay agents with the agent of Peolad Factory at Bombay. The price was Rs. 21-8-0 per box and each bale was to contain 20 boxes of 10 lbs each. The Varthamanam letter, Ex. A, is dated 27th August 1918. The plaintiffs allege that the defendants accepted delivery of 5 bales in accordance with the plaintiffs' arrival advice on the 2nd September 1918, but they afterwards did not pay for or take delivery of the remainder of the goods. The plaintiffs claim Rs. 3,405-15-8 or the difference between the contract and the market prices prevailing at the dates of the breaches. The defendants in their written statement, rely on time as being of the essence of the contract, and they say also that the plaintiffs were not justified in selling the unaccepted goods against the defendants which they did on the 27th January 1919, there having

been a breach on 13th October 1918. The written statement was filed on 12th April 1919. On the 11th October 1919 an additional written statement was put in consequence, it is said, of an examination caused to be made by the defendants of small quantity of the yarn contained in the bales accepted by them. In the additional written statement they plead that the goods offered by the plaintiff weighed only 8½ lbs. as against 10, that the yarn was not No. 20, and that the dye was not fast. For these reasons they were not bound to receive the bales.

The only issue that we are really concerned with in the case is Issue No. 5 :

Whether all or any of the plaintiffs' offers to perform the contract were made within a reasonable time in accordance with the terms of the contract and valid.

This issue inter alia was settled on the 3rd September 1919 and no additional or amended issue seems to have been thought necessary in consequence of the additional written statement of the defendants. This, as far as I can see, seems to have been completely neglected throughout. The Additional Subordinate Judge in fact notices that no supplementary written statement was filed by the defendants with reference to the alternative claim to damages which the plaintiffs were allowed to add to para. 10 of the plaint on 9th October 1920. The case on which the defendants went to trial throughout was that the plaintiffs should have delivered the 25 bales within a month. This has been found against by both the Courts and is of course, binding on us in second appeal. The Additional Subordinate Judge, however, held that the plaintiffs were bound to prove that the goods tendered and refused were in accordance with the contract in respect of quality and that, therefore, this, not having been proved, all that the defendants could recover in consequence of the breach committed by the plaintiffs was the amount of their advance.

The learned District Judge, on the other hand, held that, on the authority of *Braithwaite* v. *Foreign Hardwood Co.* (1), the Subordinate Judge was not justified in allowing the 5th issue to be taken and in giving judgment for the defendants upon it. The District Judge found that the defendants absolutely repudiated the contract by Ex. F and that by that repudiation they absolved the plaintiffs from proving any of the conditions precedent, e.g., as to quality of the goods. (His lordship examined the evidence as regards the repudiation of the contract and proceeded.) I think, therefore, the learned District Judge was right in holding that there was a repudiation of the contract by Ex. F. Now the question is: Was he right in refusing to permit the defendants to take advantage of any defects such as non-performance of the conditions precedent to the contract?

A long argument has been addressed to us on the principle of *Braithwaite's* case (1) and as to the exact principle which was laid down in that case. The principle, as enunciated there, appears to be that, if the defendants repudiate the contract, they are not entitled to allege thereafter that the plaintiffs were not in a position to tender the goods according to the contract. It was urged in argument in the Court of appeal in that case, for the plaintiffs, that the defendants were really endeavouring to contend that a continuing repudiation of a contract has the effect of reviving conditions precedent, the performance of which they had already waived by their original repudiation. *Braithwaite's* case (1) was perhaps complicated by the fact that the original repudiation was not accepted by the plaintiffs. This took place while the goods were still on the sea and in spite of it the plaintiffs tendered the goods after they arrived. Collins, M. R., said :

In my opinion that act (namely, the repudiation) of the defendants amounted in fact to a waiver by them of the performance by the plaintiff of the conditions precedent which would otherwise have been necessary to the enforcement by him of the contract which I am assuming he had elected to keep alive against the defendants notwithstanding their prior repudiation, and it is not competent for the defendants now to hark back and say that the plaintiff was not ready and willing to perform the conditions precedent devolving upon him, and that if they had known the facts they might have rejected the instalment when tendered to them. One answer to such a contention on the part of the defendants is that, tested by the old form of pleadings, it would have been a good replication by the plaintiff to aver that the defendants had waived performance by him of the conditions precedent by adhering to their original repudiation of the whole contract, and would not accept any instalment if tendered to them. The defendants are not in a position now

(1) [1905] 2 K.B. 543=74 L. J. K. B. 688=92 L.T. 637=10 Com. Cas. 189 =10 Asp. M.C. 52=21 T.L.R. 413.

by reason of their after-acquired knowledge, to set up a defence which they previously elected not to make.

In so far as the additional written statement in this case is concerned, those words apply to the present case. We have heard a great deal of the effect of *British and Beningtons Ltd.* v. *North Western Cacher Tea Co.* (2), on the decision in *Braithwaite's* case (1). It is even said that this decision has displaced the authority of *Braithwaite's* case (1). Lord Atkinson, who delivered the leading opinion of the House of Lords in that case was, I think, of opinion that *Braithwaite's* case (1) was perfectly good law. He cited in extenso, and apparently with approval the quotation which I have given above from the judgment of Collins, M. R. Lord Sumner, who was counsel for the defendants in *Braithwaite's* case (1), said discussing the case that :

it was dealt with as one in which the buyers had explicitly waived all conditions precedent, while retaining a right to rely on them as terms, the breach of which would sound in damages that could be given in evidence in reduction of the claim.

Hence, I take it the consideration that a certain percentage of the cargo in *Braithwaite's* case (1), was inferior to the contract quality. Further, remarks Lord Sumner :

It does not anywhere appear that, even if the first cargo might rightly have been rejected, the seller could not have found another exactly conforming with the contract, which he might have duly tendered and so have put himself right.....I do not think that the case, as reported, lays it down that a buyer, who has repudiated a contract for a given reason which fails him, has, therefore, no other opportunity of defence either as to the whole or as to part, but must fail utterly.....what he says (i. e., on the alleged repudiation) is of course very material upon the question whether he means to repudiate at all, and, if so, how far, and how much, and on the question in what respects, he waives the performance of conditions still performable in future or dispenses the opposite party from performing his own obligations any further; but I do not see how the fact, that the buyers have wrongly said "we treat this contract as being at an end, owing to your unreasonable delay in the performance of it" obliges them, when that reason fails, to pay in full, if, at the very time of this repudiation, the sellers had become wholly and finally disabled from performing essential terms of the contract altogether.

Braithwaite's case (1) was further considered in *Taylor* v. *Oakes, Roncoroni Co.* (3), where Greer, J., in the original Court said :

If I have rightly interpreted the judgment of Collins, M. R., the decision merely means that a buyer cannot justify his refusal of an offer to deliver goods under the contract by proving that if he had not refused, the goods, when delivered, would not have been in accordance with the contract. It does not decide that if wrong goods or wrong documents of title are actually presented for acceptance to the buyer, and refused by him without the knowledge of their defects for an untenable reason, he, the buyer, is liable for damages for his justifiable refusal because he gave a wrong reason for it.

In the Court of appeal Bankes, L. J., said :

It seems to me, after the decision in *Braithwait's* case (1), which binds this Court, that where there has been a repudiation by way of anticipatory breach, the contract is at an end, if the repudiation is accepted, and it is immaterial afterwards to consider what would have happened if there had been no repudiation, and the contract had continued and the plaintiff had been obliged to perform it.

Scrutton, L. J., was of opinion that by reason of *Braithwaite's* case (1), the Court was precluded from considering the argument of the defendant to the effect that if he had not repudiated, the plaintiff would not have been able to deliver the goods according to the contract. The case has been elaborately examined by a Bench of this Court (Ramesam and Reilly, JJ.,) in a case which bears a strong similarity to this. In fact we are told that one of the parties is the same. The case is reported as *Rayulu Iyer* v. *Kuppu Iyer* (4). There the contract was 50 bales of yarn. The defendants took delivery of two consignments of five bales each and afterwards did nothing. They relied on the defence that the boxes were not of 10 lbs. weight but only 8 & 1/2 lbs. apparently on an examination by an expert of a small portion of the bales accepted. The Subordinate Judge in that case held, as in this, that the plaintiffs had not proved that the 40 bales answered to the description in the contract and found the issue against the plaintiffs. *Braithwaite's* case (1) was there carefully examined in the judgment of Ramesam, J., and I agree with the learned Judge that the present case is as a fortiori case and the difficulties in understanding *Braithwaite's* case (1) if any need not affect it. But I should like to express my concurrence

(2) [1923] A. C. 48=28 Com. Cas. 265=92 L. J. K. B. 62.

(3) [1922] 27 Com. Cas. 261=38 T. L. R. 517=66 S. J. 556=127 L. T. 267.

(4) A. I. R. 1925 Mad. 974.

with him that Lord Sumner in *British & Benington Ltd.* v. *North Western Cachar Tea Co.* (2) applied the principle of *Braithwaite's* case (1) and did not dissent from it. I think the present case is very like the case in *Rayulu Iyer* v. *Kuppu Iyer* (4), and we are told that the contracts are entirely similar, but the contract in *Rayulu Iyer* v. *Kuppu Iyer* (4), was of a higher value and consequently it took the form of a first appeal to this Court whereas this is a second appeal. Reilly, J., also delivered a judgment in that case and was of opinion that as it had not been proved that the 40 bales in question were not of the contract description, and as even if they were not of that description plaintiffs had still time to supply others in their stead, had the quality been duly objected to by the defendants, the exact interpretation of *Braithwaite's* case (1) was not of immediate importance. I, therefore, think on the consideration of this case that the learned District Judge was right in debarring the defendants from setting up any defence from their after-acquired knowledge, other than that as to time which they raised in the first instance and which they did not succeed in establishing.

The matter is really governed by S. 39 of the Contract Act. In the note to S. 120 of the Act, the learned authors of Pollock and Mulla's Contract Act point out that two courses are open to the promisee when the promisor repudiates. He may either treat the repudiation of the other party as a wrongful putting an end to the contract and may at once bring his action as on a breach of it, or:

> he may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in the latter case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.

In the case in hand, on my construction of Exs. F and L, the repudiation contained in Ex. F was accepted in Ex. L subject to 24 hours grace. It is not suggested that during the 24 hours the defendants did anything in compliance with the contract.

The only other point raised is as to damages. It is not suggested that if the District Judge is right the basis of damages is wrong. The appellants say, however, that the District Judge was in error in taking the date of Ex. F, 13th January 1919, as the date when the contract was finally put an end to, and that 12th October 1918, the date of the first refusal to accept further bales, should be the date at which the market price is to be ascertained. In *Rayulu Iyer* v. *Kuppu Iyer* (4) the dates of breach were taken as the dates on which the plaintiffs gave notice that certain bales were ready for delivery. There, as has already been pointed out, after the acceptance of the first consignment the defendants did nothing. But here we have the letter, Ex. F, in which they absolutely repudiate the rest of the contract. The only question raised here is as to the market rate of the first consignment refused. I think, however, the learned Judge was justified in taking the date of Ex. F as the time when the contract was finally put an end to by the defendants and that he was right in assessing the damages as he did. The second appeal is, therefore, dismissed with costs.

Spencer, J.—I entirely agree. I am of opinion that the principle of *Braithwaite's* case (1) is still good law, and that its authority has not been shaken by the decision of the House of Lords in *British & Benington Ltd.* v. *North Western Cachar Tea Co.* (2), as conceived by Devadoss, J., in *Abdul Rahiman Sahib & Co.* v. *Shaw Wallace & Co.* (5). Later decisions of English Courts must be taken to have discussed and explained *Braithwaite's* case (1) rather than dissented from what was therein propounded as the legal consequences of a repudiation of a contract.

Appeal dismissed.

(5) A. I. R. 1925 Mad. 292.

A. I. R. 1926 Madras 782

ODGERS, J.

(*Hazarat Kibulai Saiyiot Sahib Kaditi*) *Ghulam Ghouse Sha*—Appellant.

v.

Minor Pakkiri Rowther and *others*—Respondents.

Second Appeals Nos. 1473 to 1487 and 1733 and 1734 of 1923, Decided on 5th January 1926, from the decree of the Dist. J, West Tanjore, in Appeal Suits Nos. 762, 761, 777, 772, 771, 768, 770, 769, 763, 764, 767, 766, 765, 754, 784 and 721 of 1920.

Madras Estates Land Act (1 *of* 1908), *Sch.* 1 *Art.* 8—"*Ascertaining the rent*" *and* "*by which the rent is finally ascertained*" *do not include proceedings necessary to sue for rent.*

The words "ascertaining the rent" and "by which the rent is finally ascertained" must be restricted to the actual rate of rent, and any proceeding necessary to enable the landlord to sue for rent is not included within the words of the Article : 27 *M. L. J.* 734, *Foll.* [P 785 C 2]

E. Vinayaka Row—for Appellant.

K. Ramchandra Iyer—for Respondents

Judgment.—This is a batch of appeals for rent of a certain land for Fasli 1316 (1907). The suits were instituted on 30th June 1910 and on 1st July 1910. The litigation thus covers a period of nearly 15-1/2 years. They were first heard by the Revenue Officer on 30th March 1911. He held that the village is one in which the melvaram is taken by the landlord at the time of the harvest, and it is then, therefore, that the rent becomes due. The harvest in 1907 must have taken place, at the latest, in March of that year, and accordingly the rent then became due. The Revenue Officer heard the arguments of the vakil who referred to *Rangayya Appa Row* v. *Bobba Sriramulu* (1) (which will have to be again referred to) and considered the wording of Schedule A, No. 8 of the Mdras Estates Land Act and came to the conclusion that the suits for enforcing acceptance of patta which the plaintiff had instituted, and in which judgment was given on 1st July 1907, were not suitsfor ascertaining the rent. He therefore held that the suits were out of time and gave judgment for the defendant. On 16th June 1911 the same Revenue Officer admitted an application for review of his judgment, basing his review order on the judgment reported in *Singaram Pillai* v. *Ghulam Ghouse Sha* (2) which had not been brought to his notice in March 1911. The latter admitted the review on a perusal of the judgment and restored the suits to file. It is said that the plaintiff paid stamp on only one suit at this time and delayed paying upon the others till five years later. The suits were then re-tried, and on 17th June 1920 the Revenue Divisional Officer, Kumbakonam Division, gave his decision which entirely turns on the conditions of the patta. On appeal to the District Judge, it was held that the suits were clearly barred and the original order of dismissal was right, there being in these no necessity for ascertainment of rent and that the summary suits were clearly not to establish this but to establish the maintainability of a suit to recover the rent. The summary suits were decreed on 1st July 1907, as stated above, before the Estates Land Act came into operation, but the suit for rent is after that, and therefore the limitation period in the Madras Estates Land Act is to be applied. The former period of limitation was contained in the Limitation Act, Article 110, this class of cases beings regulated by Act VIII of 1865. Article 110 of the Limitation Act of 1908 provides that for arrears of rent plaintiff has three years from the time the arrears became due. Now under Act VIII of 1865 no suit can be brought to enforce the terms of tenancy unless : (1) pattas and muchilikas have been exchanged ; (2) the party attempting to enforce the contract had tendered a patta or muchilika which the other party was bound to accept ; or (3) both sides had agreed to dispense with pattas and muchilikas. If the tenant refused to accept such a patta as the landlord was entitled to impose and to grant him a muchilika in exchange, the landlord could proceed by a summary suit to enforce acceptance of the same. Therefore, as a condition precedent to a suit under the Rent Recovery Act there must be either an exchange, or the landlord must have tendered a proper patta. The period of limitation prescribed by the Madras Estates Land Act of 1908 is the date when the arrears become due where there has been a suit or other proceeding for the

(1) [1904] 27 Mad. 143=31 I. A. 17=14 M. L. J. 1=8 Sar. 617 (P. C.).

(2) [1910] 36 Mad. 438=20 M. L. J. 927=8 I. C. 1091.=(1910) M W. N. 831.

purpose of ascertaining the rent, the date of the decree or order by which the rent is finally ascertained, whichever date may be later. Mr. S. Varadachariar, for the appellant, says, and I think says rightly, that it is clear from this that two alternative starting points are provided in the Act. His difficulty is that in this case the summary suits were decided on 1st July 1907, which date is vital for his purpose, and were admittedly not suits to ascertain the rate of rent, and the judgment runs as follows :

" Defendants agreed to waive the sole issue as to whether patta was served," so that the learned vakil argues in second appeal that any summary suit between the landlord and his tenant is included in the designation," suit or other proceedings for the purpose of ascertaining the rent." Rent, of course, need not mean money rent ; it may be rent in kind. And his contention is that there may be disputes as to the area cultivated, the amount of water supplied by the landlord and various claims to abatement etc., which do vary the actual rate of rent : and until these matters have been decided between the landlord and his tenants the rent has not been ascertained. In this connexion the following cases have to be considered :—*Rangayya Appa Rao* v. *Bobba Sriramulu* (1), which was a decision of the Privy Council under the Limitation Act in which their Lordships considered Sections 7, 9 10, 11 and 14 of the Rent Recovery Act, in detail and came to the conclusion, reversing the judgment of the High Court, namely, that although generally rent would become due at the close of the period in which it is to be paid, yet that need not necessarily be always the case and that as long as proceedings are pending before the Collector, and on appeal from him, before the civil Courts, the rate of rent is in suspense, for no one can say what it will prove to be; and that, therefore, no arrears of rent can be said to have become due within the meaning of the Limitation Act.

In that case the rates of rent had been finally ascertained by the High Court. In second appeal their Lordships say that by the decree of the High Court the conditions of tenancy including the rates of rent were finally determined and in their Lordships' opinion the whole series of sections considered by them, of Act VIII of 1865 applies to ascertained rents and not to rents at rates which have yet to be determined. In that case, then, it appears that what was actually decided by the High Court was the rate of rent and that under Article 110 of the Limitation Act all arrears of rent means arrears of ascertained rent. Therefore, when the proper rate of rent has to be ascertained by proceedings under Act VIII of 1865 the period of limitation runs from the date of the final decree determining the rate of rent.

Much reliance is placed by the learned vakil for the appellant on the judgment or Sir Arnold White, ex-Chief Justice, sitting as a single Judge in *Syed Ghulam Ghouse Sha Sahib* v *Shunmugam Pillai* (3). There the tenant contended that the suits were barred because they were brought more than three years after a decree of the High Court in 1902. The landlord, however, said that arrears did not become due till May 1904, being the date of the judgment of the Sub-Collector in certain proceedings under the Rent Recovery Act. The proceedings in the High Court were for declaration that the landlord was not entitled to vary the terms of the previous pattas. The learned ex-Chief Justice, distinguishing the case in *Arunachalam Chettiar* v. *Kadar Rowther* (4) considered carefully the case of the Privy Council just cited. He was of opinion that the judgment in the declaratory suit by the tenants or that in the High Court suit did not determine once and for all the rate of rent, there being in the High Court decree a provision that either party might claim a modification of the patta as circumstances arose. The ex-Chief Justice says that when their Lordships in *Rangayya Appa Rao* v. *Bobba Sriramulu* (1) speak of ascertained rents they mean rents which have been ascertained by means of procedure provided by the Rent Recovery Act. It is contended that the ratio of these decisions is such as to cover summary suits which are not in fact suits for the ascertainment of the rate of rent. I may say I am unable to follow this. The decision seems to proceed on the belief of the learned Ex-Chief Justice that the declaratory suits had not settled the rate of rent but that the Summary proceedings before the Collector had. The matter went to Letters Patent Appeal in *Sinoarum*

(3) [1911] 34 Mad. 438=8 I. C. 491.
(4) [1906] 29 Mad. 556=16 M. L. J. 486.

Pillai v. *Syed Ghulam Ghouse Sha* (2) the case relied on before the Revenue Officer. In that case the learned Judges say that they think the conclusion of the learned Chief Justice is correct and that as the patta, the landlord had already tendered, was in accordance with the judgment of the High Court and that as the fasli had already expired the landlord's only course was to sue under S. 9 of Act VIII of 1865 to enforce acceptance of the patta tendered. This he did and he had to await an adjudication under S. 10 of the Act and the learned Judges were of opinion:

> that limitation runs from the date of that adjudication as it was only then that it can be said that the rent for the suit fasli was ascertained.

It is contended by the learned vakil for the respondents that the form of this judgment shows that the learned Judges in appeal, while accepting the conclusion of the learned Chief Justice, did not accept his conclusion that ascertained rent must mean something which had been ascertained under the provisions of the Rent Recovery Act. However that may be, it is asked with some pertinency by the vakil for the respondents why should the expression "ascertainment of rent" be held to mean a suit to enforce acceptance of a patta. At first sight his objection sounds reasonable. It is further supported by the remarks in *Duraisami Reddi* v. *Venkatachalam Pillai* (5) where the suit was an inter-pleader suit brought by the tenants to ascertain whether they had to pay rent to the Government or to the landlord. Mr. Varadachariar contends that this has nothing to do with the present case. But in determining a matter which as far as I know is practically res integra I think the expression of opinion by the learned Judges of this Court may legitimately afford a guide to me in deciding this case. The learned Judges there say in reply to an argument that

> where the right to the cess is in dispute between rival claimants the amount of rent is not an ascertained sum.

that if this argument is accepted, whenever rent is claimed by two members of the same family in opposition to each other, and although the question may arise incidentally, or by two rival landholders each claiming the right to himself, the period of limitation will not commence till their dispute is finally adjudicated upon. We think this would be straining the language too far. They laid down that pleas of extenuation such as the bar of limitation have to be strictly construed; consequently the only permissible plea must be found within the Article itself. In construing the opinion of the Privy Council they say

> that in the opinion of their Lordships rent must be in suspense, and there must be proceedings to settle it.

In this case there has never been any dispute regarding the rate of rent and there were no proceedings to ascertain that rate. It may be said that an interpleader suit is a very different thing from a suit to enforce acceptance of a patta. But it seems to me clearly from the judgment of their Lordships in this case that it is only a matter of degree and that unless the summary suit is strictly a suit to ascertain the rate of the rent there will be no extenuation of limitation. It is admitted that the second clause in Schedule A No. 8 was inserted in consequence of the judgment of their Lordships in 27 *Madras* and it being therefore admitted that was a case strictly of the ascertainment of the rate of rent, I think with respect, the opinion of the learned Judges in 27 *M. L. J.* ought to be accepted on a matter of limitation.

It was argued by the respondents that the review ought not to have been allowed by the Revenue Officer in 1911 on the ground that the discovery of the authority in 36 *Madras* 438, does not constitute any reason under the Civil Procedure Code for allowing a review. I should have been inclined to agree with this if any evidence on the point had ever been taken. It is not referred to in the judgment of the learned District Judge from which the appeal is now taken. It is said that it is referred to in the grounds of appeal to the lower Court. The grounds are in print and Ground 3 is relied upon. The print reads as follows:

> The lower Court ought not to have allowed the relief sought for by the plaintiff.

It is said that the word "relief" is a misprint for "review." This is the first time that this has ever been raised in the grounds of appeal. Appeal is made to S. 115 of the Code of Civil Procedure on the ground that the lower Court's exercise of a jurisdiction not vested in it was

(5) [1914] 27 M. L. J. 734=26 I. C. 267.

assumed in June 1911 or about 14-1/2 years ago. In a matter of discretion I am decidedly averse to interfere in the circumstances of this case.

I am therefore of opinion on the main question that the words "ascertaining the rent" and "by which the rent is finally ascertained" must be restricted to the actual rate of rent and I cannot from the observations relied on in the judgment of the learned ex-Chief Justice, say that any proceeding necessary to enable the land-lord to sue for rent is within the words of the Article. The appeal therefore fails and as I am assured that the same considerations apply to all they will all be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 785

SRINIVASA AIYANGAR, J.

Mylapore Hindu Permanent Fund, Ltd.—Plaintiff.

v.

Chinniah—Defendant.

Civil Suit No. 882 of 1924, Decided on 2nd December 1925.

(a) *Contract Act, S. 23—Fund rules—Rule providing that on the death of shareholder his legal representative should apply for transfer of deceased's shares in his name otherwise shares would not vest in him is not unreasonable.*

Where by one of its rules the Articles of a Fund refused to regard the legal representative of a shareholder as the assignee or transferee by the operation of law of the shares and required that a request to such effect should be made by the legal representative:

Held: that a shareholder has not only rights in the company or against the company, but is also under certain obligations of a contractual character. Merely because the shareholder has died it would not follow that the legal representative whoever he may be would be ready and willing to assume also those obligations, and therefore, there was nothing unreasonable in the provision which required that a request for the transfer of the shares in the name of the legal representative should be made by such representative.

[P 786 C 2]

(b) *Contract Act, S. 74—Fund advancing loans to its subscribers only—Conditions that whole debt would become due on the debtor's ceasing to be subscriber and interest would be charged at enhanced rate are not penal.*

Where by its Articles of Association, a Fund provided that whenever a person ceased to be a shareholder under any of the Articles, the whole debt due from the person to the Fund would become repayable on the date of his ceasing to be shareholder and that interest at 12½ would be payable instead of 6½% the usual rate.

Held: that looking to the constitution of the Fund, viz., that it was for the benefit of its subscribers only, neither the condition of the whole debt becoming due on a person ceasing to be shareholder, nor the condition to pay interest at 12½% can be said to be penal. Moreover when the alleged penal rate is a common rate of interest in everyday transactions, Court will not be justified in departing from it. [P 787 C 1]

P. Venkataramana Rao, A. Vekatasubba Mudaliar and *V. Ganpathi Aiyar*—for Plaintiff.

S. Rajam Aiyangar—for Defendant.

Judgment.—Some very interesting questions have been raised in the course of the discussion of this case, but the main question for determination is merely whether the plaintiff Fund is entitled to recover from the defendant interest at the enhanced rate claimed as from the death of her father, the original debtor to the Fund. This fund which is called the "Mylapore Hindu Permanent Fund Limited," is a registered company governed by its Memorandum and Articles of Association. The chief object of the Company, on, a perusal of the rules and regulations would appear to be, to grant loans only to persons who are shareholders of the company or who agree to become, and do become, shareholders of the Company for the purpose of obtaining the loans applied for. It seems to me that it would be necessary to bear this chief provision in the rules in mind in coming to a decision on the question raised.

The first loan made to the defendant's predecessor was what is called a special loan, that is, a loan advanced on a promissory note secured by an equitable mortgage effected by the deposit of title-deeds of immovable property. In this case there were also subsequent loans made to the defendant's predecessor as ordinary loans. The enhanced interest is claimed in respect of all these transactions.

The contention on behalf of the plaintiff with regard to this claim of payment of enhanced interest is this: As the Company or the Fund grants loans only to subscribers or, as they are called, shareholders, the provisions contained in Art. 55 of the Articles of Association relating to this Fund become necessary to be considered. It is as follows:

Subject to the provisions of Art. 58, the death of a shareholder or his adjudication as an insolvent or his change of religion whereby he ceases to be a Hindu shall operate as a withdrawal of his shares from the date of the receipt of information in the Fund of such death, adjudication or change of religion.

I entertained and still entertain very serious doubts as to the legality of the provisions in this article at any rate with regard to the legal consequences which are said to result by virtue of this Aticle on a person ceasing to be a Hindu and embracing another faith. The legal consequences are undoubtedly in the nature of a penalty or forfeiture of benefits, The question is whether any provision that a contracting party should lose all the advantages of a contract on his ceasing to be a Hindu and embracing another religion would not be opposed to public policy, thereby rendering such a condition absolutely illegal and unenforceable.

The learned vakil for the plaintiff Fund argued that the whole constitution of the Fund was Hindu, that the Fund admitted only Hindus as subscribers and shareholders and even refused under its articles to make loans to others than Hindus and that, therefore, in these circumstances there was nothing in Art. 55 to constitute it a violation of the principles of public policy. I should have had very little hesitation in holding that it would be against public policy because it seems to me that the general principle of law that no man should be directly or indirectly prevented from giving effect to a conscientious change in his religious convictions is a principle even higher than that of mere freedom of contract so-called. Whatever the sacredness may have been in which the so-called freedom of contract was held at one time, not only by law and legislature, but also by political thinkers, that principle has yielded to a very large extent both in modern theory and practice.

Mr. Venkataramana Rao, in support of his contention that provisions with regard to forfeiture on change of religion were recognized as valid by law referred to two cases, namely *Hodgson* v. *Halford* (1) and *In Re Dicksons Trust* (2). Both these cases were cases of testamentary bequests which were really in the nature of gifts, and I cannot regard that the principles applicable to a caseo f testamentary bequest are equally applicable to contracts supported by consideration. The question would also have to be considered, if it should ever arise whether the provision that on the insolvency of the shareholder he ceases to be a shareholder should not also be regarded as opposed to general principles of law,

In this case however, I have only to do with the death of the subscriber. For this purpose, however it is not necessary to decide the question how far, if the provision stood alone and without such an article as Art. 58, it may be regarded as not opposed to public policy or general principles of law. But Art. 58 provides that where a shareholder dies, his legal representative may request the Fund to transfer the shares to such representative and thereupon the Fund shall transfer the same. The result of this article merely amounts to this. The Fund refuses to regard the legal representative as the assignee or transferee by the operation of law merely of the shares, and requires that a request to such effect should be made by the legal representative. If all that became vested in the legal representative were merely rights, and it was not a case of bundle of rights and obligations, no doubt any rule which provides for some necessary condition being satisfied before such rights are regarded as transferred or assigned by operation of law may be deemed as improper. But a shareholder has not only rights in the company or against the company but is also under certain obligations of a contractual character. Merely because the shareholder has died it would not follow that the legal representative, whoever he may be, would be ready and willing to assume also those obligations, I am, therefore, unable to regard as anything unreasonable, the provision in R. 58 which requires that a request for the transfer of the shares in the name of the legal representative should be made by such legal representative. In this case it is admitted that no such request was made. By virtue, therefore, of these two rules it came to pass that the shareholder ceased to be a shareholder and the legal representative did not continue as a shareholder in the Fund. Then we come to Art. 33 by which it is provided that if the borrower ceases to be a shareholder then on the day on which he so ceases to be,

(1) [1879] 11 Ch. D. 959=48 L. J. Ch. 548=27 W. R. 545.
(2) [1850] 61 E. R. 14.

the amount of any special loan taken by him becomes repayable. In the subsequent deeds of mortgage executed by the predecessor of the defendant in respect of the further loans advanced to him as ordinary loans there is a similar provision made in Cl. (6) of the mortgage deed. No dispute or question has been raised on behalf of the defendant with regard to legal results following on this rule or Article. But Art. 43 of the Fund provides that both in respect of the amount of all special loans that have fallen due and payable and also in respect of the amount of ordinary loans which have become payable under the articles, the interest shall be paid at 2 pies per rupee instead of at 7 per cent. per annum or 6¼ per cent. per annum as the case may be. The result of all these provisions read together is that when a shareholder of this Fund dies, and when the legal representative does not elect to continue as shareholder, all the loans taken by him from the Fund, whether special or ordinary, become repayable at once without any regard whatever to the time that might have been fixed for repayments and that the amounts of such loans would carry interest from such date at 2 pies per rupee per month.

The contention that has been urged is that this provision is penal and that the defendant should be relieved against it. At 2 pies per rupee per month the interest comes to 12½ per cent, per annum so that the stipulation merely amounts to this: that if default be made in the payment of the amount that has become payable interest shall be paid at 12½ per cent. per annum. Even if the provision should be construed to be penal in its character, and it should be decided that the plaintiff Fund would be entitled to reasonable compensation only for such default, it is impossible to hold that the rate of interest made payable, namely at 12½ per cent. per annum could be regarded as unreasonable. Reference has been made in this connexion to the case of *Srinivasa* v. *Rangayya* (3), where Sir John Wallis, O. C. J., and Hannay, J., held that:

> When the alleged penal rate is a common rate of interest in everyday transactions as, 12 per cent is here, we do not think there is any sufficient reason for departing from it.

I take it that what the learned Judges meant to lay down was merely that even if it should be viewed as compensation the Court would be justified in such circumstances to award even by way of compensation a rate of interest which would make the total stipulated rate.

But here, however, there is the further complication that by reason of the default made the penalty that followed was not merely the liability to pay this enhanced interest but also the liability to pay off immediately all the loans taken without reference to the period fixed under the contracts or under the articles. If, taking these two penalties together, I should be satisfied that they constituted stipulations only by way of reasonable compensation for the default contemplated or committed, and not by way of penalty chiefly intended to operate by way of terrorem over the party in order to secure primarily the performance of the original contract, then no question would arise whether the mere fact that the penalty was twofold would render illegal the contract between the parties.

Ordinarily I should have been disposed to hold that a twofold penalty of such a character was liable to be regarded as penal. But it seems to me that there are special circumstances connected with this institution and the Articles of Association having regard to which it is not possible to regard this twofold character of the penalty as really penal in the eye of the law. The whole purport and scope of this institution is to make loans only to subscribers at a comparatively very low rate of interest. If for any reason the borrowers cease to be subscribers a special rate of interest is provided; that it is also provided, no doubt, that the amount of the loan shall become immediately payable. This latter provision may be regarded as a reasonable consequence of the entire principle underlying the constitution of this company or Fund, namely, that it is chiefly intended merely for the benefit of persons who are subscribers to the Fund. If that be so and the default happens to be that of a borrower ceasing to be a subscriber then both the penalties may follow or result.

If ordinarily, however, a borrower makes default in the payment of the money on the due date even then these rules as to the payment of enhanced interest would have operation and then the higher rate of interest would become payable. If that was what happened, it is impossible

(3) [1914] 1 L. W. 903=25 I. C. 702.

to regard the provision for payment of enhanced interest as penal, more especially if the total rate of interest provided for and payable under such provisions cannot possibly be regarded as exorbitant. But when a man ceases to be a subscriber not only is there default on his part with regard to his contractual obligations, but there is also the fact that the security which the Fund or company expected to be possessed of is reduced.

In the contractual obligation of every borrower who is a subscriber, and who binds himself to pay to the company as and by way of share a sum of money every month, there is some further security to the Fund for the loans advanced, and if default be made in such obligation then it follows that the security expected by the Fund becomes reduced. It is possible to attribute the provision for the amount of the loan becoming repayable on a borrower ceasing to be a subscriber to the fact that by reason thereof the security becomes reduced. In any case, as I have already observed, it is only if I came to the conclusion that taking both together the amount of the loan becoming repayable immediately and the stipulation as to the payment of interest at 12½ per cent. per annum the compensation provided should, in the circumstances of the case, be held to be unreasonable, I shall be justified in regarding them as penal and seeking to relieve the party against it.

Here in this case the default has been really of a twofold character default in the continuous payment of the shareholder's subscription by reason whereof the party ceased to be a shareholder and also the non-payment of the amount of the loan which became due. The toldfold nature of the so-called penalty seems to be the mere accidental result of the nature of the default in this case and it is not necessary to regard the legal consequences that have followed as penal in their character. After all, the interest now claimed is only 12½ per cent. and it has not been argued that this rate of interest cannot be regarded as reasonable having regard to the money market at the present day. There has been really no plea raised on the question of the amount having become payable on the death of the predecessor of the defendant, and as I have come to the conclusion that the rate of interest claimed is not penal, and that, in the circumstances, I am not called upon to give relief on that ground, I hold that the plaintfff Fund is entitled to interest at the rate of 12½ per cent. per annum from the death of the defendant's father.

On this basis the plaintiff's claim has now been proved. The promissory note and the equitable mortgage by deposit of title-deeds in respect of the special loan, as also the subsequent deed of mortgage, have been proved. The total amount of principal due up to the death of the defendant's predecessor has been proved to be Rs. 5,377-7-9 and the amount with interest up to date is admitted to be Rs. 7,676-6-6. There will be a decree for this amount. Usual mortgage decree. Further interest at 12½ per cent. per annum on the principal sum from this date till date fixed for redemption. Time for redemption : six months. There will be no personal decree against the defendant. The plaintiff Fund may take the costs of this suit from the sale proceeds. I direct that to the defendant's guardian ad litem the plaintiff do pay a further sum of Rs. 50 and include the total sum of Rs. 150 in the plaintiff's costs of this suit.

Suit decreed.

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* A. I. R. 1926 Madras 788

ODGERS, J.

K. Muhammad Usan Rowther—Plaintiff—Appellant.

v.

The Secretary of State for India in Council and *others*—Defendants—Respondents.

Second Appeal No. 103 of 1923, Decided on 15th October 1925, from the decree of the Addl. Sub-J., East Tanjore, at Mayavaram, in Appeal Suit No. 109 of 1921.

(*a*) *Easements Act, S.* 15—*Lost grant—Evidence insufficient to prove long enjoyment under the Act cannot be sufficient to raise presumption of lost grant.*

Where the evidence does not prove a sufficiently long enjoyment nnder the Easements Act, it is difficult to say that the same evidence must be held sufficient to prove an immemorfal user such as would support the fiction of lost grant. [P. 791, C. 2]

* (b) *Easement—Government and ryot—Ryot getting extra water cannot insist on his getting it as easement.*:

Where a ryot has had the benefit of an extra amount of water for a long time something more than he would ordinarily be entitled to as a ryot; *Held* · that he is not entitled to insist that that extra supply should be continued. Other considerations would arise if it is proved that his enjoyment of this extra water was as of right.

[P. 792, C. 1]

A. Krishnasami Iyer and *K. Balasubramania Iyer*—for Appellants.

C. V. Ananthakrishna Iyer—for Respondents.

Judgment.—The suit from which this appeal arises was brought by the plaintiff against the Secretary of State and others as owner of about 103 acres of land in the village of Anabhogi. He claimed an injunction against the defendants to restrain them from closing a certain inlet sluice on the ground that the said sluice is an irrigation sluice for the village of the plaintiff and that he has the right, title and enjoyment from time immemorial in respect of irrigation through it. It appears that the lands in question and those adjacent to it derive their water through two channels: (1) Anabhogi channel, which is the channel in dispute; and (2) the Valkudi channel which at one point passes under the Anabhogi channel, the latter being carried over it by an aqueduct. It appears that at a point in the Valkudi channel which has been marked M in the plan, there is what has been called the Anabhogi inlet sluice which, as I understand it, is an aperture in the adjoining wall where the Valkudi channel is sunk in order to allow the aqueduct to pass over it, so that when the Valkudi channel is full of water under the aqueduct, which is of a certain height there will be an overflow into the bed of the Anabhogi channel and it is this "uniting together of the said two waters" in the Anabhogi channel that the plaintiff lays claim to in a manner that will shortly be set forth.

These lands are ryotwari, and under the settlement or contract with Government there is no doubt that the latter is bound to supply water to the plaintiff's lands. He, however, claims that the Anabhogi channel has been irrigating his lands for more than 100 years and that "the union of the waters" as it is called, has been enjoyed for a very long time. It appears from the plaint that this inlet sluice has been stopped up by the Government officials on the ground that it is, and always has been, a mere drainage sluice, and in the written statement of the Secretary of State he says:

The vent in the Valkudi channel, as it ie called, is intended solely for the escape of the surplus of Valkudi channel into the Anabhogi Channel and not for supplementing the supply to the Anabhogi Channel for purpose of irrigation.

It is also denied that the plaintiff has acquired any right by prescription.

The District Munsif found against the plaintiff on the ground that the flow of water was not enjoyed as a matter of right for 60 years. The Subordinate Judge found that there was no direct evidence as to the date when the under tunnel of Valkudi, the super passage or aqueduct and vent M were put up, nor was there any record to show that Valkudi was ever a supply channel to Anabhogi. No specific easement was, according to the Subordinate Judge, set up in the plaint and he found that the ptaintiff has no right to get a supply of water to his channel from the Valkudi channel through vent M. Nor had he any such natural right, the Judge finding that the vent was intended as a safety valve to prevent the tunnel underneath and aqueduct overhead from being damaged during floods. He also found that there was no easement acquired by prescription by the plaintiff.

As to damages he found that there was no evidence that the water going through the aqueduct would be insufficient for the irrigation of the Anabhogi lands and that the plaintiff had not proved any diminution and consequent damage to his village by reason of the closure of the vent M. On these grounds he dismissed the plaintiff's appeal.

On second appeal before me, Mr. A. Krishnaswami Iyer relied on the following points:

(1) That a ryotwari holder is in the same position with regard to acquisition of an easement as any other proprietor.

(2) That the plaintiff's accustomed supply had been interfered with and the present supply was not sufficient for his purpose.

(3) That if the plaintiff's right is restricted to his agricultural requirements,

even then there cannot be the same outturn of crop and he has a right of action.

Many cases were cited before me to the effect that the view as to the position of a ryotwari holder has been changed and that whereas he was looked upon in the older cases as a lessee, he is now regarded as a landholder with an interest in the land: *Madathapu Ramaya* v. *Secretary of State* (1). But although ryots are entitled to obtain a supply of water from the Government, it has been established beyond doubt that the Government has the right to distribute the water, though it has not the right to disturb existing arrangements to the prejudice of the tenant, i.e., ryot, and that a right of action is given to the latter if such prejudice is proved : *Ramachandra* v. *V. Narayanasami* (2). Likewise in *Krishna Rao* v. *Kuppier* (3) it was held that the Government had the right to distribute water without prejudice to the rights for necessary cultivation. In *Ponnuswami Tevan* v. *Collector of Madura* (4), which was a case of a zamindary, it was held that a right to an easement in the flow of water through an artificial watercourse is as valid against the Government as it is against a private owner of land and that the grant may be presumed as of right long and openly enjoyed. This length of time should be as long as the period prescribed for adverse possession, or, according to Innes, J., no fixed period is necessary. In *Kristna Iyer* v. *Venkatachella Mudali* (5) the right of Government to distribute water was affirmed, subject to the right of the plaintiff for irrigation and other necessary purposes. The distinction between ryots and proprietors was pointed out, and, it was held in that case that the utilization of surplus water by turning it into a new channel was no breach of contract with the plaintiff.

The Full Bench in *Fakir Muhammad* v. *Tirumala Chariar* (6) by a majority decided that the ryot does not possess rights approaching full ownership. I ought to add that the correctness of this decision was questioned in *Secretary of State* v. *Nunja* (7).

Mr. Krishnaswami Iyer really bases his case on the theory of a lost grant. He admits that no specific user for 60 years has been proved such as would establish a right against Government under the Easements Act. But he says, relying on the dissenting judgment of Innes J., (supra) that a lost grant should be presumed in a case of this sort where for a very long time enjoyment of this extra water is proved. It is pointed out by Goddard (Easements, 8th Edition, p. 161) that the doctrine can only be applied to easements which could, if the evidence were sufficient, be claimed by prescription at common law, and the expedient of presuming a lost grant is only applicable to cases where the evidence or some technicality prevents the application of the principle of prescription at common law, to which it is only ancillary. It is of course clear that S. 15 of the Easements Act is not exhaustive and does not preclude other titles or modes of acquisition. In *Muthu Goundan* v. *Ananta Goundan* (8) and *Secretary of State* v. *Venkata Reddi* (9) it was held that Government must make adequate arrangement for irrigation where a source of supply has been in use for a very long time. The Court said that cases may arise where a lost grant may be presumed though they held there was no sufficient evidence there for that purpose, cf. : *Badduluru Nagayya* v. *Bachu Chenchuramayya* (10).

It must be noticed that the enjoyment whether under the Prescription Act or whether it is relied on to establish a lost grant, must be "as of right" and the question is whether the right of the ryot to his customory supply of water by whatever means the Government chooses to put the water on the land (*Muhanakali Lakshmiah* v. *Karnam Narayanappa*) (11) can give him such right. In ordinary cases of prescription, either a right of way or right to water, it is essential that the way or water should be in one definite direction or channel from one point to another.

(1) [1904] 27 Mad. 386.
(2) [1893] 16 Mad. 333=2 M. L. J. 279.
(3) [1910] M. W. N. 428=7 I. C. 697.
(4) [1870] 5 M. H. C. 6.
(5) [1872] 7 M. H. C. 60.
(6) [1876] 1 Mad. 205 (F.B.).
(7) [1882] 5 Mad. 163.
(8) [1915] 29 M. L. J. 685=2 L. W. 1107=31 I. C. 528=(1916) M. W. N. 113.
(9) [1901] 11 M. L. J. 75.
(10) [1917] 33 M. L. J. 674=44 I. C. 625=(1917) M. W. N. 863.
(11) [1918] M. W. N. 276=45 I. C. 80.

The right of way generally over another person's land is unrecognized in law, and the right to water not contained in a definite channel, either natural or artificial, is equally unknown to law.

It is admitted in this case that the channel is artificial and was at some time or another constructed by Government. The channel is therefore undoubtedly a Government channel. The question is : Can the ryot, under the decisions concerning him which I have set forth, be said to acquire any rights in water as against Government beyond the right to insist that his customary and necessary supply is not diminished ? The irrigation supply for the plaintiff's land is admittedly the Anabhogi channel, and the question is whether this channel, having been permitted to be augmented at certain seasons of the year by an additional supply from the Valkudi channel, gives the ryot any rights that he can enforce as to the water supply.

Reliance was placed by the learned Government Pleader on *Gavad* v. *Martyn* (12) where a stream was made to flow over the defendant's land by the operation of miners who had not permanently abandoned their right of control over the water in the stream when the plaintiff diverted it to his works. The latter used it uninterruptedly for 20 years, but such user was held no evidence that the land from which the water was sent had become subject to the servitude of being bound to send it on to the land of the neighbour below. That seems to me a very similar case to this. Valkudi being also artificial and the property of Government, could not the latter take other steps if it chose to dispose of the surplus water in that channel than by keeping open the vent M ? In *Wood* v *Wood* (13) it is true that the artificial enjoyment depended on temporary circumstances, but it was held that the right to an artificial watercourse must depend on the character of the latter and upon the circumstances under which it was created, which circumstances may show that one party never intended to give, nor the other to enjoy, the use of the stream as a matter of right. The House of Lords in *Gardner* v. *Hodgson's Kingston Brewery Co.* (14) held that the user must be as of right, and if the enjoyment is equally consistent with two reasonable inferences enjoyment as of right will not be established see *Hanna* v. *Pollack* (15) and *Augus* v. *Dalton* (16) where Cotton L. J., observed referring to the means by which an easement is capable of being acquired independently of the prescription test and they are either an enjoyment beyond living memory from which, in the absence of evidence to the contary, enjoyment before the time of legal memory would be presumed or by enjoyment from such a time as could be sufficient in the absence of evidence to the contrary to justify a presumption of a modern grant that had been lost.

It is not alleged that either of these conditions has been fulfilled in the present case. It therefore appears to me that where the evidence does not prove a sufficiently long enjoyment under the Easements Act, it is difficult to say that the same evidence must be held sufficient to prove an immemorial user such as would support the fiction of lost grant, and particularly in this case where the channel is Government property and the only right of the ryot is to have a sufficient supply of water brought on to his land. I quite agree that if the ryot can show that, owing to new irrigation arrangements by the Government, the supply is insufficient for his cultivation he may have a cause of action. Here it has been found by the lower appellate Court that no damage has been sustained and it appears to me that I am bound by that finding although an attempt has been made to show from certain statistcs that the outturn has been less since the vent M was closed. But Mr. Krishnasami Iyer says proof of damage is unnecessary because in *McCartney* v. *Londonderry* and *Loughirlly Railway* (17) it was held that any act which injures another's right and would be evidence in future in favour of the wrongdoer may give ground for an action without proof of any specific iniury.

That of course may be so in case an act injures another's right. But under all the circumstances of this case, I cannot say that any such injury has occurred.

I am not able to say that any more weight is to be attached to the plaintiff's

(12) 144 E. R. 974.
(13) 154 E. R. 1047.
(14) [1903] A. C. 229=72 L. J. Ch. 558=88 L. T. 698=19 T. L. R. 458=52 W. R. 17.
(15) [1900] 2 Ir. 664.
(16) [1879] 4 Q. B. D. 185.
(17) [1904] A. C. 301=73 L. J. P. C. 73=91 L. T. 105=53 W. R. 385.

case that this surplus water has been overflowing from Valkudi for a number of years into the Anabhogi channel than to the defendant's case that the overflow was never intended to supplement the Anabhogi supply, but was merely a drainage vent for Valkudi ; in other words that Government never gave up control to this extra supply.

It seems to me that just because tne plaintiff has had the benefit of an extra amount of water for a long time (by extra amount of water I mean some thing more than he would ordinarily be entitled to as a ryot) he is not entitled to insist that that extra supply should be continued. It may be, as the learned Judges say in *The Secretary of State* v. *Venkata Reddy* (9) that under certain circumstances a lost grant may be presumed in favour of a ryotwari holder.

But in the state of the findings on the evidence here, I cannot say that there are any grounds for deciding this point in favour of the appellant. I do not think in the first place he has established that his enjoyment of this extra water was as of right as, in my opinion, the flow of water to the plaintiff's land was not bound to be supplied in the same channel and was not bound to be of any particular quantity, and it was also regulated by the contract between the ryot and the Government. Reference may also be made to S. 2 (a) of the Easements Act whereby nothing is deemed to derogate from any right of the Government to regulate the collection, retention and distribution of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation.

I therefore think that the appeal fails and must be dismissed with costs of 1st respondent and 2nd respondent (two sets) in this Court.

Appeal dismissed.

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* A. I. R. 1926 Madras 792

PHILLIPS AND RAMESAM, JJ.

M. C. Chegganmull Sowcar—Plaintiff-Appellant.

v.

Desur Manicka Mudaliar—Defendant-Respondent.

Original Suit Appeal No. 9 of 1924, Decided on 15th October 1925, against the decree of Coutts-Trotter, J., in Civil Suit No. 56 of 1923.

* (a) *Contract Act. S. 59—Until creditor has appropriated, debtor can give intimation of appropriation and then creditor has no choice—If creditor appropriates and informs debtor, debtor too has no choice—Creditor can alter appropriation if debtor is not informed already.*

If the defendant does not intimate his wishes along with the payment there is a chance of the creditor making an appropriation and intimating to the debtor and thus shutting the mouth of the debtor for ever. But where the creditor has not made any appropriation, the debtor can make the appropriation which he wishes, some reasonable time after, say, a week, or a month, or three months. It may be said that whenever he intimates such a wish after a reasonable interval it forms part of the same transaction as the payment. The words " with an intimation " in S. 59, Contract Act, are not inconsistent with an intimation, after a reasonable interval. So long as both have not made an appropriation the debtor can intimate the appropriation he wishes to the creditor later on. So long as the appropriation is not communicated to the debtor, the creditor can alter it afterwards, thereby showing that an uncommunicated appropriation is not complete as between both parties. If it is so complete, one cannot alter it. Unless both parties have known of the entry it is not complete as between both the parties. It is difficult to see why an uncommunicated appropriation in an account-book should be binding on the debtor, but the creditor may be at liberty to alter it. The creditor has the right of election ' up to the very last moment ', and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention, expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account or anything else which indicates an itnention one way or the other and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction. [P 795 C 1, 2]

(b) *Negotiable Instruments Act, Ss. 68 and 69 —" Place" includes " places".*

The word " place " must be construed as including " places " as it would be anomalous to require presentment, if one place is mentioned, but none, if two places are mentioned. If more

than one place is mentioned there must be presentment at one or other of those places.
[P 796 C 2]

M. A. Tirunarayanachari and *K. B. Ranganatha Aiyar*—for Appellant.

V. S. Govindachari and *Rangaswami Aiyangar*—for Respondent.

Ramesam, J.—This appeal arises out of a suit to recover money due on two promissory notes. The plaintiff is the appellant before us, the learned trial Judge having dismissed the suit except as to Rs. 800 admitted due by the defendant and deposited by him in Court. The suit was filed on the 24th of January 1923, under the summary procedure. The defendant applied for leave to defend in February. Leave was granted on the 5th of March and the written statement of defendant was filed on the 15th of March. The two suit promissory notes are dated 17th December 1921 (Ex. B) and 22nd December 1921 (Ex. A) and carry interest at the rate of Rs. 2-13-0 per cent. per mensem. The plaintiff and defendant ordinarily reside at Tindivanam in the South Arcot District. On the 22nd of April 1922, the plaintiff, through his Madras vakil, Mr. Mahadeva Aiyar, sent a notice demanding the balance due on Ex. B (Ex. V). Two days after, the same vakil issued another notice, Ex. D, in which he mentions that he was really instructed by his client to demand the amount due on both the pro-notes but that one of them was omitted from the first demand by mistake, and the mistake having been detected the second notice was sent. In the second notice he mentions that two amounts of Rs. 1,000 each were paid on 3rd February and 16th April. The defendant, in his reply notice, Ex. VI, dated 1st May 1922, and in his written statement, pleaded that besides the payments admitted by the plaintiff he made two other payments, viz., a sum of Rs. 1,000 on 5th January 1922, and another sum of Rs. 700 on 22nd April 1924.

I shall first deal with the payment of Rs. 700. The defendant examined himself (D. W. 1) and D. Ws. 2, 3 and 4 to prove this payment. D. W. 2 is Krishnaswami Aiyar, a clerk in the firm of Srinivasa Aiyangar and Sons. He says his firm lent Rs. 1,200 to the defendant and that the defendant wanted it to give to some Marwari whose name he does not remember. D. W. 3 is Subramania Aiyar, a clerk in the Official Assignee's office. He saw payment of some amount in 100 rupee notes by the defendant to plaintiff at the gate of the High Court, and he and D. W. 4 were present. D. W. 4 corroborates him. He does not know the number of notes, but he saw the counting by the plaintiff who said it was seven. Defendant himself swears that Rs. 700 was paid on 22nd April out of the Rs. 1,200 borrowed from Srinivasa Aiyangar and Sons. He sent word to the plaintiff, who was living at St. Thomas' Mount. The plaintiff has not gone into the box. His clerk produced the account books which will be referred to later on and he does not know anything personally about these transactions. The defendant's ledger (Exs. 1 and 1-A) supports him. The result is we must believe the evidence adduced for the defendant and find that this payment of Rs. 700 has been proved. It follows that the plaintiff is not an honest man.

The other payment of Rs. 1,000 is admitted by the plaintiff before us and also in the Court below at the time of trial. But his contention with respect to it is that it was credited by him towards a third pro-note executed by the defendant to the plaintiff on 5th November 1921, for Rs. 1,000, carrying interest at 2 per cent. The defendant, in his affidavit (dated 23rd February 1923), which he filed for obtaining leave to defend, mentioned in para. 5 :

The account-book of the plaintiff himself may, if produced, substantiate the payment of the said sum of Rs. 1,700.

In the counter-affidavit of the plaintiff, para. 2, the plaintiff said :

I deny that the defendant paid the sums of Rs. 1,000 and Rs. 700 referred to in paragraphs 4 and 5 of the affidavit and say that the said payments are absolutely false.

This statement of the plaintiff is now sought to be explained by his advocate as meaning that the payments towards the suit pro-notes were meant to be denied and not the fact of payment itself so far as the payment of Rs. 1,000 is concerned. Even with this explanation, as far as the payment of Rs. 700 is concerned, I have already found that the statement must be false. As to the other payment, seeing that the defendant, who sent the amount through his son, who signed in the plaintiff's account book and who must have informed his father of the entry, refers to the fact of entry in the account book in paragraph 5 of his affi-

davit and that the plaintiff himself relied on such account books at the trial to prove the credit towards another pro-note. I find it difficult to believe that the plaintiff, assuming that he is dishonest, meant to deny the payment of Rs. 1,000 on 5th March 1923. It seems to me unlikely that he meant to deny both payments on 5th March and afterwards in August during the time of trial meant to admit one of them. It seems to me that the affidavit of the plaintiff, who is a Marwari, was drafted for him by a careless pleader or pleader's clerk and signed by him without realising its full import. I make these remarks not for the purpose of establishing that the plaintiff is an honest man—and with the other finding he cannot be made honest—but merely to know what the probability is. Whatever it may be, we have got the fact that he admits payment of Rs. 1,000 and the only question is whether there is a legally binding appropriation of the payment towards another pro-note. This other pro-note was mentioned to the defendant in his cross-examination and he was asked to produce his day-book of that date. But he said he has not got it. The day-book produced by him begins from 21st November, but its non-production is immaterial. He admitted the pro-note after he was shown the entry in the plaintiff's book signed by the defendant's son. He said :

This pro-note amount was not borrowed for my business. You may look into my account. The entry is signed by my son Ramalingam. I might have borrowed another amount from the plaintiff on 5th November 1921. (By Court) : I did borrow it. I have been keeping separate ledgers. There is a ledger prior to the one I have filed in Court, but it belongs to my own business, while the one I have filed belongs to the joint business. Prior to November 1921 I have got a day-book for my own business. There is also a ledger page maintained for my dealings with the plaintiff for that period. The balance due on that ledger has been brought over to this ledger. It would have been entered in all other ledgers like that. That is paddy business, joint business, and this is groundnut business. In regard to my own business there would have been nothing there prior to November 1921, and so it would not have been brought forward.

This deposition shows that the defendant admitted the pro-note of 5th November 1921, after some hesitation, but suggests that it is connected with some joint business which is a paddy business. He does not say who the other partner is, nor does he say that the pro-note was signed by himself and the other partner. Nor does he say that the plaintiff knew it was a business joint between defendant and another. I do not suggest, by referring to his hesitation, that the defendant is dishonest. I am satisfied that he has been honest throughout this case. But he hesitated at first probably because he was afraid that the entry signed by his son may bind him as an appropriation towards the other note. The defendant's son was examined as D. W. 5. He was in school in the year 1921. He says his father gave him Rs. 1,000 and he paid it to the plaintiff but did not get any document or pro-note. In cross-examination he admits his signature under the entry in plaintiff's day book, Ex. C, which shows that the amount of Rs. 1,000 was credited towards the pro-note of 5th November 1921. He was then asked : " Q.—You told your father what you wrote here ? A.—No." This question suggests that he wrote the whole entry. It is true that the question is a double question and that double questions are not generally fair to witnesses. But seeing that the question was not objected to either by the witness or by his vakil, Mr. Govindachari, and seeing it is a very simple question which is not apt to confuse a witness, I think it is clear to me that neither the witness nor the defendant's vakil meant to suggest that the entry was not written by the witness. The only other alternatives are that the entry was written by some other person but signed by the defendant's son or there was no entry then but the bare signature of the witness taken then and there was an interpolation afterwards. There is no re-examination of the witness suggesting such interpolation. Nor did Mr. Govindachari seriously suggest before us, though I put the suggestion to him, that the entry was interpolated afterwards.

I cannot imagine that the Judge and the practitioners on either side were thinking that they were exhibiting the signature of the witness only as an exhibit, for such exhibit is of no use in the case. I think all understood in the Court below that the whole entry with the signature was meant to be exhibited and that the fact of the entry made by the plaintiff was not communicated to the defendant. Mr. Tirunarayanachari, the learned advocate for the plaintiff, contended that the notice, Ex. D, may be taken to be a

notice of appropriation towards the note of 5th November. But this contention cannot be accepted. Ex. D makes no reference to the pro-note of 5th November. It is true that in that notice the payment of Rs. 1,000 on 5th January was not mentioned as a payment towards the suit notes. But it cannot be necessarily inferred from this that the amount must have been credited towards the third note. There are other alternatives. The amount might have been kept in suspense or one might imagine that it was a mere piece of omission as Ex. D already shows that the vakil committed other mistakes. In Ex. VI the defendant mentions to plaintiff that that amount was sent towards the suit pro-notes. This is the first occasion on which an appropriation known to both parties is stated. Mr. Tirunarayanachari contends that a debtor can intimate the appropriation he desires only along with the payment or so immediately after it as to form part of the same transaction and cannot make his appropriation long after the payment. It is true that if the defendant does not intimate his wishes along with the payment there is a chance of the creditor making an appropriation and intimating to the debtor and thus shutting the mouth of the debtor for ever. But supposing the creditor has not made any appropriation, can it be said that the debtor cannot make the appropriation which he wishes some reasonable time after, say, a week, or a month, or three months ?

It may be said that whenever he intimates such a wish after a reasonable interval it formed part of the same transaction as the payment. But should it be immediately after the payment ? I do not see why it should be immediately after a payment. The words "with an intimation" in S. 59, Indian Contract Act, are not inconsistent with an intimation after a reasonable interval. So long as both have not made an appropriation I do not see why the debtor cannot intimate the appropriation he wishes to the creditor later on. Mr. Tirunarayanachari, though he had first denied that a debtor cannot do this, practically conceded this in his argument. In such a case, he said, the creditor leaves it open. If once so much is conceded it follows that the essence of an appropriation is that it should be known to both parties and if not communicated by the creditor that it is left open; for, if we hold an uncommunicated entry in an account-book effective, an entry in an informal note-book or a loose piece of paper, or even a piece of paper put in an envelope and secreted, or even a bare mental resolution to appropriate in a particular way (sworn to by the creditor), would bind the debtor. In the case of regular account-books generally an extract of the account-book is sent to the opposite party according to the custom in commercial circles. In *The Mecca* (1), cited by the appellant, Lord Herschell said at page 292:

> It is clear that if the appellants had merely entered in their own books an account such as was transmitted, it would not have amounted to any appropriation by them, and they would still have been at liberty to appropriate the payment as they pleased. It is equally clear, however, that when once they had made an appropriation and communicated it to their debtors, they would have no right to appropriate it otherwise. What, then, was the effect of bringing the items of debt into a single account, and transmitting it to their debtors in the manner they did ?

This quotation shows that so long as the appropriation was not communicated to the debtor, the creditor can alter it afterwards, thereby showing that an uncommunicated appropriation is not complete as between both parties. If it is so complete, one cannot alter it. There seems to be an analogy between this and the communication of an acceptance of an offer of a contract or a revocation. The priciple seems to be that unless both parties have known the entry it is not complete as between both the parties. It is difficult to see why an uncommunicated appropriation in an account-book should be binding on the debtor, but the creditor may be at liberty to alter it. At page 294 Lord Macnaughten says:

> But it has long been held, and it is now quite settled, that the creditor has the right of election "up to the very last moment," and he is not bound to declare his election in express terms. He may declare it by bringing an action or in any other way that makes his meaning and intention plain. Where the election is with the creditor, it is always his intention, expressed or implied or presumed, and not any rigid rule of law that governs the application of the money. The presumed intention of the creditor may no doubt be gathered from a statement of account, or anything else which indicates an intention one way or the other and is communicated to the debtor, provided there are no circumstances pointing in an opposite direction.

(1) [1897] A. C. 286=66 L. J. P. 86=45 W. R. 667=76 L. T. 579.

The use of the words "express, implied or presumed," "communicated," "indicates an intention" show that a concealed or secreted entry cannot satisfy the requirements laid down by Lord Macnaguhten. In *Simson* v. *Ingham* (2) Bayley, J., observed:

> If, indeed, a book had been kept for the common use of both parties as a pass-book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account.

See also *Friend* v. *Young* (3) and *Smith* v. *Betty* (4) and Chitty on Contracts, pp. 851 and 852. In the present case, up to 1st May 1922, neither party communicated his intention to the other. For the first time in Ex. VI the defendant mentioned that he paid the amount towards the suit notes. Within four months after the payment he repeated this in his affidavit of February 1923. The plaintiff does not contradict it up to the trial. I do not see that we must infer that he accepted the defendant's wishes, for he was pressing his suit; but it seems to be a piece of foolish and meaningless cleverness in not stating his own appropriation up to the trial.

Though I am not able to infer that the payment must be taken to be appropriated by the creditor towards the suit notes under the circumstances existing on 5th January 1922, within the meaning of S. 59 of the Contract Act [see *Rameswar Koer* v. *Mahomed Mehdi Hossein* (5)] all the later circumstances up to the trial, I think, justify me in rejecting the plaintiff's earlier concealed appropriation as ineffectlve and in holding that the defendant's intimation in Ex. VI was reasonable in the circumstances and binds both the parties. This conclusion is not inconsistent with the expressions of Lord Macnaughten in *The Mecca* (1) or of Vaughan Willams, Romer and Stirling, L. JJ., in *Seymur* v. *Pickett* (6) for the question whether the debtor may intimate if the creditor has left it open did not arise and was not considered in these cases. At first I thought this conclusion is hard on the plaintiff for the suit on the other note would now be barred. On the other hand Mr. Govindachari pointed out that a suit for contribution by him againt his partner will now be barred. The result is I excluded all questions of hardship from my mind in dealing with the case especially as I have no sympathy with the plaintiff. But I may now point out that suit on the other note by him will not be barred as the defendant's deposition in August 23 is an acknowledgment of that note. Anyhow the plaintiff is not now entitled to recover Rs. 1,000. I have dealt with the case at great length just as the argument also took a little more than the usual time a case of this kind ought to have taken, because I was anxious to deal with the facts and the law only on the merits uninfluenced by the opinion which we have formed about plaintiff's honesty with reference to the other payment. It is admitted that the interest due to plaintiff is still due. The amount of interest was admitted also in Ex. VI in May 1922. No arrangements were made for paying it up to the date of suit, and even after the suit defendant deposited only the principal amount of Rs. 800 and not interest, thus necessitating the appeal. But Mr. Govindachari contends for the defendant that the suit does not lie in Madras. He refers to Ss. 68 and 69 of the Negotiable Instruments Act, and the suit notes mentioned "in Madras or any place where you have your shop as the place of payment." The only specified place is Madras. But the other clause might cover a number of other places. Mr. Tirunarayanachari argued that Ss. 68 and 69 do not apply as more than one place is mentioned. But the word "place" must be construed as including "places" as it would be anomalous to require presentment if one place is mentioned but none if two places are mentioned. If more than one place is mentioned there must be presentment at one or other of those places. The demand by Ex. D does not amount to a presentment. The result is strictly the plaintiff has no right of action to sue without presentment, but the defendant did not take the point in this shape, namely, that the plaintiff has no right to sue, but raised only the question of jurisdiction. I do not see how these sections can help

(2 2 B and C 65=3 D and R 549=1 L. J. (O. S.) K. B. 234=26 R. R. 273.
(3) [1897] 2 Ch. 421=66 L. J. Ch. 737=77 L. T. 50=46 W. R. 139.
(4) [1903] 2 K. B. 317=72 L. J. K. B. 853=89 L. T. 258=19 T. L. R. 602=52 W. R. 137.
(5) [1899] 26 Cal. 39=25 I. A. 179=2 C. W. N. 633=7 Sar. 413 (P. C.).
(6) [1905] 1 K. B. 715=74 L. J. K. B. 413=92 L. T. 519=21 T. L. R. 302.

the defendant ou the particular plea he has taken. The object of presentment seems to be to give the defendant an opportunity to pay, and until presentment no right to sue arises. But the Negotiable Instruments Act does not provide that after presentation at one of several places that one place to the exclusion of others is the place which determines jurisdiction for a suit.

Nor do I find any such provision in the corresponding English Law, S. 87 of the Bills of Exchange Act. The section of the Civil P. C. which mentions the place of performance of the contract also as giving jurisdiction stands and is unaffected by Ss. 68 and 69 of the Negotiable Instruments Act, an Act which has nothing to do with the questions of jurisdiction. I must, therefore, disallow the plea of the defendant, a plea which is important only on the question of costs. If the defendant's plea had been upheld we would disallow all costs to plaintiff while giving a decree for interest, but as it is by the defendant's waiver of plea of right of suit that the plaintiff is able to get a decree for the balance of principal and interest I must disallow plaintiff's costs in the Court below. But the defendant's omission to admit the interest or deposit has necessitated the appeal. I therefore award plaintiff proportionate costs on the amount of interest in appeal only. The result is the plaintiff will have a decree for the amount of Interest due up to the date of deposit of Rs. 800 in Court with further interest on it from the date of the lower Court's decree at 6 per cent. up to date of payment. Plaintiff will have proportionate costs in appeal only on such amount. He will pay defendant's costs on the rest of his claim throughout.

Phillips, J.—I agree. On the question of jurisdiction I entertain some doubt, but I am not prepared to differ from my learned brother's opinion. I accordingly concur in the order proposed by him.

Decree modified.

A. I. R. 1926 Madras 797

DEVADOSS AND WALLACE, JJ.

Sri Rajah Satrucharla Gangaraju Bahadur Garu and *others*—Defendants 2, 4 and 8—Appellants.

v.

Sir Sri Sri Ramachandra Deo Garu, Rajah of Jeypore and *another*—Plaintiffs—Respondents.

Appeal No. 179 of 1924, Decided on 25th November 1925, from the order of the Sub-J., Vizagapatam, D/- 20th February 1924.

Civil P. C., O. 40, R. 1—Property not in suit—No personal decree likely to be passed against owner—Receiver cannot be appointed.

Where there is no personal decree against the person and when there is no reasonable chance of a personal decree being passed against him in the near future, there is no reason why the person should be deprived of the possession of the estate which is not in any way connected with the property in the suit and a Receiver appointed for it. [P. 797, C. 2]

Y. Suryanarayana—for Appellants.

P. Somasundaram—for Respondents.

Devadoss, J.—This is an appeal against the order of the Subordinate Judge directing the appointment of a Receiver in respect of the Pedda Merangi estate. The plaintiff has obtained a mortgage decree for a very large amount against the appellant. It is said that the personal remedy is outstanding, but no personal decree has yet been passed against the appellant. The allegation of the plaintiff is that the mortgaged property would not fetch even half the amount of the decree. Granting for argument's sake that it is so, we do not see any reason why the Court should appoint a Receiver for property which is not the subject-matter of the suit. The appellant succeeded as reversioner to the estate of a certain minor and the Pedda Merangi estate descended to him from the minor after the mortgage suit was filed. In these circumstances we do not see any justification for the appointment of a Receiver for Pedda Merangi estate and for depriving the appellant of the possession of that estate.

When there is no personal decree against the appellant, and when there is no reasonable chance of a personal decree being passed against him in the near future, we do not see why the appellant should be deprived of the possession of the estate which is not in any way connected with the property in the suit.

We, therefore, set aside the order appointing a Receiver, but to prevent the appellant from alienating the property in order to defeat any personal decree that may be obtained by the plaintiff against him, we direct that he should be restrained by an injunction from alienating the whole or any portion of the Pedda Merangi estate.

There was a conditional attachment pending the disposal of the Receiver application. If the attachment has lapsed it will be open to the plaintiff to apply to the lower Court to attach the property and the Subordinate Judge will dispose of snch an application on its merits.

The appellant will have the costs of the appeal here and in the lower Court.

Order set aside.

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* A. I. R. 1926 Madras 798

JACKSON, J.

Vice-Chairman, Chidambaram Municipality—Defendant—Petitioner.

v.

Ganasambandham Pillai—Plaintiff—Respondent.

Civil Revision Petitions Nos. 854 and 855 of 1925, Decided on 28th October 1925, against the order of the Dist. Munsif, Chidambaram, in I. A. No. 1005 of 1925.

* *Jurisdiction—Special tribunal created by an Act—Civil Court cannot deal with cases under the Act unless special tribunal refuses to Act.*

Where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. If this tribunal had functioned and given a decision, whether right or wrong, the civil Court would have no jurisdiction. It is only when the special tribunal has refused to function that a civil Court exercises the jurisdiction which the proper tribunal has failed to exercise. *A. I. R.* 1923 *Mad.* 475 and 31 *Bom.* 604 *Foll.* [P 798 C 2]

T. R. Ramachandra Iyer—for Petitioner.

Patanjali Sastri—for Respondent.

Judgment.—The petitioner seeks to set aside two orders of the District Munsif of Chidambaram, one ordering the production and the other ordering the attachment and seizure of the ballot boxes in the election of a Councillor for the 4th ward of the Chidambaram Municipality. There is no ground for presumption from the record at this stage of the proceedings that the District Munsif had any jurisdiction to interfere with the final election. It seems that when the final list of valid nominations was posted in accordance with Election Rule 5, the respondent found that his name had been omitted. Accordingly he filed O. S. No. 502 of 1925 in the Court of the District Munsif of Chidambaram. His remedy would have been to refer the matter to the Local Government under R. 31 or to have filed an election petition under R. 1 of the Election Dispute Rules. As Mr. Justice Wallace observes in *Sarvothama Rao* v. *Chairman Municipal Council Saidapet* (1) it is impossible in deciding the propriety of an injunction to avoid deciding on the maintainability of the suit and it is better if the Court concerned decide the two questions together. But the Munsif does not seem to have addressed his mind to this question of jurisdiction.

The law is quite clear, and is set forth both in the Madras ruling quoted above, and in *Bhaishankar Nanabhai* v. *Municipal Corporation* (2) where a special tribunal out of the ordinary course is appointed by an Act to determine questions as to rights which are the creation of that Act, then except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive, *Bhaishankar Nanabhai* v. *Muncipal Corporation* (2). If this tribunal had functioned and given a decision, whether right or wrong, I am clear that the civil Court would have no jurisdiction. It is only when the special tribunal has refused to function that a civil Court exercises the jurisdiction which the proper tribunal has failed to exercise *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet* (1).

It is idle for the respondent to complain that if that is the law, it deprived him of the speedy and drastic remedy which he personally desires. It is only under the statute that he has any rights at all in this matter, and he must submit to the whole statutory scheme, instead of accepting the privileges and repudiating disabilities. It is an essential

(1) A. I. R. 1923 Mad. 475.
(2) [1907] 31 Bom. 604=9 Bom. L. R. 417.

condition of those rights that they should be determined in the manner prescribed in the Act to which they owe their existence. In such a case there is no ouster of the jurisdiction of the ordinary Courts for they never had any; there is no change of the old order of things; a new order is brought into being *Bhaishankar Nanabhai* v. *Municipal Corporation* (2). Nor are the reasons for the statute far to seek.

It is a positive practical necessity that these elections should be held and completed without being delayed at every stage by some person who considers that he has a personal grievance; and it is highly important that the ordinary Courts of law should be kept entirely immune from the excitement that elections invariably generate. It would be deplorable if Munsifs' Courts were to become the storm-centre of disputed elections. If these principles require illustration the present case could hardly be bettered. An election has been held which ought not to be delayed because a Chairman has to be elected in November yet all the ballot boxes for one ward are in the Munsif's Court, and the Munsif has plunged into the fray not only with the fervour but with the vocabulary of the hustings. The respondent made yet a third application to have the taking of the votes stopped by the injunction, and the Munsif ordered that the election should not proceed without the respondent as candidate, whereupon the Chairman added his name as a candidate and proceeded. The Munsif describes this act, which was certainly not in contravention of the plain terms of his order as an insult and gross insubordination. Evidently he regards himself as the authority in supreme control of the election, and the various other functionaries are his subordinates; and it is precisely to avoid putting the Courts of Law in this intolerably invidious position that the Legislature is careful to appoint special tribunals and to exclude the ordinary jurisdiction.

I find that the orders in question were passed without jurisdiction and order the District Munsif of Chidambaram to restore the ballot boxes to the proper authority. The injunctions are cancelled, costs to petitioners.

Order set aside.

A. I. R. 1926 Madras 799

DEVADOSS AND WALLER, JJ.

Bangarammal—Petitioner.

v.

Ramanuja Iyengar and *others*—Respondents.

Appeal No. 45 of 1923 and Civil Revision Petition No. 938 of 1923, Decided on 28th October 1925, from an order of the Sub-J., Chingleput, D/- 8th August 1922, in M. P. No. 398 of 1920.

Civil P. C., S. 92—Appointment of trust under tentative scheme providing not for his removal—He can only be removed by regular suit—Any other order of removal is not one in execution and so not appealable under S. 47.

Where a tentative scheme provides for the appointment but not the removal of a trustee appointed under it, such trustee cannot be removed except by a regular suit under S. 92. Any order removing such a trustee other than by a regular suit is without jurisdiction and is not appealable as it is not an order in execution: *A. I. R.* 1925 *P. C.* 155, *Foll.* [P. 799, C. 2]

C. V. Ananthakrishna Iyer—for Petitioner.

V. Krishna Mohan and *T. P. Srinivasachari*—for Respondents.

Waller, J.—In O. S. No. 8 of 1911 a scheme was drawn up for the administration of the Tiruvadandai temple. It consisted of five clauses, the last of which provided that:

The scheme shall work tentatively for three years and may be mpdified hereafter by the on the motion of the trustees, the sobha or any person interested.

Nothing further appears to have been done by anyone thereafter and the tentative scheme remained in force till 1920. In that year an application was presented to the Court for modification of the scheme, coupled with a prayer for the removal of the Defendant No. 3 from the trusteeship of the temple. In the result, the Court framed an entirely new scheme and granted the prayer for the removal of the Defendant No. 3. It is against this last part of the Court's order that she appeals. The original scheme made no provisions for the removal of a trustee and it seems to us clear that the Courts had no power to remove Defendant No. 3 except on a suit brought for the express purpose under S. 92, Civil P. C. The order of the Subordinate Judge was, therefore, made without jurisdiction.

It is, however, argued that no appeal lies against it. It has hitherto been the

practice to treat orders of this kind as orders passed in execution and appealable as such. The Privy Council has, in a recent decision ruled that such orders do not come under S. 47, Civil P. C.: *Sevuk Jeranchod Bhogilal* v. *Dakore Temple Committee* (1). We must hold that Defendant No. 3 has no right of appeal. We see no reason why she should not be allowed to convert her appeal into a revision petition and it is converted accordingly. The order removing her was passed without jurisdiction and it is set aside with costs.

The additional Court fee paid by petitioner will be refunded.

Devadoss, J.—I agree.

Appeal dismissed.

(1) A. I. R. 1925 P. C. 155.

A. I. R. 1926 Madras 800

DEVADOSS, J.

Municipal Council, Rajahmundry—Defendant—Petitioner.

v.

Nidamarti Jaladurga Prasadarayudu and *another*—Plaintiffs—Respondents.

Civil Revision Petitions Nos. 375 to 377 of 1924, Decided on 4th February 1926, from the decrees of the Principal Dist. Munsif, Rajahmundry, in S. C. S. Nos. 398, 721 and 733 of 1923, respectively.

Madras District Municipal Act (1920), *S.* 80—*Rate of tax to be levied must be specified.*

When the Municipal Council proposes to levy a tax it must make the people understand at what rate it is going to collect the tax as provided for by the District Municipalities Act in Sch. 4 or anything of the kind. [P 800 C 2]

V. Ramadass—for Petitioner.

C. Rama Rao—for Respondents.

Judgment.—*C. R. P. No.* 375 *of* 1924.—This is an application to revise the order of the Principal District Munsif of Rajahmundry. The petitioner is the Municipal Council of Rajahmundry. The respondent was assessed to profession tax and he brought a suit for the recovery of the amount collected from him on the ground that the collection was illegal. The main contention in the case is whether the Municipal Council published a notification as required by S. 80 of the District Municipalities Act. Under that section, when a Municipal Council shall have determined under the provisions of Ss. 78 and 79 to levy any tax or toll for the first time or at a new rate, the Chairman shall forthwith publish a notification in the District Gazette and by beat of drum specifying the rate at which the tax or toll shall be levied from a date to be specified in the notification. The notification published by the Municipal Council on the 16th October 1920, was to the following effect:

> This (i. e., profession) tax will be levied at the maximum rates in Sch. IV of the District Municipalities Act (V of 1920).

This notification does not comply with the requirements of S. 80. What the Municipal Council published amounted to only that the profession tax will be levied at an increased rate. It ought to mention in the notification the rate at which the profession tax was going to be levied. Instead of that the Council published a notification to the effect that it would collect at the maximum rates in Sch. IV. The reference to Sch. IV is not a sufficient compliance with the clear terms of S. 80; for that section says the rate at which the tax is to be levied should be mentioned. I think this is a serious defect in the notification published and it cannot be cured in any way. When the Municipal Council propose to levy a tax it must make the people understand at what rate it is going to collect the tax and should not simply say it is going to collect the tax as provided for by the District Municipalities Act in Sch. IV or anything of the kind. On this point the plaintiff was entitled to succeed and the District Munsif was right in holding that the Municipal Council could not collect the tax when the notification did not comply with the requirements of the law. The revision petition is dismissed with costs.

After delivering the judgment my attention is drawn to a judgment of Mr. Justice Jackson in *Krishna Jute and Cotton Mills Co., Ltd., Ellore* v. *Municipal Council, Vizianagaram* (1) and I am glad to find that I am in agreement with him.

C. R. P. Nos. 376 *and* 377 *of* 1924.—Same order as the above in the above two petitions but the respondent will have his costs only in C. R. P. No. 377 of 1924.

Petitions dismissed.

(1) A. I. R. 1926 Mad. 152.

* A. I. R, 1926 Madras 801

WALLACE AND MADHAVAN NAIR, JJ.

Chowdappa Gounder—Creditor—Appellant.

v.

Kathaperumal Pillai and *others*—Responents.

Appeal No. 364 of 1923, Decided on 25th January 1926, from the order of the Dist, J., Coimbatore, D/- 13th December 1922, in I. A. No. 558 of 1922.

* (a) *Provincial Insolvency Act* (1920), *S.* 75 —*Individual creditor can always appeal whether Official Receiver appeals or not and whether appellant's interests are or are not homogeneous with those of other creditors.*

In original proceedings in the insolvency Court in which an individual creditor's individual interests are concerned, and are opposed to the interests of other creditors so that the Official Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be made by him also ; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest so that the Official Receiver can represent all, the proper person to move is the Official Receiver and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under S. 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does ; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors : *A. I. R.* 1924 *Mad.* 345 ; 39 *All.* 152 and 2 *Pat. L. J.* 101, *Expl.* ; 40 *Mad.* 630 and *A. I. R.* 1922 *Mad.* 246, *Dist.*

The fact that the appellant was not, in his individual capacity, a party to the original petition, does not preclude him from appealing, as he should then be deemed as represented by the Official Receiver. [P. 802, C. 2, P. 803, C. 1]

(b) *Provincial Insolvency Act* (1920), *S.* 53—*Court's duty.*

The District Judge cannot decline to go into the matter of the nominal or fradulent nature of the alienation in an application under S. 53. [P, 805, C. 2]

L. A. Govindaraghava Aiyar—for Appellant.

T. R. Ramachandra Aiyar and *S. R. Dikshit*—for Respondents.

Wallace, J.—The first question in this appeal is whether an appeal lies. The Official Receiver of Coimbatore in proceedings in insolvency applied to the lower Court under S. 53 of the Provincial Insolvency Act to declare void against him an assignment or sub-lease in favour of the 2nd respondent before it. The lower Court dismissed the petition. The appellant before us is not the Official Receiver, but one of the creditors ; and a preliminary objection is taken that such an appeal by a single creditor is not competent. It does not appear that the appellant before appealing moved the Official Receiver to appeal. For the purpose of this argument I assume that the Official Receiver was not moved to appeal.

The appellant relies very strongly on the general wording of S. 75, sub-Cls. 1 and 2, which undoubtedly lays down that any creditor aggrieved by the decision of the District Court may appeal to the High Court in a matter of the kind. The short question then is, is the appellant a creditor aggrieved by this order, and does the fact that he did not first move the Official Receiver to appeal make him any the less an aggrieved creditor ?

Now, the general scheme of the Act is that in insolvency proceedings creditors cannot act individually and independently but are represented by the Official Receiver who alone may ordinarily take action. Clearly, however, the Official Receiver can act for the whole body of the creditors only when the interests of the whole body are homogeneous ; if the interests of individual creditors conflict, then the Official Receiver cannot represent the interests of the creditor who is standing on his individual rights as opposed to those of the general body, so far as that right is concerned. Such a case would occur, for example, when the Official Receiver or some creditor wishes to have the debt of another creditor struck out as fictitious, or when one creditor wishes to be ranked as a secured creditor, or when an alienation in favour of one creditor is sought to be declared void under S. 53 or S. 54 of the Act. In such cases it seems to me clear that no one but the individual creditor can represent his individual interest, as distinguished from the interest he possesses homogeneous with those of the general body of creditors. The general principle thus would seem to be that where the insolvency proceedings under consideration concerns only an individual creditor and his interest, he alone can agitate the matter both in the original Court and in the appeal Court. Reference may be made in this connexion to the reported

ruling in *Khushali Ram* v. *Bholar Mal* (1). In such cases, however, there would ordinarily be an order by the Receiver as representing the general body of creditors, and a fortiori, the homogeneous interests of all individual creditors, including the creditor opposed to him in the matter of that creditor's individual claims, unfavourable to the individual creditor's individual claims, and the latter would apply first of all to the Court under S. 68 for redress: see *Thiruvenkatachariar* v. *Thangayiammal* (2). But where the proceeding concerns the general interests of the general body of creditors, then individual creditors are not in the first instance permitted ordinarily to act individually but must be represented by and must act through the Official Receiver. What then is the principle to be invoked if the Official Receiver, being moved on behalf of the general body of creditors, refuses to act? The proper principle, as I conceive, has been laid down by Cave, J., in *Ex parte Kearsley: In re Gense* (3). It is quoted in extenso in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4).

That principle would, prima facie, apply equally to proceedings in the original insolvency Court and to proceedings in appeal from it. But, having regard to the generally adopted interpretation of the phrase "any person aggrieved" set out in the well-known case of *In re Sidebotham* (5) and adopted therefrom in various decisions in this country—see *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) and *Kumarappa Chettiar* v. *Murugappa Chettiar* (6)—it must be admitted that S. 75 does give an individual creditor a wider right, viz., a right to appeal in any case in which his interests are adversely affected, whether it is his individual interests or his interests as one of the general body of creditors which are so affected, so that it is open to the individual creditor to appeal in a case where his interests are homogeneous with and not opposed to those of the whole body of creditors, even though he has not first moved the Official Receiver to appeal and had a refusal.

At the same time it is essential that the general principle that the individual creditor cannot without leave or order of the Court represent the whole body of the creditors, must not be lost sight of, and in cases where he does so it must be made clear that the appeal is on behalf of the general body of creditors. Following, therefore, the analogy of a suit by an individual creditor under S. 53 of the Transfer of Property Act, [cf. *Pokker* v. *Kunhammad* (7) and *Ishvar Timappa* v. *Devar Venkappa* (8).] I would direct that before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out if necessary by the Official Receiver.

The general principles on which such insolvency proceedings ought to be conducted would then be these: In original proceedings in the insolvency Court in which an individual creditor's individual interests are opposed to the interests of other creditors so that the Official Receiver cannot represent the individual creditor's individual claims, a motion may be made by the individual creditor and an appeal may be made by him also; but when in the original proceedings the individual creditor's interests are homogeneous with those of the rest, so that the Official Receiver can represent all, the proper person to move is the Official Receiver, and the individual creditor cannot move unless there is a decision of the Official Receiver against him under which he can come up under S. 68. But in the matter of appeals an individual creditor can always appeal whether or not the Official Receiver does; but if in the matter of appeal his interests are homogeneous with those of the rest of the creditors, then in such a case he must make his petition a representative petition on behalf of all the creditors.

I do not think that the fact that the appellant was not in his individual capa-

(1) [1915] 37 All. 252=28 I. C. 573=13 A. L. J. 270.
(2) [1916] 39 Mad. 479=29 I. C. 294=29 M. L. J. 755.
(3) [1886] 17 Q. B. D. 1=55 L. J. Q. B. 325=34 W. R. 474=3 Morrel 57.
(4) A. I. R. 1924 Mad. 345.
(5) [1880] 14 Ch. D. 458=49 L. J. B. K. 41=28 W. R. 715=42 L. T. 783.
(6) [1916] 36 I. C. 771.
(7) [1919] 42 Mad. 143=(1919) M. W. N. 39=36 M. L. J. 231=51 I. C. 714=9 L. W. 138.
(8) [1903] 27 Bom. 146=5 Bom. L. R. 19.

city a party to the original petition precludes him from appealing. This individual creditor was in matters in which his interests are homogeneous with those of the general body of creditors sufficiently represented in the original Court by the Official Receiver who was a party to the original proceedings.

Various decisions have been quoted at the Bar. I shall refer only to a few of them. *Iyappa Nainar* v. *Manicka Asari* (9) is no authority against a right of appeal in this case. There the creditors' interests were not affected in any way and it was held, therefore, that he had no right of appeal at all. The case of *Appireddi* v. *Appireddi* (10) is not a case of an appeal, and S. 75 did not come under consideration. Ordinarily, as I have said, where the interests of all creditors are involved, the individual creditor cannot move in the original Court unless and until the Official Receiver has refused to move. The same rule is laid down in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) and *Hemraj Champa Lall* v. *Ramakishen Ram* (11). The respondent relied strongly on *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4). That, however was a case in which the Court did not deny the right of a creditor to come up on appeal, but only held that he had been premature and should have applied himself to the original Court in place of the Official Receiver who refused to act under Ss. 53 and 54 of the Act to have the alienation set aside, and it was laid down generally that the principle must be safeguarded, that a creditor should ordinarily act on behalf of the whole body of creditors, and if necessary for that purpose, should apply for and obtain permission to use the Official Receiver's name. The same principle was safeguarded in another way in *Jagannatha Aiyangar* v. *Narayana Aiyangar* (12), by the Court directing that the proceedings after remand ordered on appeal by an individual creditor should be conducted by the Official Receiver. The respondent relies on the wording in *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4), with reference to the right of appeal under S. 75 :

> We see no reason why we should not. . . . hold that a creditor can appeal when he is a party to the decision appealed against,

and it is sought to deduce the inference that he cannot appeal when he is not a party to the decision appealed from. As to this, I think, as I have said, that as his interests in that case are homogeneous with those of the general body of creditors he need not have been represented in the original proceedings in his individual capacity ; it is sufficient that he was represented by the Official Receiver. In *East India Cigarette Manufacturing Co., Ltd.* v. *Ananda Mohan Basak* (13), an individual creditor whose individual interests were at stake was allowed to appeal and make the Official Receiver a party in order to have on record the general body of creditors. The previous view in the Allahabad High Court set out in *Jhabba Lal* v. *Shib Charan Das* (14), that the provisions of Act III of 1907 did not allow an individual creditor to appeal has been altered in deference to the wording of the present S. 75—see *Shikri Prasad* v. *Aziz Ali* (15) and *Niadar* v. *Ramji Lal* (16).

I would, therefore, allow the appeal to be argued provided the appellant amends his appeal petition to make it clear that his appeal is presented by him as representative of the general body of creditors, and then he may be heard on the merits.

Madhavan Nair, J.—The facts of this case are very simple. One Kathaperumal Pillai was adjudicated as an insolvent. He had assigned a lease in his favour to the 2nd respondent. The Official Receiver at the instance of the present appellant, one of the creditors, filed an application before the District Judge to set aside this alienation under Ss. 53 and 54 of the Provincial Insolvency Act V of 1920. The appellant himself was not an actual party to the proceedings. The District Judge declined to set aside the alienation. The present appeal is against this order of the District Judge. The appellant, before filing the appeal, did dot move the Official Receiver to file an appeal, but he has made him the 3rd respondent before us.

Mr. Ramachandra Aiyar on behalf of the 2nd respondent, the alienee, takes the

(9) [1917] 40 Mad. 630=27 I. C. 241.
(10) A. I. R. 1922 Mad. 246.
(11) [1916] 2 Pat. L. J. 101=(1917) P. H. C. C. 303=38 I. C. 369=1 Pat. L. W. 752.
(12) [1919] 52 I. C. 761.
(13) [1919] 24 C. W. N. 401=58 I. C. 10.
(14) [1917] 39 All. 152=37 I. C. 76=15 A. L. J. 1
(15) A. I. R. 1922 All. 196.
(16) A. I R. 1925 All. 549.

preliminary objection that the appellant, inasmuch as he did not request the Official Receiver to file an appeal before hand, is not himself entitled to file it. The appeal has been preferred under S. 75, sub-S. (2) of the Provincial Insolvency Act. Section 46 of Act III of 1907 gave a right of appeal to any person aggrieved by an order made in the exercise of insolvency jurisdiction. The Madras High Court in *Thiruvenkatachariar* v. *Thangayiammal* (2), held that an individual creditor was a person aggrieved and was entitled to appeal. In this view, as pointed out in *Niadar* v. *Ramji Lal* (16), the terms of S. 46 have been altered in the new Act in S. 75, sub-S. (1) to

> The debtor, any creditor, the Receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction. . . . .

Sub-S. (2) of S. 75 provides that,

> Any such person aggrieved by any such decision or order of a District Court as is specified in Sch. I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court.

There can be no doubt that the decision of the District Judge is clearly adverse to the interests of the appellant; for it reduces the amount of property out of which he will be entitled to claim a dividend. It is conceded by Mr. Ramachandra Aiyar that the language of the section is certainly wide enough to include within its terms "any such person aggrieved by any such decision or order of a District Court" a creditor like the present appellant who was not an actual party to the original proceedings or who has not asked the Official Receiver to file an appeal. But he argues that, according to the decisions of this Court, an appeal by a creditor under this section is to be deemed incompetent if he is not an actual party to the proceedings, or if he has not moved the Official Receiver to file the appeal beforehand.

In my opinion, the position contended for is not warranted by the decisions of this Court. In *Kumarappa Chettiar* v. *Murugappa Chettiar* (6), when an objection was raised as regards the maintainability of an appeal filed by a contesting creditor in insolvency proceedings under S. 36 of the old Act (III of 1907), Krishnan, J., after a consideration of the English authorities as to who is a person aggrieved, stated as one of his conclusions that a person is aggrieved by an order where he is a party to an order, or, even if he is not, he is bound by the order and that order affects his interests, i. e., his person or his property, injuriously. If so, the appellant though not a party, as "an aggrieved person" is certainly entitled to prefer the appeal. Oldfield, J., made the following observations:

> The Official Receiver, from the moment at which the insolvent's estate vests in him, represents the body of creditors and ought to protect their interests. If in the exercise of his discretion he thinks it unnecessary to appear to do so but finds that a particular creditor thinks an appearance necessary, the proper practice is for him to obtain an indemnity from such creditor and to carry on the contest, recovering his costs from him in case of failure.

These remarks, in my opinion, do not lay down that an aggrieved creditor can prefer an appeal only in cases where the Official Receiver has refused to do so; they only indicate the usual practice and are meant to point out that the order passed in insolvency cases after the vesting of the estate in the Official Receiver will enure only to the advantage of the whole body of creditors. This decision was followed by Oldfield and Seshagiri Aiyar, JJ., in *Jagannatha Aiyangar* v. *Narayana Aiyangar* (12), with this remark:

> This, however, we may observe, will not entitle the appellant (a creditor) to the conduct of the petition in the lower Court, when it is dealt with there in pursuance of this order.

In *Anantanarayana Aiyar* v. *Sankaranarayana Aiyar* (4) the case most relied on by Mr. Ramachandra Aiyar, it was held that a creditor could move the Court to set aside a voluntary transfer or to avoid a fraudulent preference and that he could file an appeal against the order of the lower Court. In the course of their judgment the learned Judges observed:

> If the Official Receiver refuses to move the Court under S. 53 or 54, even though a creditor offers to indemnify him against costs in the event of an adverse order against him, such creditor can apply to the Court to permit him to use the Official Receiver's name, or make him a party to the proceedings and may move for an order under S. 53 or 54; and if the order is against him, if the Official Receiver refuses to appeal notwithstanding the offer of indemnity against the costs, the creditor can appeal against the order and may make the Official Receiver a party to the appeal.

These remarks, while laying down a very salutary rule of practice, do not, in my opinion, support the contention that an aggrieved creditor cannot prefer an appeal under S. 75 (2) without first obtaining a refusal from the Official

Receiver. The observation in the judgment

We see no reason why we should not....hold that a creditor can appeal when he is party to the decision appealed from

does not necessarily lead to the conclusion that an aggrieved creditor can prefer an appeal only if he actually figures in his own person as a party to the original proceeding. In the present case, the appellant was sufficiently represented by the Official Receiver in the lower Court as his interests did not conflict with those of the other creditors and, in this sense, he may be deemed to have been a party to the original proceeding. It is true that in all the rulings of the Madras High Court that we have examined the creditor was an actual party to the proceedings and that in some of them there are remarks that a creditor, before he moves the Court, should apply to the Official Receiver to take necessary proceedings; but it seems to me that none of the decisions goes the length of holding that a creditor can prefer an appeal against an adverse order passed by the District Judge only if he is an actual party to the proceeding, or only if the Official Receiver on being moved refuses to appeal. To import this limitation would be to cut down the general right conferred on an aggrieved creditor by S. 75 (2).

The contention that has been advanced on behalf of the appellant is supported by the decision in *Chikri Prasad* v. *Aziz Ali* (15). In that case the original application was by the insolvent complaining under the old Act against an act of the Official Receiver and from the order passed by the District Judge a creditor preferred an appeal. In reply to the objection that no appeal lay, the learned Judges observed that S. 75 (2) of Act V of 1920 gives a right of appeal to any creditor against the decision of a District Court of the nature specified in Schedule 1 of the Act. In *Niadar* v. *Ramji Lal* (16) the crops in suit were attached by a Receiver in insolvency at the instance of the appellant who was a creditor of the estate. The District Judge held that the crops were sold by the respondent and belonged to him and directed their release from attachment. The creditor preferred an appeal to the High Court under S. 75 (2). As regards the preliminary objection taken that no appeal lay, the learned Judges pointed out that the decision being adverse to the interests of the creditor, he was a person aggrieved and had, therefore, a right of appeal under S. 75 of the Act. It is not clear from the report whether the creditor was actually a party to the original proceedings.

In my opinion, the preliminary objection in this case should be overruled. The right conferred by S. 75 (2) is not to be fettered hy considerations such as whether he was an actual party to the proceedings, or whether before he filed his appeal he moved the Official Receiver to appeal. It is the policy of the insolvency law to administer an insolvent's estate in the interests of all the creditors. Any order that may be passed in favour of the appellant-creditor will enure only to the benefit of the entire body of creditors represented by the Official Receiver and not merely for his own benefit. Since the Official Receiver is a party to this appeal, there can be no difficulty, in the event of the creditor's success, in passing an order in favour of the Official Receiver, so that the advantage resulting from it may enure for the benefit of all the creditors. The same result may be achieved, as suggested by my learned brother, by directing that, before this petition of appeal be entertained and heard, the petition be amended so as to make it clear that the appellant is appealing on behalf of the general body of creditors, so that any order he may obtain will enure on their behalf and be worked out, by the Official Receiver.

For these reasons, I would overrule the preliminary objection and proceed with the case. I agree with the order proposed by my learned brother.

Judgment.—The appeal petition has been amended and is now in proper form. The District Judge cannot decline to go into the matter of the nominal or fraudulent nature of the alienation. The "Separate Suit" he speaks of is not between the present parties and will not settle the matter at issue between them. We set aside his order and direct that the petition be re-heard and decided in the insolvency proceedings. Appellant will get his costs here up-to-date.

The Memorandum of Objection is dismissed.

Appeal allowed and objection dismissed.

A. I. R. 1926 Madras 806

WALLER AND MADHAVAN NAIR, JJ.

E. Raghavachariar—Accused—Petitioner.

v.

President, Union Board, Tiruvellore—Complainant—Respondent.

Criminal Revision No. 122 of 1925, Decided on 29th January 1926, from the judgment of the Taluk Mag., Tiruvellore, D/- 16th December 1924, in C. C. No. 4 of 1924.

Madras Local Boards Act (1920), *S.* 223—*Reply to first notice inviting Board to make fresh inquiry regarding offence—Second notice served after enquiry—Time runs from second notice.*

Board served the accused with a notice in respect of an encroachment. Accused replied that there was no encroachment and invited the Board to make fresh enquiry. Board made further enquiries and issued a fresh notice on the accused.

Held: that time under S. 223 would run from the second notice, as in the circumstances both parties should be considered to have ignored the first notice and treated it as inoperative: 29 *Bom.* 35, *Rel. on.* [P 807, C 1,2]

C. Padmanabha Aiyangar—for Petitioner.

C. Narasimhachariar—for Respondent.

K. N. Ganapathi—for the Crown.

Order.—The accused has been convicted by the Taluk Magistrate of Tiruvellore, under Ss. 159 (1) and 207 (1) of the Madras Local Boards Act (XIV of 1920), for failure to comply with a notice issued to him to remove an encroachment on a public road lying within the limits of the Tiruvallore Union. The encroachment consistsd of a mud koradu in front of the accused's house. He first began to raise it early in 1916. Ever since 1918, the accused, the Taluk Board and the Revenue authorities had been in communication with each other regarding the removal of this encroachment. After showing an inclination to accept a temporary patta on payment of a small rent, the accused finally declared that he had acquired a prescriptive title to the land said to have been encroached upon by him. Some time after, the Union Board passed a resolution directing the issue of notice to the accused to remove the encroachment. This notice, Ex. M (2), was accordingly issued on the 25th of June 1923. Later on the Union Board sent a fresh notice, Ex. M. (7), dated the 16th of July 1924, for the same purpose; and as the accused did not comply with the requisition contained in it, proceedings were commenced against him on the 11th of August, 1924.

On a consideration of the evidence, the Taluk Magistrate held that the koradu in question was an encroachment on a public road which vested in the Union Board of Tiruvellore and finding the accused guilty of having failed to comply with the notice issued by the Union President directing its removal he convicted him under S. 159 (1) read with S. 207 (1) of the Local Boards Act and sentenced him to pay a fine of Rs. 30 and, in default, to undergo simple imprisonment for a week.

It is argued on behalf of the petitioner that the Sub-Magistrate should have dismissed the complaint on the ground that the prosecution is barred by limitation under S. 223 of the Local Boards Act. S. 223 provides that

> No person shall be tried for any offence against the provisions of this Act, or of any rule, or by-law made under it, unless complaint is made by the police or the President of a Local Board, or by a person expressly authorized in this behalf by the Local Board or its President within three months of the commission of the offence.

It is contended that under this section a prosecution should be launched before the expiry of three months after the commission of the offence, that the proceedings in this case took place long after the expiry of the time to remove the encroachment mentioned in the first notice, and that though the proceedings would be within time if the period of limitation is calculated with reference to the second notice issued by the Board, the conviction is illegal inasmuch as the issue of a second notice with regard to the same offence is prohibited under the Act. In support of this argument reliance is placed on a decision of this Court reported in *Ramanujachariar* v. *Kailasam Aiyar* (1). In that case, with reference to S. 223, Srinivasa Aiyangar, J., observed that:

> It will be against all principle to hold that, even though a person commits an offence by thus disobeying the terms of the notice he should be deemed to commit a fresh offence every time the local authority chooses to give a fresh notice calling upon him to remove the obstruction.

If we have to decide the case before us solely by reference to the principle just referred to, we may have to examine the

(1) A. I. R. 1925 Mad. 1067.

correctness of this principle ; for it does not seem to us to be unreasonable to put forward the view that refusal to remove an encroachment like the one in question may be treated as a continuing offence. But, however that may be, in the view that we take of the proceedings in this case, we think it was competent for the Taluk Board to issue the second notice, Ex. M. (7), dated the 16th of July 1924. and so S. 223 cannot be pleaded as a bar to the prosecution.

The notice Ex. M. (2) dated the 25th June 1923 directed the accused to remove the encroachment within 15 days from the date of its receipt. The events that happened subsequent to the issue of this notice are not in dispute. In reply the accused sent Ex. M. (3) in which he denied having encroached upon the Union land and asserting that the koradu in question had been in existence for a hundred years, pointed out that the question of encroachment had been previously threshed out by the Taluk Board and Revenue officers and that this might not have been brought to the notice of the Union Board and that the wording of the notice imported the false idea that this was a fresh case of encroachment as though made very recently within a period of three months or so, paragraphs 8 and 9 of Ex. M. (3). The Union Board considered this petition at a meeting and referred the question to a sub-committee. The sub-committee reported, on the 29th of September 1923, that the koradu in question was a clear case of encroachment and that action might be taken to remove it. As a result of this recommendation the Union Board issued to the accused Ex. M. (7) the second notice already referred to on the 16th of July 1924.

There can be no doubt that it was at the instance of the accused that the Union Board was led to make a fresh enquiry. In our opinion, Ex. M. (3) was in the nature of an invitation to the Union Board to examine the matter afresh and more carefully. Evidently, as is shown by its subsequent conduct, the Union Board accepted this invitation and referred the matter to a sub-committee. In the circumstances of the case we think it is reasonable to hold that when a fresh inquiry was commenced by the Board after the receipt of M. (3) from the accused both parties should be considered to have ignored the first notice and treated it as inoperative. The first notice being thus disregarded, it was certainly competent to the President of the Union Board to issue a fresh notice after the close of the enquiry which was initiated at the suggestion of the accused. The complaint, therefore, filed before the expiry of three months with reference to Ex. M. (7) is certainly not time-barred.

In support of the above conclusion reference may be made to the decision of the Bombay High Court in *Emperor* v. *Nadirsha* (2). In that case, after the issue of a notice to construct a drain and to execute certain works, correspondence began between the Municipal Commissioner of Bombay and the accused, which resulted in the issue of a second notice and a prosecution thereafter. In reply to the argument that the complaint was time-barred having reference to the first notice issued to the accused, the learned Judges, after referring to the correspondence between the accused and the Commissioner, observed that :

> Both Dr. Sukhia (i.e. the accused) and the Commissioner entered upon a course of negotiation which had the effect of keeping the notice in abeyance leading Dr. Sukhia to believe that the Municipal Commissioner would not enforce the strict rights arising under it. Both the parties must be regarded after that as having waived the notice and treated it as non-existent and unenforceable.

Cases of this description, as pointed out in *Emperor* v. *Nadirsha* (2), come within what Earl Cairns in *Hughes* v. *Metropolitan Railway Company* (3), describes as :

> the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results certain penalties or legal forfeiture afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

We are, therefore, of opinion that the complaint in the present case is not time-barred.

The other points argued before us relate only to questions of fact. It is impossible to say that there is no

(2) [1905] 29 Bom. 35=6 Bom. L. R. 667.
(3) [1877] 2 A. C. 439=46 L. J. C. P. 588=36 L. T. 932=25 W. R. 680.

evidence to support the finding that the koradu in question is an encroachment. We dismiss this Criminal Revision Petition.

Petition dismissed.

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* A. I. R. 1926 Madras 808

WALLACE AND MADHAVAN NAIR, JJ.

Narayanaswami Aiyar—Plaintiff—Appellant.

v.

Venkatarama Aiyar and *another*—Defendants Nos. 4 and 8—Respondents.

Appeal No. 361 of 1924, Decided on 19th January 1926, from the order of the Addl. Sub- J., Tanjore in Appeal Suit No. 19 of 1924.

Evidence Act, S. 115—Mortgagor estopped from denying consideration of the mortgage—Transferee from mortgagor is also estopped.

A mortgaged certain property to *B.C*, A's widow, sold the property to *D* subject to the payment of the mortgage to *B* and the consideration for the mortgage was specifically mentioned in the sale deed. *B* brought a suit to enforce his mortgage and *D* pleaded want of consideration for the mortgage.

Held : that as *C* who was in the position of mortgagor was estopped from raising the question of consideration, D, who claimed through *C*, was also estopped. [P 809 C 1]

T. V. Muthukrishna Aiyar and *V. Subramania Aiyar*—for Appellant.

T. M. Krishnaswami Aiyar and *N. Swaminatha Aiyar*—for Respondents.

Judgment.—This is an appeal from an order of remand. Plaintiff is the appellant. He is the assignee of a mortgage from the 8th defendant, The 1st defendant's deceased husband mortgaged the suit properties to the 8th defendant for a sum of Rs. 550 under Ex. A dated the 23rd of July 1909. Later on the 1st defendant who had become entitled to the properties sold them to the 4th defendant under Ex. D subject to the payment of the suit mortgage, the consideration for which was mentioned as Rs. 550. This appeal arises out of the suit instituted by the plaintiff, the assignee, for the enforcement of the mortgage by sale of the mortgaged property.

The 4th defendant contended that the mortgage was not supported by consideration. The District Munsif held that he was estopped from questioning the consideration for Ex. A. The learned Subordinate Judge on appeal held that there was no estoppel and remanded the suit for trying the question of consideration.

The contesting respondent has taken a preliminary objection that no appeal lies against the order of remand, inasmuch as the decision of the case by the District Munsif was not based upon a 'preliminary' point.' It is true, as pointed out by him that the District Munsif has referred to the evidence regarding consideration in paragraph 10 of his judgment, but it is clear from the records—and this is pointed out by the Subordinate Judge also—that the District Munsif did not give an opportunity to the 4th defndant's vakil to cross-examine the witnesses on the question of consideration or to tender any evidence in support of his contention, obviously on the ground that he was estopped from impeaching Ex. In these circumstances. we are satisfied that the District Munsif rested his decision on the 'preliminary point' of estoppel and 'thus disallowed evidence on the main issue. An appeal, therefore, lies against the order of remand.

The main question for decision is whether the 4th defendant is estopped from questioning the consideration for Ex. A. At the very outset it may be mentioned that neither the first defendant nor the 8th defendant denies the consideration for the suit mortgage. It is argued by the learned vakil for the appellant that the 1st defendant who occupies the position of the mortgagor is estopped from raising the question of consideration and that since the 4th defendant claims the suit properties through her as his vendor, the plea of estoppel operates equally against him. In *Bickerton* v. *Walker* (1), it was held that

> where a deed of conveyance—whether by way of mortgage or otherwise—contains within itself a receipt for consideration money, or has a receipt indorsed upon it, the vendor or mortgagor is estopped as between himself and a person who innocently acts upon the faith of such a representation from averring that a less sum or no sum at all has been received by him.

(See Halsbury, Vol. XIII, p. 371. paragraph 523). As pointed out by Fry, L. J., in that decision, so in this case the mortgagor allowed the mortgagee (8th defendant) to have possession of the deed containing the statement that Rs. 550 was the consideration for the mortgage and

(1) [1885] 31 Ch. D. 151=53 L. T. 731=34 W. R. 141=55 L. J. Ch. 227.

the plaintiff "must be taken to have advanced his money on the faith of the production of the mortgage deed." The mortgagor being thus clearly estopped from raising the question of consideration for Ex. A, we think that the vendee the 4th defendant, who claims the property through the mortgagor is also equally estopped from raising the same question. In *Shailesh Chandra* v. *Bechai* (2) it was held that a transferee of a portion of mortgaged property is not competent to avoid a deed on the ground of undue influence exercised on the mortgagor when the mortgagor himself did not at any time avoid the contract, nor did he seek to do so in the suit brought against him and the transferee on the deed.

On behalf of the respondent Mr. Krishnaswami Aiyar relies on a decision in *Izzatunnissa Begum* v. *Partab Singh* (3), in support of the argument that the plea of estoppel does not operate against the 4th defendant. In that case it was held that the owner of properties sold subject to incumbrances which were afterwards declared void, would not be entitled to claim from the auction-purchaser the incumbrance amount. This decision has absolutely no bearing on the question raised before us. In reply to the plea that the auction-purchaser was estopped from contending that he was not bound to pay the incumbrance moneys, their Lordships pointed out, "There is nothing in the circumstances of the case to raise an estoppel against the appellant," meaning thereby that no representations affecting anybody's conduct could be supposed to have been made by the auction-purchaser. In the present case the 4th defendant is estopped not by any representations or admission which he has himself made but by representations or admission made by the mortgagor (now represented by the 1st defendant) through whom he claims title to the mortgaged properties.

In this view, it follows that the 4th defendant is estopped from raising the question of consideration and, as all the other issues have been decided in favour of the plaintiff, we think the plaintiff is entitled to get the decree passed in his favour by the Distict Munsif for the sale of the B Schedule properties. Setting aside the order of the lower Court we therefore restore the decree of the District Munsif with costs here and in the Court below.

Appeal allowed.

(2) A. I. R. 1925 Cal. 94.
(3) [1909] 31 All. 583=3 I.C. 793=36 I.A. 203.

A. I. R. 1926 Madras 809

SPENCER, J.

Kuchibhotla Seetarama Sastri and *others*—Appellants.

v.

Kuchiabhotla Sivaramayya and *others*—Respondents.

Second Appeal No. 703 of 1923, Decided on 12th February 1926, from the decree of the Dist.-J., Kistna, at Masulipatam, in A. S. No. 1 of 1922.

Civil P. C., O. 1, R. 1 — Co-owners — One can maintain suit against trespassers.

One or more co-owners can maintain an action for ejectment of a trespasser: 39 *Mad.* 501, *Foll.* [P 809.C 2]

T. R. Ramchandra Iyer and *S. Srinivasa Iyer*—for Appellants.

V. Ramadoss and *G. Lakshmanna* — for Respondents.

Judgment.—It is argued that this suit should have been dismissed on the technical ground that two of the agraharamdars, who are joint owners, were not parties and that the plaintiffs' pleader declined to add them as parties. *Ahmad Sahib Shutari* v. *Magnesite Syndicate, Ltd.* (1), establishes the principle that one or more co-owners can maintain an action for ejectment of a trespasser. This case quoted the opinion of Best, J., in *Gopalasami* v. *Periasami Tevar* (2), who held, dissenting from Shepherd, J., who sat with him, that a Hindu coparcener could sue alone to recover joint family property without making the other coparceners parties to the suit.

The learned Judge was in favour of remanding the suit for fresh disposal after joining the plaintiffs as defendants, observing that the trespasser-defendants could insist on that procedure in order to protect themselves from a multiplicity of suits. That was a decision under the Civil P. C. of 1882 before S. 31 was amended as regards non-joinder of parties by O. 1, R. 9.

(1) [1915] 39 Mad. 501=28 M. L. J. 598=29 I. C. 60=2 L. W. 460.
(2) [1896] 6 M. L. J. 27.

I do not think that the Bench which decided *Shutari* v. *The Magnesite Syndicate, Ltd.* (1) intended to import all Best, J.'s observations with their exposition of the law as it stands under the Code of 1908.

Mohanevelu Mudaliar v. *Annamalai Mudaliar* (3) was a case of executors, who like trustees, must act together.

An attempt has been made to distinguish *Ahmad Sahib* v. *Magnesite Syndicate, Ltd.* (1) on the ground that the present is not a case of trespass, the Defendants 2 to 6 being Agraharamdars like the plaintiffs.

But reference to para. 3 of the written statement of Defendants 1 to 6 shows clearly that Defendant 2 stood upon an exclusive title by gift to the suit property and that 1st defendant's title was derived from the 2nd defendant.

I think that this certainly amounted to a denial of the Agraharamdar's right of joint ownership and an encroachment on the property of these joint owners in the assertion of a separate adverse title and that such acts on the part of Defendants 1 to 6 gave rise to a cause of action to recover joint possession from the alienee (1st defendant).

The decrees of the Courts below are right and the second appeal is dismissed with costs of contesting respondents (1 set).

Appeal dismissed.

(3) A. I. R. 1923 Mad. 337.

A. I. R. 1926 Madras 810

WALLER AND MADHAVAN NAIR, JJ.

Payath Ramdupurayil Sara Umma and *others*—Plaintiffs—Appellants.

v.

Kidangu Kettiya Ramdupurayil Kunhammad and *others*—Defendants—Respondents.

Letters Patent Appeal No. 61 of 1925, Decided on 25th November 1925, from the judgment of Phillips, J., D/- 17th February 1925, in S. A. No. 1635 of 1923, reported in *A. I. R.* 1925 *Mad.* 1158.

(a) *Malabar Law — Tarwad — Maintenance arrangement.*

Mere maintenance arrangements are usually subject to modification if there is an appreciable or material change in the circumstance of the family : (1913) *M. W. N.* 379, *Ref.* [P. 811, C. 1]

(b) *Malabar Law — Maintenance — Arrangement for the lifetime of a karnavan existing—Suit for maintenance by junior members—Entire tarwad property must be represented.*

Where in a suit for maintenance against the karnavan by the junior members of a tarwad it was found that a maintenance arrangement was entered into by a previous karnavan for his lifetime :

Held : that the entire tarwad must be represented in the suit in order to give a decree for maintenance against the tarwad property. Moreover, in order to give effect to the plaintiffs' right to maintenance it may be necessary to substitute a new arrangement in the place of the existing one. The law is well settled that a karnavan cannot set aside an existing maintenance arrangement unless he makes some other suitable arrangement. The plaintiff's right to maintenance may be given effect to possibly without altering the existing arrrangements by some slight adjustment. These and other necessary relevant questions can be considered and decided only in a suit in which the entire tarwad is properly represented. [P. 811, C. 2, P. 812, C. 1]

(c) *Malabar Law—Maintenance arrangement.*

A Karnavan cannot set aside an existing maintenance arrangement unless he makes some other suitable arrangement. [P. 811, C. 2]

K. P. M. Menon and *P. Pocker*—for Appellants.

T. S. Viswanatha Aiyar and *V. P. Karkunakaran Nambiyar*—for Respondents.

Judgment.—The suit out of which this Letters Patent appeal arises was instituted by one of the junior members of a Malabar tarwad against their karnavan for maintenance. The 1st defendant, the karnavan died in the course of the suit and Defendants 2 to 5, the respondents before us, have been added as his legal representatives. The suit was to recover a money allowance from the 1st defendant personally and as karnavan of the tarwad. In defence it was pleaded that Ex. 1 was a bar to the plaintiffs' claim. Ex. I is a karar dated 1886 between the then karnavan of the tarwad, Kunhi Thoppar, and the members mentioned in it according to which properties were allotted to various tavazhies for maintenance. The present plaintiffs are the descendants of one Ummathal, No. 4 in Ex. I. It is admitted that they were not born at the time of the karar and the records do not show that their mother was a party to it. The tarwad at that time consisted of 69 members of whom 33 were adults and the rest minors. No one represented the minors in the karar. At present the tarwad consists of obout 364 members living in 10 or 12 different houses. The

District Munsif and the Subordinate Judge, holding that the karar was only a temporary arrangement intended to have effect only during Kunhi Thoppar's lifetime, gave a decree in favour of the plaintiffs at the rate of Rs. 5 per mensem per adult and Rs. 3 per mensem per minor. This decree was set aside by Phillips, J. The learned Judge held that the karar, Ex. I, was intended to enure for the benefit not only of the members then in existence but also persons born subsequently, that the plaintiffs had been obtaining the benefit of the karar until shortly before the suit and that if the plaintiffs wanted enhanced maintenance they must bring a suit in proper form impleading all the necessary parties. Inasmuch as that was not done, he dismissed the plaintiffs' suit.

We cannot agree with the learned Judge's view. (The judgment then construed Ex. I and came to the conclusion that it was to enure only for the lifetime of the then karnavan. Then it proceeded.) It may, however, be open to the tarwad as a whole by its conduct subsequent to Kunhi Thoppar's death to adopt the karar as binding on its members. Even so, mere maintenance arrangements are usually subject to modification if there is an appreciable or material change in the circumstances of the family : see *Kelu Achan* v. *Lakshmi Nethyar Ammal* (1). Apparently the learned Judge seems to be of the view that the express stipulation in paragraph 5 is not of much importance as the karar seems to have continued in force after Kunhi Thoppars' death in the case of some of the tavazhies. That question was not raised in the Courts below and we do not express any opinion on it, though we may say in passing that some documents with reference to it were brought to our notice from the list of plaintiff's exhibits found in the District Munsif's judgment. The real question would be whether the plaintiffs or their tavazhi along with the other branches can be understood to have tacitly adopted the karar as binding on them having regard to the general administration of the affairs of the tarwad and the tavazhies subsequent to the death of Kunhi Thopper and have thereby lost their rights to claim maintanence. This question also was never raised in the lower Courts and has not been considered. Ex. VIII referred to by the learned Judge admittedly does not refer to the plaintiff's tavazhi. In this connexion the learned Judge states that

> it appears from the District Munsif's finding on Issue II that the plaintiffs have been obtaining the benefit, at any rate, until shortly before suit.

We find, and it is conceded, that there is no such finding by the learned District Munsif, what he finds being only this viz. :

> Even if the persons who are in actual enjoyment of the properties give anything gratuitously to plaintiffs, they will not be deprived of their right to get maintenance from the tarwad.

The point is not even referred to in the judgment of the lower appellate Court. From these considerations the conclusion is inevitable that Ex. I does not bar the plaintiff's right to claim maintenance from the tarwad.

This being so, Mr. Menon argues that the appellants are entitled straightway to get a decree for maintenance and the decree of the Subordinate Judge confirming the decree of the District Munsif should be restored. In our opinion this consequence does not necessarily follow from our conclusion. In the way we look at the case, the plaintiffs have to surmount certain obstacles before they can ask for a decree. Barring the personal relief, the relief claimed is against the tarwad property. This admittedly is in the hands of the various tavazhies managed by the tavazhi karnavans. In the absence of the persons as parties obviously no decree can be given against the property in their hands. The decree directed against the properties in the hands of the karnavan alone as has been given by the lower Courts is unjustifiable in view of the fact that he has not the entire tarwad property in his possession. Further, as pointed out by Mr. Viswanatha Aiyar on behalf of the karnavans representing the tarwad, in order to give effect to the plaintiffs' right to maintenance it may be necessary to substitute a new arrangement in the place of the existing one. The law is well settled that a karnavan cannot set aside an existing maintenance arrangement unless he makes some other suitable arrangement. The plaintiff's right to maintenance may be given effect to possibly without altering the present arrangements or by some slight adjust-

(1) [1913] M. W. N. 379=18 I. C. 234.

ment. These and other necessary relevant questions can be considered and decided only in a suit in which the entire tarwad is properly represented. Such is not the framework of the plaintiffs' suit, but we think this is a proper case in which they may be given a chance to proceed with the suit after making the necessary persons parties to it. The learned Judge, Phillips, J., apparently did not allow them this indulgence because in his view the suit which the plaintiffs could bring was one for increased maintenance, while this one instituted by them was for maintenance only. As we have held that Ex. I does not bar the plaintiffs' suit for maintenance we think they are entitled to proceed with the suit.

We, therefore, set aside the decree of the learned Judge and remand the entire case to the District Munsif for fresh disposal according to law in the light of our observations. All the new defendants will be entitled to file written statements, if they desire to do so and the plaintiffs may amend the plaint, if necessary, to meet the new contentions which may be urged by the defendants.

If the plaintiffs had framed the suit in proper form, there would have been probably no need for this remand. The defect was pointed out to them by the defendant in the 1st Court though the omission does not seem to have been referred to in the Court of appeal. In these circumstances we have decided that each party should bear its own costs up to date.

Suit remanded.

A. I. R. 1926 Madras 812

PHILLIPS, J.

(*Pokuri*) *Viraraghavulu* and *others*—Appellants.

v.

(*Pokuri*) *Yellamanda* and *others*—Respondents.

Second Appeal No. 828 of 1923, Decided on 10th December 1925, from the decree of the Addl. Sub-J., Nellore, in A. S. No. 14 of 1922.

Evidence Act, S. 91—Factum of sale in question—Oral evidence is not excluded—Registration Act, S. 49.

When the existence of a sale is in question and not its terms, oral evidence is admissible.

The word "terms" in S. 91 is applicable to both classes of documents, i. e., documents which are reduced to writing and which are required by law to be written. [P. 812, C. 2, P. 813, C.1]

T. L. Venkataramier—for Appellant.

M. Patanjali Sastri—for Respondents.

Judgment.—The only question of law that is raised in this appeal is whether the Subordinate Judge was right in admitting oral evidence of a purchase by 1st defendant from D. W. 2. The sale deed was registered but only a copy was produced in Court which was held to be inadmissible and it is now argued that oral evidence of that sale is inadmissible under S. 91 of the Evidence Act. That section provides (S. 91 quoted.) If it were necessary in this case to prove the terms of the sale that section would undoubtedly be applicable but all that was sought to be proved was the factum of purchase by 1st Defendant. The terms on which that purchase was made were quite irrelevant and had not to be proved in the present case. It is however argued that although S. 91 only prohibits evidence of the terms of "such a contract, grant or other disposition of property," yet in regard to the further class of cases in which any matter is required by law to be reduced to the form of a writing no evidence shall be given in proof of such matter i. e., any evidence not only of the terms of such matter but also of the existence of such matter is altogether excluded. No authority has been pointed out for reading the section in this manner and I certainly am of opinion that it is not right and that the word 'term' is applicable to both classes of document.

The cases relied upon by the appellants are *Maung Tun* v. *Maung Khan* (1). *Parameshri Devi* v. *Autor Singh* (2) and *Safar Ali* v. *Mohash* (3). In the first two cases undoubtedly the terms of the document were in issue and consquently S. 91 would be applicable : and, although in the Rangoon case the document was one required by law to be registered the learned Judge distinctly refers to the fact that the evidence sought to be given was as to the terms of the mortgage. The case in *Safar Ali* v. *Mohash* (3), is more in appellant's favour, but even in that case the sale in question was the

(1) A. I. R. 1925 Rang. 61.
(2) [1921] 3 L. L. J. 173.
(3) [1916] 23 C. L. J. 122=34 I. C. 956.

sale upon which plaintiff based his title and was the foundation for his suit. Consequently it was impossible for plaintiff to prove his title unless he proved the terms of the sale deed. If the decision meant to declare that the mere existence of the sale or the mere fact of the purchase could not be proved by oral evidence I must respectfully venture to differ, for so early as in *Sibulsain Mookerji* v. *Bhuthath Gerchait* (4), it was held that where the contents of a lease are in question it is necessary to prove them by the production of the document. Where this is not the case oral evidence of the patta is admissible. Similarly in *Chhotalal Aditram* v. *Bai Muhakore* (5), the factum of partition was allowed to be proved without the production of the deed. In *Amir Ali* v. *Aykub Ali* (6), oral evidence of rent under a tenancy was held to be admissible although the lease was inadmissible in evidence. These two cases clearly support my view that when the existence of a sale is in question and not its terms oral evidence is admissible. The Judge has based his finding on this oral evidence which I hold to be admissible. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(4) 22 W. R. 425.
(5) [1917] 41 Bom. 456=40 I. C. 83=19 Bom. L. R. 322.
(6) [1914] 41 Cal. 347=25 I. C. 509=19 C. L. J. 428.

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* A. I. R. 1926 Madras 813

WALLACE, J.

Panchapakesa Ayyar—Appellant.

v.

Natesa Pattar—Respondent.

Appeal No. 81 of 1924, Decided on 16th February 1926, from the decree of the Dist. J., East Tanjore, in Appeal Suit No. 212 of 1923.

* (a) *Civil P. C., S. 144—"Court of first instance" must be interpreted on principles laid down in S. 37 (b), Civil P. C.*

The Code has not defined for the purpose of S. 144 what is the "Court of first instance" when the "Court of first instance" has lost territorial jurisdiction. In a case like this the Court must proceed upon some general principle as laid down in S. 37 (b) in interpreting the phrase "the Court of first instance" which would apply even to cases where the Court of first instance has been abolished and also to cases where the Court of first instance has ceased to have jurisdiction: 13 *L. W.* 67, *Ref.* [P. 814, C. 1]

(b) *Civil P. C., S. 144—Proceeding under is one in execution.*

An application for restitution is an application in execution: 20 *Mad.* 448; (1917) *M. W. N.* 643; *A. I. R.* 1923 *Mad.* 270; 40 *Mad.* 780 and 31 *All.* 551, *Foll.*; *A. I. R.* 1925 *Patna* 1; 41 *Bom.* 625 and 45 *Bom.* 1137, *not Foll.* [P. 814, C. 1]

K. S. Narayana Ayyar and *M. S. Venkatrama Iyer*—for Appellant.

S. Muthiah Mudaliar—for Respondent.

Judgment.—This appeal relates to an application for restitution under S. 144, Civil P. Code in the following circumstances: Neither of the lower Courts has stated the facts correctly. The Court of first instance, the Principal District Munsif's Court of Tiruvalur, had decreed the plaintiff's (appellant's) suit. On first appeal the second defendant, (respondent here) was directed to pay into the first Court Rs. 750 as security for mesne profits. The money was paid into Court on 2-10-1917 and the plaintiff drew it out on 11-11-1918. On second appeal in the High Court the plaintiff's suit was dismissed on 1-9-1919. On 16-8-1922 the respondent put in an application for restitution in the Court of the Principal District Munsif of Tiruvalur, the Court which had passed the decree. Now in June 1922 the Court of the Additional District Munsif of Tiruvalur which had hitherto no independent territorial jurisdiction was given such jurisdiction over a locality including the locality of the present cause of action. The Principal District Munsif, holding that he had no jurisdiction, transmitted it to the Additional District Munsif's Court. That Court held that the Principal District Munsif had no jurisdiction to order such a transfer and directed a fresh application to be put in before him. This was done on 27-9-1922. On 1-1-1923 this Additional District Munsif's Court became the Court of the District Munsif of Nannilam.

The appellant contended in the 1st Court that the District Munsif's Court of Nannilam had no jurisdiction. That was overruled and the application for restitution was allowed. He appealed to the District Court of East Tanjore, apparently giving up the contention that the District Munsif's Court of Nannilam had no jurisdiction, but contending that the

application was barred by limitation. The District Judge held against him and dismissed his appeal and he now appeals here.

The two points urged here are : that the District Munsif's Court of Nannilam had no jurisdiction, the contention however being on a new argument, and that the application is out of time, The appellant's contention is that S. 144 directs that such application must be put in the Court of first instance, and points to the difference of language between this section and the old S. 583 where the phrase used was "the Court which passed the decree." He contends that since the Court of first instance was the Principal District Munsif's Court, which is still in existence, that was the proper Court to which the application should be put in. The Code has not defined for the purpose of S. 144 what is "the Court of first instance" when the "Court of first instance" has lost territorial jurisdiction. Under the old code there was no such difficulty, since the phrase used 'the Court which passed the decree' was defined by S. 649 (present S. 37). The reason for the change of language is not obvious, and it will certainly result in technical difficulties ; for example in a case where the Court which actually passed the decree has been abolished. S. 150, C. P. C., would not apply in terms to such a case. I think in a case like the present the Court must proceed upon some general principle in interpreting the phrase 'the Court of first instance' which would apply even to cases where the Court of first instance has been abolished and must apply such a general principle also to cases where the Court of first instance has ceased to have jurisdiction. I think it clear that the principle laid down in S. 37 (b) must be followed. On some such principle the ruling in *Lakshmana Goundan* v. *Subramanya Ayyar* (1) proceeds.

The appellant further argues that S. 37 (b) cannot be called in aid because that section only applies to cases of applications for execution, and that an application for restitution is not an application in execution. He admits that the balance of authority in this Court is against him (see *Venkayya* v. *Raghavacharlu* (2) under the old code, *Unnamalai Ammal* v. *Mathan* (3), *Muthun Pillai* v. *Sudalaimuthu Pillai* (4) and *Somasundaram* v. *Chockalingam* (5) under the new code), and there is the authority of the Privy Council in *Parag Narain* v. *Kamalshia Singh* (6) that proceedings under the old code, S. 583, were proceedings in execution. He contends strenuously that such matters as the payment of interest, damages, compensation etc., which may be awarded under S. 144 cannot be matters in execution, since the decree in no way provides for them. Were the matter res integra such a contention might be reasonable. But the trend of authority is too strong against it. Even under the old S. 583 all that the Court executing a decree could strictly do was to execute it, and obviously the restoration by way of restitution any sum paid under the decree before it was reversed by the appeal decree would not come strictly within the term "execution." Nevertheless it has been laid down by the Privy Council that restitution under S. 583 was a matter in execution. If then this term "execution" can be stretched to include restoration by way of restitution of the principal sum paid under a decree before it was reversed I see no difficulty in stretching the term a little further to include collateral reliefs of interest, damages and compensation. No doubt other High Courts have held that proceedings under the new S. 144 are not proceedings in execution see *Jivanram* v. *Nandram* (7) and *Balmukunda Marwari* v. *Basanta Kumari Devi* (8). The view in Bombay is the same as in Madras : vide *Kurgodi Gowda* v. *Ningam Gowda* (9) ; *Hamidalli* v. *Ahmedalli* (10). In such matters it is more important that a uniform procedure be adhered to than that the strict wording of the section be enforced. I am not therefore prepared to uphold the contention that the present application for restitution is not an

(1) [1921] 13 L. W. 67=61 I. C. 962.
(2) [1897] 20 Mad. 448.
(3) [1917] 6 L. W. 359=33 M. L. J. 413=42 I. C. 530=(1917) M. W. N. 643.
(4) A. I. R. 1923 Mad. 270.
(5) [1917] 40 Mad. 780=38 I. C. 806=5 L. W. 267.
(6) [1909] 31 All. 551=3 I. C. 798=36 I. A. 197 (P. C.).
(7) A. I. R. 1922 All. 223.
(8) A. I. R. 1925 Patna 1.
(9) [1917] 41 Bom. 625=41 I. C. 238=19 Bom. L. R. 638.
(10) [1921] 45 Bom. 1137=62 I. C. 233=23 Bom. L. R. 480.

application in execution. I see, therefore no objection in applying the principle of S. 37 (b) in interpreting the phrase 'the Court of first instance' when that Court has ceased to have territorial jurisdiction over the locality of the cause of action.

The "Court of first instance" in the present case, therefore, was the Additional District Munsif's Court of Tiruvalur, now the Principal District Munsif's Court of Nannilam.

The next point is that the application to the Principal District Munsif of Tiruvalur was improper and therefore cannot be called in aid to save limitation. The lower appellate Court got over that difficulty by holding that the present petition to the Additional District Munsif's Court of Tiruvalur was merely a continuation of the petition to the Principal District Munsif's Court of Tiruvalur. But I do not think that contention will hold. If the original petition is not a proper one the continuation of it cannot be proper. The respondent calls in aid S. 14 of the Limitation Act. It appears from the endorsements on the E. A. (628/22) that it was being prosecuted in the Court of the Principal District Munsif from 16-8-1922 to 25-9-1922. This period will have to be excluded. The proper petition to the "Court of first instance" was put in on 27-9-1922. The petition is, therefore, with the excluded period, within three years of 1-9-19 and is in time.

I see no reason to interfere with the order of the lower appellate Court and dismiss this appeal with costs.

Appeal dismissed.

A. I. R. 1926 Madras 815

JACKSON, J.

In re. Arulay — Complainant — Petitioner.

Criminal Revision No. 657 and Criminal Revision Petition No. 554 of 1925, Decided on 23rd October 1925, from the judgment of the Taluk 2nd Cl. Mag. Sivaganga, in Calendar Case No. 60 of 1925, D/- 16th September 1925.

Criminal P. C., S. 350—Magistrate transferred —Accused calling for prosecution witnesses but contenting himself on their cross-examination only —Court acting on the evidence recorded — Procedure is not irregular.

After a case was charged, there was a transfer of Magistrate, and in exercise of his privilege under S. 350, Criminal P. C., the accused asked that the prosecution witnesses might be re-summoned and re-heard. When they appeared, he said he would be content to cross-examine them.

Held : that the accused could change his mind and leave the Court free to exercise its statutory option and act upon the evidence recorded by its predecessor. The complainant has no privilege under S. 350, and if the accused declines to act under sub-Cl. (1) (a), the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. [P 815 C 2, P 816 C 1]

A. Srinivasa Iyengar—for Petitioner.

Order.—The petitioner seeks to revise an order of acquittal in C. C. No. 60 of 1925 on the file of the Court of the Second Class Magistrate of Sivaganga. After the case was charged, there was a transfer of Magistrates, and in exercise of his privilege under S. 350, Criminal P. C., the accused asked that the prosecution witnesses might be re-summoned and re-heard. When they appeared, he said he would be content to cross-examine them. The question raised is whether his original application had the effect, as it were, of cancelling the evidence recorded by the Magistrate's predecessor, so that on the adjourned date of hearing the only course was to examine the witnesses afresh, or whether on the contrary the accused could change his mind and leave the Court free to exercise its statutory option and act upon the evidence recorded by its predecessor. The petitioner relies upon the rulings in *Sobh Nath Singh* v. *Emperor* (1) in which it was held, no doubt, that the accused has no right to change his mind.

My difficulty in following these rulings is that they seem to assume that the ordinary procedure under the Code when the Magistrate is transferred in the course of the hearing, is a re-trial, and if there is no re-trial, the accused must be held to be gravely prejudiced.

It is impossible to say that the accused have not been materially prejudiced by the procedure adopted ; for it is evident that the Honorary Magistrate has arrived at the conclusion on the evidence the whole of which was not recorded by himself, page 139. If the law requires that there should be a trial de novo on the transfer of a case from one Magistrate to another the waiver of the accused goes for nothing :

(1) [1907] 12 C. W. N. 138.

Deputy Legal Remembrancer v. *Upendra Kumar Ghose* (2). The short answer to these observations is that the law requires no such thing, and if an accused is materially prejudiced by the Magistrate passing judgment on his predecessor's record, it is a prejudice by the Statute. It would be a very different case if the statute forbade the Magistrate to act upon this record and the accused was induced to plead that he would allow the recorded evidence to go in spite of the statute. That was the point in *In re K. K. Ummar Hajee* (3), which has no reference to S. 350.

If a Magistrate acting under S. 350, sub-Cl. (1), says that he is prepared to act on his predecessor's record, and the accused states that he does not wish to press his privilege under sub-Cl. (1) (a), but would like some witnesses re-called for cross-examination, it could be done quite regularly under S. 540, Criminal P. C. Of course in that case it would still be open to a superior Court to consider whether a material miscarriage of justice had resulted from the act that the Magistrate who convicted had not seen and heard the witnesses, but his procedure could not be said to have been ipso facto irregular.

In *Narayan Reddy* v. *Enmula Bojamma* (4) on which petitioner also relies, it seems that the accused exercised his privilege under the proviso and the Magistrate confined him to cross-examination which was clearly wrong. The present is a case where the accused did not exercise his privilege. Of course the complainant has no privilege under S. 350, and if the accused declines to act under sub-Cl. (1) (a), the complainant of necessity must suffer any disadvantage which follows upon the Magistrate electing to proceed upon the evidence already recorded. To try to get an acquitted man again put upon his trial, because he failed to insist upon the prosecution witnesses being re-heard is a recourse chiefly commendable for its ingenuity.

There is no ground of interference; the petition is dismissed.

Petition dismissed.

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(2) [1907] 12 C.W.N. 140
(3) A.I.R. 1923 Mad. 32.
(4) A.I.R. 1925 Mad. 1280.

** A. I. R. 1926 Madras 816

WALLACE AND MADHAVAN NAIR, JJ.

Thirukonda Ellarayan—Defendant—Appellant.

v.

Nakonda Rangaswami Aiyar—Plaintiff—Respondent.

Letters Patent Appeal No. 32 of 1925, Decided on 7th January 1926, against the judgment of Devadoss, J., D/- 23rd October 1924 in S. A. No. 1139 of 1922, reported in *A.I.R.* 1925 *Mad.* 1191.

** (a) *Civil P. C., S.* 11—*Mortgage suit for sale—Right to redeem is in issue—Decree for sale bars a fresh suit for redemption—Old and new law discussed.*

The right to redeem is in issue in the mortgage suit for sale and is therefore res judicata when a decree in suit is obtained. The mortgagor cannot bring another suit for redemption. Old Law under Transfer of Property Act and new law under Civil P.C. compared. *Case law fully discussed*: 25 *Mad.* 300, (F.B.,) *Foll.* [P. 820, C. 1]

** (b) *Civil P. C., O.* 34, *R.* 5—*After final decree right to redeem disappears—Payment by mortgagor after final decree is not payment qua mortgagor but is qua judgment-debtor.*

Right to redeem disappears when the final decree is passed. Any payment made by the mortgagor after the passing of the final decree for sale is not a payment qua mortgagor in the exercise of the right to redeem, but a payment by a judgment-debtor, to avert the sale, in the exercise of a right given him qua judgment-debtor, springing from and dependent on the execution of the decree by the mortgagee. In all suits on mortgage which are successful, the mortgage, so far as parties to the suit are concerned, is merged in the decree and the mortgagor's rights are only exercisable under the decree and do not exist any longer outside the decree. It follows then that, after the decree in a mortgage suit, whatever the form of that decree, whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the mortgage: 12 *L.W.* 173, *Rel. on.*

[P. 818, C. 2, P. 819, C. 1]

T. L. Venkatrama Aiyar—for Appellant.

C. S. Venkatachariar—for Respondent.

Wallace, J.—The original suit in this case was a suit for redemption of a mortgage. The suit property was mortgaged usufructuarily to the defendant on 29th August, 1904. In the mortgage was also a personal covenant to pay. The defendant sued on 2nd August 1912 in O. S. No. 430 of 1912 and got a preliminary decree for sale on 14th October, 1913 and a final decree on 25th February 1914. No action was taken by him under the final decree. On 2nd September

1912, pendente lite the same mortgagor mortgaged the property to the plaintiff's father. The plaintiff sued in O. S. No. 289 of 1918 and got a decree for sale in 1918, brought the property to sale and bought it in Court auction. He now sues to redeem the mortgage. The plaintiff was not a party to the suit of 1912, but the defendant contends that, as his mortgage was pendente lite and the plaintiff, therefore, has no higher rights than his mortgagor, and as the mortgagor did not choose to redeem under the decree of 1913, the mortgagor and therefore the plaintiff is barred by res judicata from redeeming. Both the trial Court and the lower appellate Court held that the suit was barred by res judicata. In second appeal Devadoss, J., has held that it is not, and against this judgment this Letters Patent appeal is filed.

It has been ably argued at length before us by Mr. C. S. Venkatachariar for the plaintiff and Mr. T. L. Venkatrama Aiyar for the defendant. The real question at issue may be shortly stated, but cannot be as shortly answered. It is, when a mortgagor has failed within the time fixed in the preliminary mortgage decree for sale to pay up the amount due under the decree, and a final decree for sale has been obtained, does a suit for redemption by him lie or is his cause of action barred by res judicata? There is a long series of decisions, some taking one view and some the other passed before and under the provisions of the Transfer of Property Act, but there is no direct decision under the present Civil Procedure Code after the repeal of Ss. 86 to 89, 92 and 93 of the Transfer of Property Act and their re-birth in other forms under O. 34 of the Civil Procedure Code. The most important case in this Court is the Full Bench decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) passed under the old provisions of the Transfer of Property Act and the Civil Procedure Code, and if the principles of that decision have not been reversed by the Privy Council, and are still applicable in spite of the changes in the law, that decision is binding on this Bench. Otherwise, the matter is res integra.

The case with which the Full Bench had to deal was based on a usufructuary mortgage of 1858. There had been a suit and a decree for redemption, the decree being passed under S. 92 of unamended Transfer of Property Act containing a provision for sale of the mortgaged property, if the mortgage amount was not paid, but containing no foreclosure clause. The decree was not executed and the decree amount was not paid, but no order absolute for sale under S. 93 was obtained by the mortgagee. A second suit for redemption was then filed and the Full Bench was called on to decide whether in these circumstances the second suit was maintainable. It was held by all five Judges that, whether or not the relationship of mortgagor and mortgagee subsisted, because of the fact that no order absolute under S. 93 had been obtained, and the property, therefore, had not been sold, the cause of action, namely the right to redeem, had become merged in the decree, and was, therefore, res judicata and no second suit for redemption would lie. We are not pointed to any subsequent decision of the Privy Council which has controverted that decision, and so far as it goes, therefore, it is binding on us. Mr. Venkatachariar, however, contends that, even accepting that position, the present case differs from the Full Bench case in two vital particulars which will take it out of the purview of that decision. These differences are, first, that the first suit hereon which the decree for sale was obtained was not a suit by the mortgagor for redemption but by the mortgagee for sale, and secondly, that the changes in the law since the Full Bench case render its principles no longer applicable. These two points may be dealt with together as they are intimately connected.

It is essential to recall the terms of the Transfer of Property Act under which that decision was passed. Under S. 88 of that Act, in the event of the plaintiff mortgagee's success in a suit for sale the decree is first to take an account and declare the amount due and secondly, to order that if the mortgagor pays the amount into Court within the time fixed, he shall be put in possession of the property, and thirdly, to declare that, if the amount is not so paid the property shall be sold. S. 89 provided that, if the mortgagor pays the amount within the time fixed, he shall get possession, and that, if payment is not so made, the mortgagee shall apply for an

(1) (1902) 25 Mad. 300=12 M.L.J. 128 (F.B.).

order absolute for sale and obtain it and thereupon the mortgagor's right to redeem and the security shall both be extinguished. A decree in a foreclosure suit, Ss. 86 and 87 followed similar lines, and, in default of payment by the mortgagor, the plaintiff was entitled to obtain an order absolute declaring that the mortgagor is absolutely debarred from all right to redeem, and on the passing of such order the mortgage debt is deemed to be discharged. A decree for redemption, Ss. 92 and 93, also followed similar lines, and the result of non-payment was that the defendant mortgagee may apply for an order absolute that the mortgagor is absolutely debarred from all right to redeem, or that the property be sold. On the passing of such order the right to redeem and the security extinguished. In this Court it was held by the Full Bench in *Mallikarjuna Shetti* v. *Lingamurthi Pantulu* (2), that such orders absolute are not decrees but proceedings in execution. The decree to be executed was what is now styled the preliminary decree, and in such a decree, in a suit for sale or redemption the decree inter alia directed payment of the money by the mortgagor and delivery thereon of the property by the mortgagee.

Now Mr. Venkatachari's first point is this: When the decree for sale was under S. 89 and not under S. 93 it was open to the mortgagor even after the order absolute for sale to execute that decree so far as it was executable by him and to pay up the mortgage amount, in fact up to the time when the property was actually sold; and he deduces therefrom that the right to redeem was not put an end to by an order absolute for sale under S. 89. This has, no doubt, been held in several cases, but it is essential to note that after the order absolute, payment was open to the mortgagor, not qua mortgagor, under the provisions of the Transfer of Property Act, but qua judgment-debtor under the mortgage decree under the provisions of the Civil Procedure Code, which permit a judgment-debtor whose property is being sold in execution of a decree to pay up the decree amount at any time before the actual sale even under certain circumstances after the sale itself. It is true that some of these decisions, for example *Rammuni* v. *Brahmadathan* (3) *Bibijan Bibi* v. *Sachi Bewah* (4) and *Misri Lal* v. *Mittu Lal* (5), seem to favour the view that such payment after the order absolute is made by the mortgagor in the exercise of the right to redeem, that is, that the right to redeem was still open after the passing of the order absolute for sale. But such a view must be held to have been erroneous since the Privy Council has definitely laid down in *Het Ram* v. *Shadi Ram* (6) what the proper interpretation of S. 89 of the Transfer of Property Act is. The language does not admit of doubt. Their Lordships say:

> The construction which their Lordships put on the language so used is that on the making of an order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

This brings S. 89 into line with the clearer wording of S. 93 on this point. Therefore, any payment made by the mortgagor after the passing of the order absolute for sale is not a payment qua mortgagor in the exercise of the right to redeem, but a payment by a judgment-debtor to avert the sale, in the exercise of a right given him qua judgment-debtor springing from and dependent on the execution of the decree by the mortgagee. Whether on such payment the Court could in execution restore the property to the mortgagor on the ground that the decree implied that the mortgagee could not have payment except on the condition of restoring the property is an open question which *Adipuranama Pillai* v. *Gopalaswami Mudali* (7) is inclined to answer in the affirmative. In any case it is quite clear from the Privy Council dictum that under the old procedure both the security and the right to redeem were extinguished by the passing of the order absolute for sale and that the security, so far at least as the parties to the suit were concerned, was absorbed into the decree and had no further existence outside it. It follows, therefore, that the opportunity to redeem, given to the mortgagor under the old decree for sale just as under the

(2) [1902] 25 Mad. 244=12 M.L.J. 279 (F.B.).

(3) [1892] 15 Mad. 366.
(4) [1904] 31 Cal. 863=8 C.W.N. 684.
(5) [1906] 28 All. 28=(1905) A.W.N. 168.
(6) [1918] 40 All. 407=45 I.C. 798=45 I.A. 130 (P.C.).
(7) [1908] 31 Mad. 354=18 M.L.J. 259.

old decree for foreclosure or redemption, might be lost for ever if the mortgagee obtained an order absolute under S. 87, S. 89 or S. 93. When under the decree or in execution of it the opportunity to redeem might in a certain contingency be lost for ever, it is difficult, almost impossible, to say that the right to redeem was not a matter in issue in the suit. It would not, of course, be lost unless the conditions which entailed its loss were fulfilled, but it was certainly a matter in issue—it was so vitally in issue, that proceedings in the suit might result in its being lost for ever. This is the sum and substance of the Full Bench decision.

Now all these sections of the Transfer of Property Act are gone and it is to be decided whether their disappearance involves the disappearance of the ground on which the former decision was based. R. 2 and 3 of O. 34 of the Civil Procedure Code correspond to the old Ss. 86 and 87 of the Transfer of Property Act. Rr. 4 and 5 to Ss. 88 and 89 and Rr. 7 and 8 to Ss. 92 and 93; but the clause under S. 89 relating to the extinguishment of the security and the right to redeem has disappeared, and does not appear in R. 5, though similar clauses are retained in Rr. 3 and 8. I think, however, it is clear that it does not appear in R. 5 because it is not necessary. Under the old procedure the preliminary decree which allowed redemption remained the executable decree, and, therefore, the right to redeem was not extinguished automatically by the order absolute itself. So it was necessary to enact that on the passing of the order absolute it should disappear. Now the right to redeem embodied in the preliminary decree simply does not appear in the final decree which is now the executable decree. Therefore it disappears when the final decree is passed just as before it disappeared when the order absolute was passed. What was previously effected by direct statutory provision is now affected by procedure. But the contingency above noted still remains, namely, that when certain proceedings are taken in the suit after the preliminary decree for sale the right to redeem is extinguished. In my view therefore, the right to redeem is still vitally a matter in issue in the mortgage suit for sale. There is no essential change in the law which necessitates any inference that the principles laid down in the Full Bench case will not still apply. The final decree in its own terms makes it clear that the right to redeem is no longer enforceable under it; for it makes no provision for redemption. It cannot be that the adjudication on the right to redeem which was in issue in the suit and present in the preliminary decree somehow vanishes out of the suit upon the passing of the final decree. Before the final decree was passed, the mortgagor could not file a fresh suit for redemption because a suit is still pending in which the relief he seeks for is given him by the preliminary decree. He cannot by his own neglect attain a better position. I say "a better position" because obviously, if he can in such circumstances file a fresh suit for redemption, he can choose his own time to redeem and is not bound to redeem within the time fixed by the preliminary decree. It seems to me an irrational contention that says in effect that the passing of a final decree resuscitates a right—the right to file a fresh suit for redemption—which expired on the passing of the preliminary decree. The effect no doubt is to enable the mortgagee to force redemption on the mortgagor and to convert his decree for sale into one for foreclosure, but that again is no new factor introduced by the new procedure.

The only case in which any feature of novelty arises, is when a mortgagee is in possession and has obtained a final decree for sale, which has put an end to the mortgagor's right to redeem and will not proceed further to bring the property to sale. This is the case now before us and Mr. Venkatachari strongly urges that it puts the mortgagor in an unfair position, since he has under the final decree no power to compel the mortgagee to bring the property to sale. He urges that under the old procedure, where the executable decree was executable by the mortgagor as well as by the mortgagee the mortgagor could pay up the decree amount at any time, until the property was actually sold. But in practice I see no real innovation. Under the old procedure, the mortgagor could pay up (a) within the time fixed in the decree; then he paid as mortgagor: (b) when the decree was being executed; then he paid qua judgment-debtor. He could not, qua

mortgagor, have the time fixed in the decree extended [see *Vallabha Valiya Raja* v. *Vedapurathi* (8), *Adipuranam Pillai* v. *Gopalaswami Mudali* (7)]. Therefore, any payment after the time fixed, could only be in execution after the passing of the order absolute when the right to redeem was gone, and he paid only qua jndgment-debtor. Such right was then equally as now, dormant unless and until the mortgagee took proceedings in execution. Thus the former right of paying up after the time fixed in the decree is the same and no other than the present right of paying up after the final decree, viz., the right qua judgment-debtor, to pay up, which right is in both cases contingent on the mortgagee proceeding to bring the property to sale and was not at any time exercisable independently of that contingency. There is no new hardship here, though there is no doubt some hardship, or at least some undue partiality by the law in favour of the mortgagee who is in possession and elects to be content with having destroyed by a final decree his mortgagor's right to redeem and refuses to bring the property to sale under the final decree.

It may be that in view of this, Courts may be open to reconsider the position that the time granted for redemption in the preliminary decree for sale cannot be extended before the final decree (or order absolute) is passed. It is true that R. 5 of O. 34 does not contain a provision similar to that in Rr. 3 and 4 allowing the Court to extend the time for payment; but it is a power which may well be within the inherent powers of the Court as in the case of preliminary decree of specific performance [see *Abdul Shaker Sahib* v. *Abdul Rahiman Sahib* (9)] or it may be that a suit may lie on the decree to compel the mortgagee to bring the property to sale in view of the fact that a mortgagee who delays to bring the property to sale is frustrating the fundamental principle of the mortgage contract, and of the right to redeem as defined in S. 60 of the Transfer of Property Act, both now merged in the final decree, that his ultimate claim is not to the property but to his money, and to the recovery of that money by sale of the mortgaged property. However that may be, I am clear that the procedure neither affects nor requires any change whatever from the old position, laid down in the Full Bench case, that the right to redeem was in issue in the mortgage suit for sale and is therefore res judicata when a decree in that suit was obtained. It may be noted incidently that two of the learned Judges in the Full Bench case were of opinion: vide their judgments in the Full Bench case *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* (2) that the order absolute for sale was a decree, in fact a final decree and yet that view did not dissuade them from holding that the second suit for redemption did not lie, even though in their view the first suit had only reached the stage of a preliminary decree since no order absolute had been obtained. In the Full Bench case, the right to redeem had not been extinguished by any order absolute, and therefore subsisted. Nevertheless the Full Bench were unanimous that the right to redeem was merged in the decree and was res judicata.

My conclusion on this part of the case, therefore, is that to follow the Full Bench ruling even under the new procedure will inflict no new hardship on the mortgagor.

I shall notice very briefly a few of the cases cited before us, dealing first with High Court cases and then with the Privy Council cases. The greater number are suits in which the first suit was for redemption and the second suit also for redemption, and either the decree in the first suit did not provide foreclosure of the right to redeem or, if it did, neither party had taken any steps to foreclosure. Such decisions in Madras prior to the Full Bench case must be held to have been overruled, so far as they are inconsistent therewith for example *Periandi* v. *Angappa* (10), which was however not under the Transfer of Property Act, *Vallabha Valia Rajah* v. *Vedapurathi* (8) and *Rammuni* v. *Brahma Dattan* (3) which rejected the then Bombay doctrine of constructive foreclosure by res judicata [see *Gan Savant Bal Savant* v. *Narayan Dhond Savant* (11)] even when the decree in the first suit did not provide for foreclosure. The case *Maloji* v. *Sagaji* (12), though there the second suit was not for redemption

(8) [1896] 19 Mad. 40=5 M. L. J. 282 (F. B.).
(9) A. I. R. 1923 Mad. 284.
(10) [1884] 7 Mad. 423.
(11) [1883] 7 Bom. 467.
(12) [1889] 13 Bom. 567.

but by a mortgagee for sale, also followed the res judicata principle, holding that the mortgage was merged in and could not be separated from the redemption decree obtained in the first suit. The Allahabad Court followed suit in *David Hay* v. *Hazi-ud-din* (13) and so did Bombay in *Bapuji Ramachandra* v. *Guja Malu Dhangar* (14) which, however, must be taken to have been overruled by the Full Bench of Bombay in *Ramji* v. *Pandharinath* (15) which has altered the previous view in Bombay. The Full Bench case in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) already mentioned is also a case in which both suits were for redemption. To come to cases in which the first suit was as in the present case a suit for sale and an order absolute for sale had been obtained but no further action had been taken, this High Court in *Ranga Aiyangar* v. *Narayanachariar* (16), where the first decree was in 1872 prior to the passing of the Transfer of Propery Act, held that the second suit for redemption was barred. In *Rama* v. *Bhagchand* (17) the later Bombay view prevailed that the suit was not barred by res judicata. No previous case in India is discussed in that judgment and only one English case is cited. *Shah Mehdi Hasan* v. *Ismail Hasan* (18) a case under the present Civil Procedure Code, adopted the Bombay view that the suit was not barred. An earlier Allahabad case reported in *Sham Sundar Lal* v. *Har Narayan* (19), takes the same view. So far as this Court goes then, the general principle of res judicata has been applied to the case where the first suit was a suit for sale.

Coming now to the Privy Council cases, the earliest is one of 1873, *Gokuldas* v. *Kriparam* (20). The first suit was by the mortgagee for sale. The decree in that case was a curious one which did not provide any opportunity to the mortgagor to come in and redeem, and in execution of which the mortgagee somehow got into possession. It was held that the mortgagor had never had his legal opportunity of redeeming and, therefore, a suit for redemption lay in the cirtumstances of the case. That is no authority in favour of the respondent. In *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (21) the question whether the mortgagor could, instead of suing for redemption, fall back on the original mortgage and claim to redeem it was not decided. In *Mahabir Pershad Singh* v. *Macnagthen* (22). where the mortgagee had got a decree for sale and the mortgagor sued to have the sale set aside and certain set-offs allowed, it was held that the second suit was barred by res judicata. The case is not much to the point here. In *Raja Papamma Rao* v. *Ramachandra Raju* (23) the decree passed on a simple mortgage did not suggest foreclosure or necessarily anything more than a usufructuary mortgage. The case is explaind at page 335 (25 M.-Ed.) of the Full Bench case in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). It again is no authority in favour of the respondent.

In *Faiyaz Hussain Khan* v. *Prag Narain* (24) the first decree was in favour of the mortgagee for sale, and he had also got an order absolute for sale, and the plaintiff had in execution become the auction-purchaser. The second suit was by the auction-purchaser (defendant) in a suit on a second mortgage to redeem, the plaintiff's purchase being subsequent to the defendant's. It was held that the defendant could not resist the plaintiff's claim to possession. Incidentally it was laid down that an auction-purchaser on foot of a second mortgage could have and ought to have redeemed before the sale under the first mortgage decree was confirmed and that his subsequent application to redeem was properly refused. There is nothing in any of these cases which runs counter to the general principles laid down in *Vedapurathi* v. *Vallabha Valiya Rajah* (1).

(13) [1897] 19 All. 202=(1897) A. W. N. 24.
(14) [1918] 42 Bom. 246=44 I. C. 908=20 Bom. L. R. 164.
(15) [1919] 43 Bom. 334=49 I. C. 894=21 Bom. L. R. 56.
(16) [1916] 39 Mad. 896=32 I. C. 30=30 M. L. J. 13.
(17) [1915] 39 Bom. 41=27 I. C. 249=16 Bom. L. R. 687.
(18) [1920] 42 All. 517=56 I. C. 172=18 A. L. J. 622.
(19) [1911] 9 I. C. 153.
(20) [1872] 13 B. L. R. 205=9 Sar. 279 (P. C.)
(21) [1886] 10 Bom. 461=13 I. A. 66=4 Sar 719 (P. C.).
(22) [1889] 16 Cal. 682=16 I. A. 107=5 Sar. 345 (P. C.).
(23) [1896] 19 Mad. 249=23 I. A. 92=6 M. L. J. 53 (P. C.).
(24) [1907] 29 All. 332=34 I. A. 162=4 A. L. J. 344 (P. C.).

In *Sukhi* v. *Ghulam Safdar Khan* (25) a prior mortgagee had obtained a decree for sale without joining a puisne mortgagee and the latter sued, and it was argued that the prior mortgagee could not use his mortgage as a shield, because the mortgage was merged in the decree for sale and was, therefore, extinguished. The Privy Council held that under the altered wording of the Transfer of Property Act and the Civil P. C., the mortgage was not extinguished and could be held up as a shield. I do not consider that this ruling is authority for the proposition that, when a mortgagee has obtained a decree for sale, the mortgage as between himself and his mortgagor and all parties to the suit is not merged in the decree in the suit. The decision merely declares that by the decree the security is not extinguished so far as to prevent the agitation of rights under it which were not decided by the decree. It does not touch the question agitating afresh rights already concluded by the decree.

The plaintiff's mortgage in the present case is pendente lite and his rights are, therefore, no higher than the rights of the mortgagor, and, as I have already said, the rights of redemption as between the mortgagor and the mortgagee have been once for all merged in the decree in the suit for sale. The principle involved is that in all suits on mortgage which are successful the mortgage, so far as parties to the suit are concerned, is merged in the decree and the mortgagor's rights are only exercisable under the decree and do not exist any longer outside the decree. The right to redeem therefore, can be exercised only as provided under the decree and not outside the decree. It follows then that, after a decree in a mortgage suit, whatever the form of that decree, whether for foreclosure, sale or redemption, the parties to the mortgage and to the suit and their legal representatives or assignees cannot maintain in future any separate suit or any claim arising out of the mortgage: see *Ameenammal* v. *Meenakshi* (26). The proper test, I think, is, does the decree provide for every relief obtainable by the parties under the mortgage and leave none unprovided for? It appears to me that it does. It may be noted that the form of final decree, Form 10-A of Sch. I-D is the same in a suit for sale as in a suit for redemption, in the case of a simple or usufructuary mortgage when payment has not been made, and that sub-Cl. (3) in O. 34, R. 8 does not apply to sub-clause (4). In the case of a final decree for redemption under a simple or usufructuary mortgage it cannot be doubted that the right to redeem ceases with the passing of the decree. Why should it be deemed otherwise in the case of a final decree of exactly the same wording in a suit for sale?

The learned Judge from whose judgment this appeal is preferred has distinguished the case of *Ranga Aiyangar* v. *Narayanachariar* (16) by saying that, if the Judges there had been dealing with a decree unexecutable by a mortgagor, the decision would have been different. I do not think it follows. Under a preliminary decree it is as open to the mortgagor as to the mortgagee to obtain the final decree and the fact that the former's neglect results in a final decree which is not executable by him cannot resuscitate the right to redeem which is gone. When the learned Judge holds that the right of the mortgagor to redeem property has not been taken away upon the passing of the final decree for sale, I must, for reasons I have already given, with respect differ from him. The learned Judge relies mainly on *Ramji* v. *Pandharai Nath* (15) which lays down that the right to redeem is not a matter in issue in a suit for sale. I have already given my opinion that, if the right to redeem can be foreclosed, as it can, in such a suit, it is very difficult to hold that it is not a matter in issue in the suit. I must, for reasons given above, hold that the learned Judge's decree should be reversed. I would reverse it and restore the decree of the lower appellate Court with costs to the defendant throughout.

Madhavan Nair, J.—The defendant-appellant as usufructuary mortgagee with a personal covenant to pay sued in O. S. No. 430 of 1912 for the sale of the suit properties. A preliminary decree was passed in his favour on the 14th of October 1913, in which time was fixed for payment till the 14th of

(25) [1921] 43 All. 469=65 I. C. 151=48 I. A. 465 (P. C.).

(26) [1920] 12 L. W. 173=60 I. C. 226.

November 1914. A final decree was passed on the 25th of February 1915. While this suit was pending, the mortgagor gave another mortgage of these properties to the plaintiff's father. In O. S. No. 289 of 1918 the plaintiff-respondent obtained a decree for sale without making the defendant a party to the suit and purchased the property himself. He then instituted the present suit for the redemption of the mortgage in favour of the defendant.

The question for decision is whether the decree in O. S. No. 430 of 1912 operates as res judicata in the plaintiff-respondent's suit for redemption. Devadoss, J., reversing the concurrent judgments of the lower Court, rejected the plea of res judicata and remanded the suit for disposal. This decision is the subject-matter of the Letters Patent Appeal.

In my opinion, this case must be decided by applying the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). In that case a Full Bench of this Court held that, where a suit for redemption has been instituted and a decree for redemption had been passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgage. It is no doubt true that in the present case the decree in the prior suit was one for the sale of the properties and not for redemption; but if we have regard to the real nature of the decree for sale passed under Ss. 88 and 89 of the Transfer of Property Act, it will be found that this difference does not really make the decision inapplicable. It is not denied that the decree in O. S. No. 430 of 1912 gave the mortgagor who was the defendant in that suit a right to obtain possession of the suit property by paying the decree amount within the time fixed by the Court. In *Vedapurathi* v. *Vallabha Valiya Rajah* (1), Sir Bhashyam Aiyangar, J., states thus:

> Whether the decree be in a suit for foreclosure or in a suit for sale or in a suit for redemption, there is in each a conditional decree for redemption in favour of the mortgagor, the condition being the payment by the mortgagor of the amount decreed on or before the day fixed. . . . . Decrees for specific performance, decrees respecting rights of easements and similar decrees are often made conditional, but they are none the less 'final judgments' having the force of res judicata.

The learned Chief Justice said:

> The Legislature has laid down what is the 'matter in issue' in a redemption suit. In order to succeed the mortgagor has to show that he is entitled to a decree ordering that if he pays off the mortgage debt in pursuance of the order of the Court, the mortgagee shall re-transfer the property and if necessary put him in possession. The matter in issue is—aye or no—is the mortgagor entitled to the decree which, if he succeeds, the Court is required by S. 92 to make.

The same matter is in issue in a mortgagee's suit for sale. The form of the decree shows that it contains a conditional decree for redemption. The right to redeem having been thus once adjudicated, the decision in which it was so done must operate as res judicata in a subsequent suit for redemption. It is true that even after the order absolute for sale under S. 89, it is open to the mortgagor to pay up the mortgage amount and thus aver the sale [see *Adipuranam Pillai* v. *Gopalswami Mudali* (7)]; but this does not mean that the right to redeem still survives. The payment is made by the mortgagor not under the Transfer of Property Act but in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. The substantial right involved in the suit, viz., the right to redemption being thus merged in the decree, though the decree is one for sale, the same right cannot again be put in issue in another suit. Applying the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) it was held by Sadasiva Aiyar and Napier, JJ. in *Ranga Aiyangar* v. *Narayanachariar* (16) that a subsequent suit instituted by the mortgagor for redemption of the mortgage was barred by res judicata by the decision in a prior suit for sale instituted by the mortgagee in which a decree had been passed containing a direction in favour of the mortgagor who was a defendant therein for recovery of possession of the property and which decree was not executed by either party.

The learned vakil for the respondent argues that the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) is inapplicable to the present case, also because of the alteration in the law regarding the nature of the decree to be passed in mortgage suits for sale of properties introduced by O. 34, Rr. 4 and 5; which repealed Ss. 88 and 89 of the Transfer of Property Act. By the repeal of the old

sections of the Transfer of Property Act there are now two decrees in all mortgage suits—the preliminary decree and the final decree. The preliminary decree cannot be executed the executable decree being the final one. It is argued by Mr. Venkatachariar that, since under the Code of 1908 the preliminary decree is now inexecutable, all that is stated in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) with reference to the operative character of such decrees become inapplicable to cases arising under the present Code. He also argues that since by the omission in O. 34, R. 5 of the words "and thereupon the defendant's rights to redeem and the security shall both be extinguished" which occurred at the end of the old S. 89, the relationship of the mortgagor and the mortgagee still subsists in spite of the final decree, it is open to the mortgagor to institute a second suit for redemption. In my view, the non-executability of the decree and the alleged continuance of the relationship of the mortgagor and the mortgagee even after the passing of the final decree do not affect the application of the principle of the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) to the facts of the present case. The question that we have to decide is purely one of res judicata. A properly framed preliminary decree contains a direction enabling the mortgagor-defendant to pay the money declared to be due on the mortgage to the mortgagee within the prescribed period in which event the mortgagee shall deliver the property to the mortgagor. By paying the amount prescribed in the preliminary decree it is open to the mortgagor to obtain a final decree. Since he did not do so in the present case, the right of redemption which has become merged in the decree cannot be re-opened again in a subsequent suit.

It may be observed that the learned Chief Justice in *Vedapurathi* v. *Vallabha Valiya Rajah* (1) did not rest his judgment on the excutability of the decree; for he had on the same day delivered judgment in another Full Bench case: see *Mallikarjunadu Setti* v. *Lingamurthi Pantulu* (12) in which he held that an order passed upon an application made under S. 89 of the Transfer of Property Act corresponding to O. 34, R. 5 of Act V of 1908 was not an order made in execution proceedings. Sir Bashyam Aiyangar also bases his judgment on principles of res judicata embodied in S. 11 of the Code of Civil Procedure though as a supplemental ground, the learned Judge states that the second suit is barred by the provisions of S. 244 also, inasmuch as the applications under Ss. 89 and 93 were applications in execution. As regards the continuance of the relationship of the mortgagor and the mortgagee, it cannot be said, as has already been pointed out, that the payment which the mortgagor-defendant is entitled to make to avert the sale is made by him as a mortgagor. He pays only in the capacity of a judgment-debtor under the provisions of the Code of Civil Procedure. Whether on making such payment he is entitled to be put in possession of the property is a doubtful question which it is not necessary to decide in this case though the case in *Adipuranam Pillai* v. *Gopalaswami Mudali* (7), decides that he is so entitled. In the course of his arguments, Mr. Venkatachariar referred particularly to three decisions, namely, *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (21), *Raja Papamma Rao* v. *Ramachandra Raju* (23), and *Gokaldas* v. *Kriparam* (20), in support of his contention that the second suit for redemption would lie. The first two cases have been explained by Sir V. Bashyam Aiyangar, J. in *Vedapurathi* v. *Vallabha Valiya Rajah* (1). In *Hari Ravji Chiplunkar* v. *Shapurji Hormasji Shet* (21), their Lordships of the Privy Council, though they cite the decision in *Periandi* v. *Angappa* (10), do not express any opinion on the question whether the plaintiff could fall back upon the original mortgage and the case therefore does not afford any help in answering the question whether a subsequent suit on the same mortgage is barred by S. 11 of the Code. The decision in *Raja Papamma Rao* v. *Ramachandra Raju* (23), really depended on the construction of the prior decree passed on the mortgage which contained the condition that

> If the debt is not discharged according to the instalments, you should recover the same by means of the mortgaged property, the crops of our cultivation and our other property and from our person according to your wish.

The learned Judges held that the prior decree in effect put the mortgagee in the position of the usufructuary mortgagee and therefore the mortgagee could be

redeemed by a fresh suit. The decision in *Gokuldas* v. *Kriparam* (20), is also based on the construction of the prior decree passed in the case under which the mortgagee got into possession. It was held that as that decree did not extinguish the mortgagor's right of redemption, a suit by him for that purpose was not barred.

The decision in *Ramji* v. *Pandharinath* (15), took the view that a second suit for redemption would lie. Mr. Justice Devadoss has in effect followed that decision. The view of our own High Court in *Vedapurathi* v. *Vallabha Valiya Rajah* (1), is different from that of the Bombay High Court. Mr. Venkatachariar has not been able to persuade me that the decision in *Vedapurathi* v. *Vallabha Valiya Rajah* (1), does not lay down the correct law. I do not think it is necessary to discuss the various other decisions referred to by him in the course of the argument, as they do not in my view directly bear on the question under consideration. In my opinion, the plaintiff's suit is barred by the operation of the doctrine of res judicata. I would therefore set aside the decision of the learned Judge and dismiss the plaintiff's suit with costs throughout.

Appeal allowed : suit dismissed.

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* A. I. R. 1926 Madras 825

WALLACE AND MADHAVAN NAIR, JJ.

Ramanujulu Reddy—Petitioner—Appellant.

v.

Rangiah Reddiar—Respondent.

Appeal No. 269 of 1925, Decided on 5th November 1925, from an order of the Dist. J., Chingleput, D/- 2nd May 1925, in M. P. No. 157 of 1925.

* *Guardians and Wards Act, S 34 (d)—Orders under, should relate to cash in hand only*

It is only that cash which the guardian would have had, if he had followed the Court's directions as regards investment, that the Court can under S. 34 compel him to produce. It is immaterial whether the guardian invests in approved securities as per Court's order or in unapproved securities in contravention of Court's order. [P 826 C 1]

K. Rajah Iyer—for Appellant.

T. R. Ramaswami Iyengar—for Respondent.

Judgment.—There can be no doubt that appellant has wilfully disobeyed the orders of the District Court. On 10th October 1922 he was directed to invest the minor's money in approved securities. Instead of doing so, he lent it out on pro-notes and did not inform the Court that he has done so until he was called to account over a year later. The excuse that on 11th October 1922 he was not a proper guardian, as he had not given security, carries no weight. The Court then pointed out to him his duty, whether as guardian de facto or as guardian de jure and he has not done his duty. Since then, he has at various times been ordered by the District Court to realize and deposit those moneys in that Court. The earliest of these orders was on 29th October 1924. Admittedly he has taken no steps to realize the money on the pro-notes and is now no nearer doing so than he was then. He pleads that owing to tightness in the money market his promisors cannot pay at present. He has taken no steps to compel them to pay.

Nor is the appropriate remedy for such conduct action under S. 45 (1) which the lower Court has taken. Is it a case to which that section is applicable ? The lower Court has brought the case under S. 45 (1) (b) as failure to exhibit accounts in compliance with a requisition under S. 34 (e) and to pay into Court the balance due on those accounts in compliance with a requisition under S. 34 (d) (3).

The appellant's contention is that S. 34 (d) is limited to such balance as his accounts show to be in his hands and not moneys invested and in the hands of others. The respondent does not go so far as to centend that S. 34 (d) authorizes a Court to compel a guardian peremptorily, to realize all investments of the minor's money and produce the cash but he does contend that it authorises the Court to compel such immediate realization and production of cash or production of the whole cash anyhow by the guardian, whether or no he can at once realize the investments in cases where the investments have been made in defiance of the orders of the Court.

It is clear to our minds that when, say, a guardian's accounts are in the shape of so much invested in approved securities and so much in cash, the balance due

from him on those accounts would naturally be the amount of cash in his hands. We are unable to see that the interpretation of that phrase should mean anything different when the investments are in securities, but not in approved securities, even when the investment was in defiance of the orders of the Court. No more cash than is in the hands of the guardian would have been in his hands if he had obeyed the orders of the Court, and it is only cash that ought to be in his hands that the Court can at most under S. 34 compel him, on pain of punishment under S. 45, to produce. In other words the Court cannot in this case say to him "if you had obeyed my orders you would have had more cash to produce," because that would not be true. The test, to our minds, is what cash should the guardian have had, if he had followed the Court's directions, and it is such cash and such only that the Court can under S. 34 compel him to produce.

Authority on this point is scanty. Our attention has been called to two rulings of the Calcutta High Court *Jagannath Panja* v. *Mahesh Chandra* (1); and *In re Nikhrannessa Bibi* (2). In both cases the Court proceeded on the accounts filed by the guardians, and called on them to produce only such cash as those accounts showed to be in their hands.

A Bench of the Allahabad High Court has dissented from the Calcutta view in *Sita Ram* v. *Gobindi* (3) and laid down that the Court is not bound to accept the balance shown on the guardian's accounts, but may revise it by striking out payments which appear to it improper. The finding of fact in that case was that a sum of Rs. 900 alleged by the guardian to have been spent had not been spent on behalf of the minors, and the High Court, in arriving at the balance of cash which the guardian ought to have had, added that item. The case is not on all fours with the present.

Here the investments attacked are for the minor and enure from him. It was the guardian's duty in obedience to the order of the Court dated 11th October 1922 to invest the money now tied up in the pro-notes in approved securities. For this purpose it was unnecessary for the Court to order him on 27th October 1924 to realize the investments and deposit the actual cash, and that order, we have already held, was not an order under S. 34 (e) and (d).

We are given to understand that the promisors of the pro-notes are willing to convert their obligations into first mortgages on immovable property. If this is true, the intention of the District Court in its order of 11th October 1922 is fulfilled.

We are of opinion that the order under appeal is ultra vires. We, therefore, set it aside. Two months' time from to-day will be given to appellant to have the pro-note replaced by first mortgages. If this is not done the District Court will take steps to remove the appellant from his guardianship and to have the secuity bond enforced against him and the sureties. We make no order as to costs.

The fine, if paid, should be refunded.

Appeal allowed.

(1) [1916] 25 C. L. J. 149=36 I. C. 286=21 C. W. N. 688.
(2) [1916] 20 C. W. N. 663=33 I. C. 918.
(3) A. I. R. 1924 All. 593.

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* A. I. R. 1926 Madras 826

WALLACE AND MADHAVAN NAIR, JJ.

Official Receiver of South Kanara—Plaintiff—Appellant.

v.

Bastiao Souza and *others*—Defendants—Respondents.

Civil Miscellaneous Appeal No. 98 of 1924, Decided on 16th December 1925, from the order of the Sub.-J., South Kanara, D/- 19th April 1923, in A. S. No. 125 of 1922.

* *Transfer of Property Act, S. 53—Creditors or Official Receiver can proceed under the section though another remedy is open under Provincial Insolvency Act* (1920), *S.* 53.

There is nothing in the Provincial Insolvency Act to prevent the creditors and, therefore, the Official Receiver from proceeding under S. 53 of the Transfer of Property Act, if they wish, though they have another remedy under S. 53 of the Provincial Insolvency Act: 42 *Mad.* 322 *Expl.* [P 827 C 1]

B. Sitarama Rao—for Appellant.

K. Y. Adiga—for Respondents.

Judgment.—There is nothing in the Provincial Insolvency Act or in *Mariappa Pillai* v. *Raman Chettiyar* (1),

(1) [1919] 42 Mad. 322=52 I. C. 519=10 L. W. 59.

to prevent the creditors and, therefore, the Official Receiver, from proceeding under S. 53 of the Transfer of Property Act if they wish ; and the fact that they have another remedy under S. 53 of the Provincial Insolvency Act does not deprive them of their right of suit under S. 53 of the Transfer of Property Act.

The appeal must be allowed and the lower Court is directed to admit the appeal and hear it.

Costs up to date will abide the result.

Appeal allowed.

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* A. I. R. 1926 Madras 827

ODGERS, J.

Addanki Lakshmanacharyulu—Appellant.

v.

Madduri Venkataramanuja Charyulu—Respondent.

Second Appeal No. 1090 of 1923, C. M. P. No. 3860 of 1923, Decided on 2nd March 1926, from the decree of the Sub-J., Bezwada, in Appeal Suit No. 89 of 1921.

* (a) *Civil P. C., O. 6, R. 17—Amendment depriving opposite party of defence of limitation should not be allowed.*

It is a cardinal maxim of the law of amendment, not only that one should not amend so as to change the cause of action but one should not amend in such a way as will deprive the opposite party of a valid defence under the law of limitation. [P. 828, C. 1]

* (b) *Limitation Act, S. 19—Initials.*

Acknowledgment merely bearing initials instead of signature is not proper: 15 *Mad.* 261, *Expl.* and *Dist.* [P. 828, C. 2]

K. N. Rajagopala Sastri—for Appellant.

C. H. Raghava Row—for Respondent.

Judgment.—This is a suit for money brought by the plaintiff against the defendants who are husbands of sisters. The first Court held that no such indebtedness was proved. On appeal to the lower appellate Court, the Subordinate Judge held that an amount of indebtedness was proved. There is one curious feature about this case, and that is, that the plaint sets forth the borrowings by the defendants of certain sums on specific dates, and the only item with which we are concerned here is Rs. 800 stated in the plaint to have been borrowed on 28-1-1916. The date given, however in the additional issues framed by the District Munsiff in the case is 28-11-1916 and in the summary of the evidence the same date appears. This case is a very striking example of the great danger of employing figures instead of words in any kind of writing that really matters. It is all very well to do it at the top of letter paper or things of that sort, though even so it may be that the date will become important, and the whole of this case hinges on the fact that 28-1-1916 was written all in figures. In the learned Subordinate Judge's setting out of the case he also says "Rs. 800 on 28-1-1916" and according to the learned vakil for the appellant this discrepancy was actually discovered not until after the conclusion of the case in the lower appellate Court. It seems almost incredible that the case should go through the Courts with the plaint alleging one date and the witnesses and the Judges setting out a different date. However, that is the fact, and I take it that the statement of the learned vakil for the appellant is accurate.

A petition for review was taken to the learned Subordinate Judge while the admission of the second appeal was pending. That was refused on the ground, and it seems to me a substantial one, that it was on the basis of the plaint that the plaintiff went to trial and that the issue was decided, and as foundation of his right to this sum of Rs. 800 he alleged a borrowing and lending on the 28th January 1916.

The question is: Should this mistake, if it is one, be allowed to be corrected herein second appeal ? Much stress has been laid on *Muhammad Sadia* v. *Abdul Majid* (1), where the Court allowed the plaintiff to amend his plaint so as to claim 17 biswani shares instead of 15 biswani shares on the ground that the amendment is a correction in the description of the property. It was attempted to be argued here that the date was merely a description of the debt, but I am unable to accept this because if it were a mere description which could be corrected, it is obvious that the sooner we get rid of the limitation law the better. It simply reduces that to futility. Another case relied on is *Sesh-*

(1) [1911] 33 All. 616=10 I.C. 476=8 A. L. J. 636.

amma v. *Chennappa* (2). That was a case where the learned Judges in second appeal thought that as the plaintiffs had not been appointed executors by the Will the plaint might be amended by substituting the adopted son as plaintiff with one of the present plaintiffs as next friend. The objection, it will be noticed, was taken by the District Judge himself and the learned Judge that the suit should not have been dismissed without giving the plaintiffs an opportunity to amend. It is perfectly clear there that the amendment was more or less a formal matter. The executors had sued under the mistaken impression that they were executors by implication. The question was how was the subject-matter of the suit to be preserved. It was really as pointed out by the learned vakil for the respondents, a question under O. 1, R. 10, Civil P. C.

I do not think either of the cases quoted is really authority for asking me to amend in this case, and, for this very strong reason, that if the amendment is allowed the defence of limitation which succeeded in the lower appellate Court obviously falls to the ground and it is a cardinal maxim of the law of amendment not only that you should not amend so as to change the cause of action but you should not amend in such a way as will take away a valid defence under the law of limitation. On the merits it is very difficult to come to the conclusion that this is a mistake. As I have already said it was allowed to go through two Courts unchallenged and when the learned Subordinate Judge comes to give his decision on the next point in the case i. e., whether this debt has been revived by acknowledgment again the foundation is given as 28th January 1916 with regard to this sum of Rs. 800. For all these reasons I am of opinion that it would be distinctly wrong to allow this amendment in second appeal.

The next point is: Was the learned Subordinate Judge wrong in holding that Exs. B. and C, two letters, did not amount to acknowledgment? He says that the acknowledgment is not specific and holds against the plaintiff for that reason. Neither of these acknowledgments, so called Exs. B and C., is signed. They are at best initialed I say "at best" because the translator of Ex. C. has only been able to decipher the initial "M". It is said that the words "I shall pay you Rs. 100" may be 1,000. The original is most suspiciously and unfortunately blurred at exactly that figure. If it is 1,000 it is said it must cover the Rs. 800. If it is 100 we do not know. It is simply an acknowledgment of liability.

Various cases were quoted for the appellant under S. 19 of the Limitation Act, but on examination they will be found to be cases of open and current account, and it is well settled that an acknowledgment of indebtedness by one party who has any open and current account with another is much favoured in the law on this point. There is no open and current account between these two people.

There is a further question and that is whether, in spite of the provisions of S. 19, namely that the acknowledgment has to be made in writing signed by the party etc., initials will do. An old case *Ammayee* v. *Yelumalai* (3) was referred to. That was the case of a Will and of initials affixed by the attesting witness. It is said obiter that initials are equivalent to a signature to an acknowledgment under the Limitation Act though no such authority is quoted in the judgment, and this morning I have been referred to an English case of *Lord St. John* v. *Boughton* (4). There it was held the acknowledgment of a debt in writing signed by a trustee or his agent is sufficient. The trustee owing to gout in the hand could not write and the letter was written by an amanuensis who concluded "for Thomas Townsend, Lt." It was sworn that the letter was written by Miss Laura Townsend, daughter of the trustee, according to her father's dictation and that it was signed by her in his presence. That makes all the difference.

Here it is true that the plaintiff says that the whole of the letter Ex. O. is in the handwriting of the defendant but it certainly does not say that he saw the defendant sign, nor has any evidence been offered to connect the defendant with the initials which appear in Ex. B, but may or may not appear in Ex. C. Ex. B. is in its contents vaguer than Ex. C. and in my opinion the learned Subordinate Judge is right in saying that

(2) [1897] 20 Mad. 467.

(3) [1892] 15 Mad. 261.

(4) [1837] 9 Sam. 219.

neither of these acknowledgments is specific, but I am prepared not only to stand on that but also on the point concerning the initials themselves. It seems to me therefore that the appeal fails on all grounds and must be dismissed with costs.

The petition for amendment of plaint is dismissed.

Appeal dismissed.

A. I. R. 1926 Madras 829

ODGERS, J.

Velayuda Pandaram and *others*—Plaintiffs—Appellants.

v.

Sundara Balakumaraswami Maniagarar and *others*—Defendants—Respondents.

Second Appeal No. 336 of 1920, Decided on 14th April 1925, from the decree of the Dist. J., Ramnad, in A. S. No. 861 of 1918.

(a) *Civil P. C., S. 11—Amount and nature of suit must be looked to.*

The amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred under S. 11. [P 860 C 1]

(b) *Civil P. C., S. 11—Bar of res judicata cannot be got over by adding untenable claim.*

A plaintiff cannot be allowed to get over the bar of res judicata by including in a later suit a clearly untenable claim. [P 830 C 2]

T. R. Ramachandra Aiyar, B. Sitarama Rao and *S. R. Muthuswami Aiyar*—for Appellants.

K. V. Venkatasubramania Aiyar, A. Krishnaswami Ayyar, T. Muthiah Pillai, K. Rajah Aiyar, A. Swaminatha Aiyar and *M. Subbaroya Aiyar*—for Respondents.

Judgment.—This was a suit for the recovery of certain moneys with interest at 12 per cent. per annum being arrears of annuity due for faslis 1318 to 1325. The step-brother of the Zamindar of Vadimitta obtained a decree for a half share in a suit for partition in the Zilla Court of Tinnevelly in 1846. The Zamindar appealed, and pending the appeal a compromise, Ex. B, was effected in 1848 the step-brother under it giving up his claim to a share in the zamindari in consideration of an annuity of Rs. 950 per annum to be made a charge on the rents of 8 villages. The step-brother died leaving three sons, Kumara Etta, Venkateswara and Dalavoy. In 1863 the two latter instituted a suit for the division of the annuity making their brother Kumara Etta and the zamindar defendants. This suit was also compromised and the two plaintiffs became entitled to an annuity of Rs. 280 out of Rs. 950. Dalavoy died and his right passed to Venkateswara by survivorship. On 12th February 1895 Venkateswara hypothecated his right in Rs. 280 to plaintiff under Exhibit A. Plaintiff sued on foot of Ex. A (O. S. No. 157 of 1899, Sattur District Munsif's Court) and got a decree, Ex. D. In execution of the decree he brought to sale the right to annuity and purchased it himself on the 31st March 1905. The Vadimitta Estate meantime was the subject of litigation among rival claimants. The Collector of Tinnevelly filed an inter-pleader suit (O. S. No. 63 of 1895) to which all the rival claimants were parties. The suit was referred to arbitration and a compromise, Ex. E, followed and the 9th defendant in that suit who is the lineal descendant of Kumara Etta, instead of the annuity of Rs. 950 got a one-fourth share in the Vadimitta Estate. He is the 1st defendant in this suit. Under Ex. E Rs. 280, which had to be paid by the present 1st defendant out of Rs. 950, was made a charge on the one-fourth share allotted to the 1st defendant instead of a charge on the 8 villages as in Ex. B, and the 1st defendant was made liable to pay this sum.

On the foot of Ex. D 1 the plaintiff sued in O. S. No. 533 of 1908 in the Sattur District Munsif's Court for the recovery of the annuity due for 3 years faslis 1315 to 1317 claiming a charge in respect of it on the 8 villages. He obtained only a money decree and the High Court held on the construction of Ex. B which is Ex. F. (1) in the present suit, that there was only a personal covenant on the part of the obligee to pay the annuity coupled with the special remedy defined in the document. Before the Subordinate Judge it was argued that the plaintiff was entitled to no interest on the annuity; and secondly that his claim for a charge was res judicata by reason of the decision of the suit O. S. No. 533 of 1908. The Subordinate Judge held that the claim for

interest was wholly untenable and unsustainable and had merely been added in order to enable the plaintiff to institute a suit in the Court of the Subordinate Judge instead of that of the District Munsiff where it would have been clearly barred as having been decided in O. S. No. 533 of 1908. The District Judge upheld the point of res judicata and also held that though the compromise Ex. E created a charge for Rs. 280 the plaintiff, a party to it was not entitled to enforce the covenant in his favour against the defendant.

Two points were argued before me in second appeal, namely, that the appellant could enforce the charge under Exhibit E; and secondly that the decision of the lower Courts as to res judicata was wrong. With regard to the second point, which I will deal with first, it is said quite rightly that the amount as well as the nature of the suit must be taken into consideration in deciding whether a subsequent suit is barred under S. 11, Civil Procedure Code. The authorities quoted for the appellant are all cases where the subsequent suit in the higher Court was bona fide admissible. By that, I mean, that the claim of the plaintiff had not been wilfully inflated simply in order to give jurisdiction to the superior Court. Here, interest was disallowed in all the Courts below, and in the High Court the second appeal was dismissed.

It does not appear in so many words from the judgment that the question of interest was argued but it was taken in the grounds of appeal and I must take it that the whole of the plaintiff's claim which included interest as set out in the plaint was found against. The judgment of the High Court in second appeal was delivered on the 15th December 1915. The plaint in the present suit was presented on 8th April 1916.

It seems to me, therefore, that the plaintiff must have known that his claim for interest was wholly unsustainable as found by the lower Courts and that the learned District Judge was right in saying that the plaintiff cannot escape the bar of res judicata by merely waiting for 7 years in order to increase his claim to an amount of Rs. 3,000. This point is sufficient to dispose of the second appeal and if interest is disallowed there is no doubt that the present claim is concluded by the judgment in O S. No. 533. Reference may be made to the case reported in *Venkatanarasimha Appa Row* v. *Narasimha Charyalu* (1), where it was held by a Bench of this Court that the plaintiff cannot be allowed to get over the bar of res judicata by including in a later suit a clearly untenable claim. The subject-matter of this suit is the same as in the former, namely, the recovery of the annuity of Rs. 280 and interest. It does not, in my opinion, make any difference that the suit in the High Court was decided on Ex. F. (1) and the present suit is brought in respect of Ex. E. The decision of the learned District Judge was right and the second appeal must be dismissed with costs of 11th and 10th respondents, two sets.

Appeal dismissed.

(1) [1910] 27 M. L. J. 154=6 I. C. 287.

A. I. R. 1926 Madras 830

KRISHNAN AND ODGERS, JJ.

Muchumarri Malliah and *others* — Defendants 1 and 2, 4 to 12 and 15—Appellants.

v.

Yerravalu Ganganna and *others* — Plaintiffs Nos. 1 to 10 and Defendants Nos. 3, 13 and 14—Respondents.

Appeal No. 8 of 1923, Decided on 26th March 1925, from an order of the Dist. J., Cuddapah, in Appeal Suit No. 35 of 1921.

(a) *Practice — New plea — Suit based upon customary right—Plaintiff can not be given relief on common law right.*

Where plaintiffs base their claim saying that they are entitled by custom to take their procession on marriage and other festive occasions through the public streets of the village with music, dancing and torches by daylight, which they claim to be component parts of the procession itself, from time immemorial and the alleged customary right is not proved, they cannot be given a decree basing their Common Law right. [P 831 C 1]

(b) *Highway—Member of public has right to lawful use of public street* (obiter.)

Any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage: *A. I. R.* 1925 *P. C.* 36, *Foll.*[P 832 C 1]

(c) *Civil P. C., S.* 105—*Court can re-open point decided before order under Civil P. C., O.* 41, *R.* 25 (obiter.)

Though parties have no right to insist upon re-opening questions that had been decided be-

fore calling for a finding, yet it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. [P 832 C 1]

Ramchandra Iyer—for Appellants.

Judgment.—In this case we called for a finding on the issue

Whether the plaintiffs have a right by custom to carry on their procession along the public streets on the occasions mentioned in the plaint with daylight torches as claimed by them ?

A finding has been returned by the District Judge against the plaintiffs ; he has held that it is not proved that the plaintiffs have made out such a custom as alleged by them. Ordinarily on this finding the appeal would have been allowed and the suit directed to be dismissed, but it is argued by Mr. Ramachandra Ayyar for the plaintiffs who now appears for the first time in the case that we should go back upon what we held on the last occasion and hold that the plaintiffs have a right as members of the public to use public roads in any manner that they can lawfully use them and that it is not open to any other member of the public to prevent them from so doing unless they infringe some particular right of the other or they infringe any magisterial orders or police regulations or cause injury to any member of the public by so using. This argument was not urged before us at the time when the case was heard by us and we called for findings. In fact as stated in our judgment it was expressly admitted by the learned vakil who then appeared for the plaintiffs that the plaintiffs based their right to take processions with the accompaniments named only as a matter of customary right and if they were not able to establish such a customary right they would not be entitled to a declaration.

It is contended on behalf of the plaintiffs that the learned vakil who appeared then was acting beyond his authority and the admission being on a question of law is not binding on the clients ; but the argument overlooks the nature of the suit. The plaint says that by immemorial custom the plaintiffs in this suit and their castemen have the right from time immemorial to conduct processions in these streets with music and daylight torches. The Kapus the defendants denied this customary right and they stated that it was merely an attempt made by the plaintiffs to make themselves equal to the Kapus in caste status by carrying daylight torches and that the Kapus alone were entitled to this privilege and that on that ground they objected to the declaration being granted. The issue was worded like this :

Whether the plaintiffs have not the right to carry daylight torches in procession as claimed by them?

It was admitted before the Subordinate Judge, as noted by him in para 7, that the suit was for the vindication of a dignity, i. e. for a declaration that the plaintiffs were entitled to carry torches during daytime on ceremonial occasions. He declined to give the plaintiffs a declaratory decree as prayed for holding that the case was one for a declaration of a mere dignity or honour unconnected with any office or temple and he was of opinion that the right was not one which civil Courts ought to recognize. Before the appellate Court the District Judge starts his judgment by saying that the suit was for a declaration of the customary right of the Gollas of Thathireddipalli to go to their temple in procession through certain public streets with music and torches during daytime on marriage and other ceremonial occasions and for an injunction. In the course of his judgment no doubt he treated the right claimed as not different from the inherent right of every citizen to use the public streets in a lawful manner and said :

Admittedly the streets in question are public streets. All members of the public have, therefore, equal rights in them. Apart from any custom every citizen has an inherent right to conduct processions, civil or religious, through a public street, so as not to obstruct the use of it by other and subject to any directions a Magistrate may lawfully give to prevent obstructions of throughfare or breaches of public peace.

It was objected before us on the former occasion that this view of the case was not permissible considering the way in which the suit was framed, the suit being to vindicate a customary right. It is not without due care and deliberation that the plaintiffs confined their case to a vindication of what they call a customary right for the plaintiffs Gollas would have no doubt objected to the Malas and Madigas and other low castes exercising a right such as the one in question now. If the right is to be claimed as a right inherent in every citizen the Malas and Madigas would be

equally entitled to the right of carrying daylight torches in their processions but the Gollas in their evidence carefully deny that any but the Kapus and themselves have got that right ; so that it is clear that here we have not got to deal with the general question as to what the right of a member of the public is on the public road. It is in view of this contention that the learned vakil for the plaintiffs who appeared on the last occasion admitted that unless he was able to establish his customary right his case must fail. We do not think, therefore, that it is open now to the plaintiffs or to the learned vakil who appears for them to put his case upon a general inherent right of the public on public roads. The recent decision of the Privy Council reported as *Manzur Hassan* v. *Muhammad Zamman* (1) has put the matter beyond controversy that any member of the public has got the right to use a public street in any lawful manner and a declaration can be granted if he is prevented from so doing without proof of any special damage. This was the view taken by the Madras High Court and the Privy Council has accepted the Madras view as correct. But that case has no bearing on the present case because such a caso as this must necessarily fail when the custom is not proved. Any right that the plaintiffs may conceive themselves to have, based upon their position as citizens, they will have to vindicate by another suit, if they are so advised and if they find it necessary to do so. Mr. Ramchandra Ayyar has quoted some cases to show that so long as this case is pending before us it is open to us to reconsider the decision already taken if we find that that decision is not correct to put matters right. It may be that the parties have no right to insist upon re-opening questions that had been decided before calling for a finding but I am clearly of opinion that it is open to the Court to do so if it thinks fit and it cannot be said to act without jurisdiction if it goes back upon the position taken by it previously so long as the case is not out of its hands. It is not necessary however tc decide this point, for the point that has now been taken by Mr. Ramchandra Ayyer we have held is not open to him on the frame of the suit. We must, therefore, accept the finding of the District Judge, as against his finding nothing has been urged, and we hold that the customary right is not proved. In this view the appeal must be allowed and the suit dismissed with costs.

Appeal allowed.

(1) A. I. R. 1925 P. C. 36.

A. I. R. 1926 Madras 832

RAMESAM, J.

Vepuri Subbayya — Plaintiff No. 1—Appellant.

v.

Secy. of State—Defendants 1 & 2—Respondents.

Second Appeal No. 393 of 1922, Decided on 1st April 1925, against a decree of the Sub.-J., Kistna, in Appeal Suit No. 318 of 1920.

Riparian owners — Two tanks connected by channel—Outlet of one falling into disrepair—Plaintiff using water of one tank for over 60 years—Government proposing to repair the outlet can repair without diminishing plaintiffs water supply.

Two tanks were connected by a channel which had been a permanent topographical feature. The outlet of one tank had fallen into disrepair and Government proposed to repair the same so as to stop the flow of water to plaintiff's fields which had been watered by one tank for over sixty years.

Held: that the Government were entitled to repair the outlet in any manner, but so as not to interfere with the usual supply of water necessary to irrigate the plaintiff's lands. The Court has no right to dictate to Government in what manner they can carry out repairs. [P 834 C 1]

B. Somayya—for Appellant.

Govt. Pleader—for Respondents.

Judgment.—The plaintiff is the appellant before me. The 1st respondent is the Secretary of State for India. The plaintiff is the owner of certain inam survey fields in the village of Vemulapalli, namely, Nos. 89, 97, 98, 100, 103 and 104. These lands are irrigated by the water of a tank called Mukkuvanigunta which is situated in Survey No. 101. The plaintiff is the owner of the tank and also of Survey No. 102. The tank was filled by the water of a channel, which takes its rise from the hills near Gopavaram. Gopavaram is the village immediately north of the village of Ganapavorigudem and the latter village is immediately north of Vemulapalli. All the three villagers

originally belonged to a zemindar, but some time before the middle of the last century the zemindari ceased to exist and all the villages passed to the Government. The channel takes a definite shape according to the old survey plan of 1864 (Ex. XI.) in the field marked No. 34 and described as a jungle. It then passes through the village of Ganapavarigudem until it reaches a tank called Jangamgunta which was in the field No. 45 of that plan. It escapes through a southern outlet of the said tank and ultimately falls into Mukkuvanigunta belonging to the plaintiff.

The District Munsif found that the whole course of the channel, as described by me above, was a natural stream and had existed for more than 70 years. The outlet of Jangamgunta, through which the water of the channel continues to flow southwards, was breached. The District Munsif found that the breach had existed for over 60 years from some time prior to the vesting of the properties in the Government.

The Subordinate Judge on appeal also found that the portion of the channel south of Jangamgunta and north of Mukkuvanigunta had been existing during the last 60 or 70 years. An examination of the whole record shows that it is impossible to say when the channel and two tanks began to exist in the form in which they now exist. All that can be said is that they must have existed in this shape for more than 70 years and have become a permanent topographical feature. After the breach of the southern outlet of Jangamgunta, that tank lost its original shape; so far as the western side is concerned no water could be stored in it, but on the western side a pond was formed which formed the irrigation source to the lands of Ganapavarigudem. This state of things, namely, the tank being in a state of disrepair, (the breach of the southern outlet not being repaired) must have led to the flow of more water into Mukkuvanigunta than was originally intended; but that it did flow and was utilized by the plaintiff for the irrigation of Survey Nos. 89, 97, 98, 100, 103 and 104 for more than 60 years is found by the Courts below and cannot be now questioned in second appeal. I am not satisfied with the evidence that it was utilized for the irrigation of Survey No. 102 for a similar period as the appellant claimed before me, and this is the finding of the Courts below. The plaintiff has, therefore, acquired an easement by which he is entitled to supply of enough water for the irrigation of his said lands (excluding Survey No. 102).

It has been suggested by the learned Government Pleader that the plaintiff could not acquire an easement as the portion of the channel beyond Jangamgunta carried only the surplus waters of that tank, and he relied on *Wood* v. *Waud* (1), *Arkwright* v. *Gell* (2), *Chamber Colliery Co.* v. *Hopwood* (3), *Mason* v. *Shrewsbury and Hereford Railway Company* (4) and *Burrows* v. *Lang* (5). But I do not think these cases apply. I have already observed that the channel was really a small natural stream and though Jangamgunta tank is probably an artificial formation, it does not mean that the channel south of it is artificial and consisted only of the surplus waters of the tank; for, before the formation of the tank, the natural stream must have continued to flow southwards.

The effect of the tank could be only to dam up the waters until they reached a certain height and then to permit their escape. But even if it were not so, I think the principle of the decision in *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk* (6) applies. The channel system and the two tanks having formed a permanent feature of the country and not being intended to be temporary, and the plaintiff having utilized the water for the use of his fields for more than 60 years, he is entitled to the continuance of that flow. In making this observation I do not mean to say that the Government is not entitled to repair the breach at A. Though this breach is continued for more than 60 years, I do not think it can be said that the Government at any time abandoned the idea of restoring the breach or that they intended the state of disrepair to be permanent. The tank was not shown in

(1) [1849] 3 Ex. 748=18 L. J. Ex. 305=13 Jur. 742.
(2) [1839] 5 M. & W. 203=2 H. & H. 17=8 L. J. Ex. 201.
(3) [1866] 32 Ch. D. 549=55 L. T. 449=51 J. P. 164=55 L. J. Ch. 859.
(4) [1871] 6 Q. B. 578=40 L. J. Q. B. 293=25 L. T. 239=20 W. R. 14.
(5) [1901] 2 Ch. 502=84 L. T. 628=49 W. R. 564=17 T. L. R. 514=70 L. J. Ch. 607.
(6) [1879] 4 Cal. 633=6 I. A. 39=3 Sar. 866 (P. C.).

Ex. A, the survey plan of 1896, but the corresponding Diglott Register Ex. B shows that Survey No. 44/3 and Survey No. 45 corresponded to the old Survey No. 45 and were described in the last column as Jangamgunta. I think the Government are entitled to repair their tank and their channel, and there is no duty on them to leave them as they existed in recent times. It is also unnecessary for me to discuss the effect of *Fischer* v. *Secretary of State* (7); for, though the Government have got the right of repairing their own channels and tanks, they cannot do this so as to prejudice existing rights; but so long as the plaintiffs' right of irrigating his inam lands already mentioned is amply protected, it seems to me that a Court has no right of dictating to Government in what manner they shall carry out the repairs. Nor is the plaintiff entitled to insist that the outlet of the repaired tank should be at the exact identical spot where it existed before.

I am not satisfied that this is a case in which it is enough to simply declare the plaintiff's right to obtain enough of water for irrigating 20 acres of land under Mukkuvanigunta; I think it is necessary to add an injunction to the declaration granted by the Subordinate Judge, though I cannot agree with the District Munsif that it need be in the very wide terms granted by him. I direct the modification of the decree of the Subordinate Judge by granting, in addition to the declaration given by him, an injunction directing the 1st defendant to carry out his works in such a manner as not to interfere with the usual supply of water necessary to irrigate 20 acres of land belonging to the plaintiff under Mukkuvanigunta.

Each party to bear its own costs in this Court. The order of the Courts below will stand.

Decree modified.

(7) [1909] 32 Mad. 141=2 I. C. 325=19 M. L. J. 131.

* A. I. R. 1926 Madras 834

PHILLIPS AND MADHAVAN NAIR, JJ.

Arukapalli Narasimha Rao and *another*—Petitioners—Appellants.

v.

Arumilli Subbarayudu and *another*—Respondents.

Miscellaneous Second Appeal No. 17 of 1925, and Civil Misc. Petition No. 1064 of 1925, Decided on 4th February 1926, from an order of the Sub J.. Amalapuram, D/-25th August 1924, in A.S.No. 2 of 1924.

* *Civil P. C., O. 21, R. 66 and S. 47—Only orders falling under S. 47, are appealable.*

All orders under R. 66 are not appealable, Only such orders as would come under S. 47 are appealable. [P. 835, C. 1]

(b) *Civil P. C., S. 47—Mortgage-decree—Order directing properties to be sold in a particular order is one under S. 47.*

A question between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor relating to the sale of their respective properties is a question which relates to the execution of the decree and would come under S. 47 and would be appealable.

Quaere Whether 27 *Mad.* 259 (*F B.*) is still good law under Civil P. C., of 1908. [P. 835, C. 2]

* (c) *Civil P. C., O. 21, R. 66—Refusal by trial Court to fix a particular order in which property should be sold is no bar to execution Court considering the same question.*

Executing Court is not precluded from considering the question of order in which properties should be sold by reason of the fact that an application relating to the same question was not granted by the trial Court; *A.I.R.* 1924 *Mad.* 509, *Foll.* [P. 835, C. 2]

K. Ramamurthi—for Appellants.

G. Lakshmanna and *A. Satyanarayana*—for Respondents.

Judgment.—*A. A. A. No.* 17 *of* 1925—This is an appeal against the appellate order of the Subordinate Judge directing the sale of the mortgage property in a certain particular order.

By this order he altered the order of the District Munsif who had directed the property to be sold in a different order. The first contention raised in this second appeal is that no appeal lay to the Subordinate Judge as the District Munsif's order was one passed under O. 21, R. 66. This rule corresponds to S. 287 of the Civil P. C., of 1882 and it was held by a Full Bench of this Court in *Sivagami Achi* v. *Subrahmania Ayyar* (1), that proceedings under that section are of an administrative and not a judicial character and that, therefore, no appeal would lie from a decision thereunder. The facts concerned in that re-

(1) [1904] 27 Mad. 259=14 M. L. J. 57 (F. B.).

reference—and the Full Bench agreed in the reasons given in the Order of Reference—were that orders had been passed fixing the market value of the property, the place of sale, the lots in which it was to be sold and the amount of the mortgage money and on these facts it was held that no appeal would lie against an order under S. 287.

The case dissented from the case in *Ganga Prosad* v. *Raj Coomar Singh* (2). and a prior Madras decision in *Sivasami Naickar* v. *Ratnasami Naickar* (3) and since that case was decided the Legislature has altered the code to a certain extent. R. 66 of O. 21, is the new corresponding section, and in the new code, there is a provision that before a proclamation is drawn up notice shall be given to the decree-holder and the judgment-debtor. This looks as if attention had been paid to a difference of opinion between the Calcutta and Madras High Courts and that it was thought fit to enter this provision, which is in effect a provision to enable the parties to be heard before a decision is arrived at. It certainly looks as if the Legislature intended to constitute such decisions as being of a judicial nature, as also the fact that the old S. 287, which is relied on in *Sivagami Achi* v. *Subrahmania Ayyar* (1), has been altogether removed. It is not necessary here, therefore, to discuss the Full Bench decision, by which we would be bound if the law were still the same. Since the passing of the new code in 1908 there have been two decisions of this Court on this question: *Mangayya* v. *Sriramulu* (4) and *Vedaviasa Aiyar* v. *Madura Hindu Labha Nidhi Co., Ltd.* (5). In both these cases which are analagous to the present one, it was held that an appeal lay because the order passed was one which came under the provisions of S. 47 of the Code. It is not, however, every order under R. 66 that would be appealable, because no right of appeal is specially given against orders under that rule, but if any such order is passed such as would come under S. 47 there is no reason why effect should not be given to the provision that all orders under S. 47 are appealable. In the present case there is a question at issue between the purchaser who has been subrogated to the rights of the prior mortgagee and the mortgagor and that question at issue relates to the sale of their respective properties and may have a very important consequence to the parties. It is certainly a question which relates to the execution of the decree, and it arises between the parties to that decree. It would, therefore, come under S. 47 and it would not be right to deny the parties their ordinary right of appeal in such a matter.

There is one case to the contrary *Rama Naidu* v. *Ramakrishna Naidu* (6), but that expressly differentiates the case in *Vedaviasa Aiyar* v. *Madura Hindu Labha Nidhi Co.' Ltd.'* (5)and consequently when it is read as applying only to its own facts it is not really an authority against the view we now take. The question whether *Sivagami Achi* v. *Subrahmania Ayyar* (1), is still good law has been considered in *Kaveribai Ammal* v. *Mehta and Sons* (7), and without entering deeply into the question the learned Judges have expressed an opinion that in view of the change in the law it may require reconsideration. As the circumstances of this case are different and there is authority to support us, we do not think it is necessary to refer the question to a Full Bench.

Coming to the merits of the case: it is argued that because the relief which the 4th defendant has now obtained was asked for in the suit itself and not granted it was not open to the lower Court to grant him the relief in execution. The point has been expressly decided in *Raghavachariar* v. *Krishna Reddy* (8) and we see no reason for not accepting that authority. On the merits of the case the lower appellate Court's decision is binding, as the order has been passed in the exercise of its discretion and it has not been shown that that discretion has not been exercised judicially.

The Second Appeal, therefore, fails and is dismissed with costs of the 4th defendant.

C. M. P. No. 1064 of 1925 must also be dismissed with costs of the plaintiff (decree-holder).

Appeal dismissed.

(2) [1903] 30 Cal. 617.
(3) [1900] 23 Mad. 568=10 M. L. J. 314.
(4) [1913] 24 M. L. J. 477=19 I. C. 448=(1913) M. W. N. 382.
(5) A. I. R. 1924 Mad. 365.
(6) A. I. R. 1924 Mad. 527.
(7) A. I. R. 1924 Mad. 234.
(8) A. I. R. 1924 Mad. 509.

* * A. I. R. 1926 Madras 836

SRINIVASA AYYANGAR, J.

Vaithilinga Pandara Sannidhi Audhina-Karthar Tiruvaduthurai Adhinam — Plaintiff.

v.

Sadasiva Iyer and *others*—Defendants.

Original Civil Suit No. 574 of 1925, Decided on 8th March 1926.

(a) *Civil P. C., O. 1, R. 10 (2) — Additional parties—In which capacity and at whose instance he party is to be added must be considered.*

Defferent considerations apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record. [P 837, C 1]

* *Civil C., O. 1, R. 10 (2)—Party sought to be added as defendant not necessary party but only permissible or proper party — Addition cannot be ordered if objected to by plaintiff — "All questions involved in the suit" refers to questions only between the parties to the suit.*

Where a third person who applies to be added as a party is only a permissible party, then on principle, his addition as party cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. The very basic principle of judgments inter partes is that the judgments are not judgments in rem but declaratory and operative only as between them. The plaintiff being generally dominus litas, there is no principle of justice upon which he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

Clause (2) of R. 10 cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should all be made parties. The expression therefore "all the questions involved in the suit" can only be questions as between the parties to the litigation; *Moser* v. *Marsden*, (1892) 1 *Ch.* 487 and *Norris* v. *Beazley*, (1877) 2 *C. P. D.* 80, *Rel. on.* [P 837, C 2, P 838, C 1]

* * (c) *Civil P. C., O. 1, R. 10 (2) — Statute sought to be declared as* ultra vires—*Secretary of State is not necessary party in all cases.*

The Secretary of State is not a proper or necessary party to every suit in which any question is raised we regard to the legality of any sttatute. [P 838, C 2]

Advocate-General—for Petitioner.

V. Radhakrishnayya and *V. N. Venkatta Varadhachari*—for Plaintiff.

P. Venkataramana Rao — for Defendants.

Judgment.—This and the other applications in the connected suits are in the name and on behalf of the Secretary of State for India in Council for the purpose of his being added as a party to the suit presumably as party defendant. The main object of each of the suits is to obtain a declaration that the Madras Hindu Religious Endowments Act I of 1925 is invalid and ultra vires, and on the basis of such declaration the plaintiff has asked for a relief by way of injunction which is merely a relief consequent on the declaration.

The plaintiff in each of the cases is the head of a mutt or religious endowment and the only defendant to each of the actions is the Board of Commissioners for the Madras Religious Endowments, a body, it may be observed in passing, created and constituted by the said Act.

The question for determination, therefore, is whether on the application I should direct the Secretary of State being added as party defendant in these suits. The question is of considerable importance and of great difficulty though I did not realize the full extent of either till I was more than half-way through the hearing. It has been argued with much learning and light, and also some little warmth on both sides, and I took time to consider my judgment not only having regard to the importance of the question to the parties, but also to the general principle on which alone it seemed to me that a satisfactory solution can be arrived at. If it had been an ordinary case, I should probably have had very little difficulty in persuading the parties to agree to the addition of the party on conditions which may be regarded as equitable in the circumstances.

It was with this view that almost at the very commencement of the discussion I asked the learned Advocate-General who appeared for the applicant whether he had any instructions to agree as to any conditions as to costs. He said he had none. Some days thereafter he again appeared before me and intimated that, so far as the applicant was concerned, he had definite instructions not to consent to any conditions. He, however, at the same time intimated that he had received a communication from the President of the Board of Commissioners to the effect that if in the action the plaintiff should fail, the Board of Commissioners would consent to only one set of costs being allowed to the defendants and that they would be willing

to allow the Secretary of State to take such one set. It is obvious that the two things are not and cannot be the same, and that in these cases a set of costs to the Board of Commissioners must mean something very different to a set of costs to the Secretary of State, at any rate as at present represented in the action. Further I felt that such orders should, if at all, be passed only by consent of all parties. The plaintiff, however, refused to agree to any such arrangement and has asked me to decide the question raised, and having regard to the great importance of the matter, and the likelihood of its being taken up elsewhere, sooner or later, I have deemed it fit to deal with the application directly and dispose of it on its merits.

The first observation that falls to be made with regard to the present application is that it is one for joinder of a third party as party defendant, and made by the third party himself and not by the plaintiff or the defendant in the action. I have felt it necessary to state this because it seems to me that different considerations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. I will not pause to refer to all such considerations. In such a case as the present one, however, it is obvious that if a third party's application to be added as party defendant were opposed by both parties, I should have had very little hesitation in rejecting the application unless I were satisfied that the party sought to be added was not only a proper party but a necessary party. Having regard, however, in this case to the learned and strenuous argument in support of the application by Mr. Venkataramana Rao on behalf of the Board of Commissioners I have felt bound to regard it virtually as an application by both. The question thus resolves itself into this: Should the plaintiff in this case be compelled to litigate against not only the defendant of his choice against whom he has prayed for the reliefs consequent on the declaration but also against the Secretary of State? I did not understand either the learned Advocate-General who argued the application on behalf of the applicant, the Secretary of State, or even Mr. Venkataramana Rao for the Board of Commissioners, to argue that the applicant was a necessary party to the suit in the sense in which that expression is understood in the law relating to parties to actions, that is to say, in other words, as a party without whom there can be no properly constituted suit, having regard to the cause of action alleged and the relief claimed. If it is to be only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. Thus, when "A" institutes a suit on title to recover certain property from 'B', 'C' should not be made additional plaintiff if 'B' should object to it, except perhaps in the case of one possible exception of the title to the property between A and C being alternative in its proper sense. The principle is even stronger in the case of a plaintiff as against whom another defendant is sought to be added. It is the plaintiff that comes to Court alleging a cause of action as against him. The very basic principle of judgments inter partes is that the judgments are not judgments in rem but declaratory and operative only as between them. The plaintiff being generally dominus litus, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

The question thus further resolves itself into this: whether in such an action the Secretary of State is a proper party having regard to the rules relating to the joinder of defendants. It was on this basis that the question was really argued by all the parties. It is O. 1 of the First Schedule to the Civil P. C. that lays down the rules regulating the joinder of parties. R. 3, no doubt, relates to joinder of defendants, but both in form and substance it is merely permissive and relates only to what the plaintiff may do if he were so minded. It is Cl. 2 of R. 10 that applies to the present case. It provides that the Court may, on any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of

any person, who ought to have been joined as defendant or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit, be added.

It has not been suggested in this case that the applicant, the Secretary of State, is a person who ought to have been added as party defendant in the suit. The contention was that the presence before the Court of the Secretary of State in this case would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If the expression in this clause had not been the word "necessary" but merely "desirable" a great deal might have been said for the argument adduced in support of the application. But at no stage of the discussion was I able to understand the learned gentleman that argued in support of the application to make out that the presence before the Court of the Secretary of State was necessary. The necessity referred to in the clause is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. It is obvious that this clause cannot be read as requiring that all persons who have, or claim to have, or are likely to have, any sort of right, title or interest in respect of any portion of the subject-matter of a suit should all be made parties.

If it be borne in mind that the suit by a plaintiff for certain reliefs is against certain persons as defendants, and that judgments of civil Courts are not judgments in rem, then it follows that the questions involved in the suit are only questions with regard to the right set up and the relief claimed on the one side and denied or withheld on the other. The expression therefore 'all the questions involved in the suit can only be questions as between the parties to the litigation. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions. In these cases there is no question of the Court not being able to effectually adjudicate and settle any question. So far as I was able to see, the entire argument in support of the application was based on the position that in the absence of the Secretary of State the Court would not completely adjudicate upon and settle all the questions involved in the suit. In other words the contention was that the Secretary of State was a proper party to every suit in which any question was raised with regard to the legality of any statute, and that in the absence of the Secretary of State as a party in any such suit there can be no completeness of adjudication within the meaning of the rule. I confess that at first I was a little impressed with this argument. But as against this, there are found heaps of cases in the reports both in this country and elsewhere in which the question of whether a particular legislative enactment was intra or ultra vires was decided merely as between the parties to the litigation without any representation in the suit either of the Crown or of the public. But it may, no doubt, be remarked that in none of those cases the question has been raised or decided. The only case that has been cited before me in which there can be said to be any indication with regard to this matter is the case of *Cunningham* v. *Tomey Homma* (1).

The question in that case was whether a particular provision was ultra vires of a Provincial Legislature and the Attorney-General of the Province was allowed to intervene at some stage. There is no decision in the case as to whether he was either a necessary or proper party and their Lordships of the Judicial Committee do not even refer to it. I am unable, therefore to regard it as a decision at all bearing on the point.

The case of *Esquimalt & Nanaimo Railway Company* v. *Wilson* (2) was also cited for the applicants and relied upon. The property which was the subject-matter of that action had been the subject of a grant by the Crown and the question that arose was whether in such an action the Attorney-General of the Province was a necessary party. At page 364 (App. Cas. Lord Buckmaster, who delivered the judgment of their

(1) [1903] A. C. 151=19 T. L. R. 126=72 L. J. P. C. 23.

(2) [1920] A. C. 358=89 L. J. P. C. 27=122 L. T. 563=36 T. L. R. 49.

Lordships of the Judicial Committee, observes as follows :

The learned Judges of the Court of Appeal from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected, but base their opinion solely on the ground that the Crown is not affected by the result and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

At page 368 (App. Cas.) occurs the following sentence :

It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with.

and at page 369 their Lordships concluded by saying that they,

therefore, think that the Crown is affected in this matter, so that the presence of the Attorney-General is proper and necessary for the determination of justice.

It is not contended in this case that by reason of any adjudication as between the original parties to the action, the rights of the Secretary of State would, in any manner or measure, be affected. It is, therefore, not a case falling under the rule that the officer representing the Crown is a necessary party to every action as the result of which the rights of the Crown may be affected. The question would, therefore, have to be determined merely on a consideration of, whether in the absence of the Secretary of State as a party to the action it is impossible to have a complete adjudication upon and settlement of all the questions involved in the suit. All the learned gentlemen that appeared at the Bar and argued the point on behalf of the various parties state that they were unable to find any decision bearing directly on the point.

I have, therefore, to arrive at a conclusion on first impression and on what I conceive to be the general principles applicable. The conclusion I have thus arrived at is this : If the expression all questions involved in the suit should be regarded as absolute and not merely relative to the parties before the Court, then the Secretary of State may in this case be regarded as a proper party and not otherwise. But it seems to me that there is neither principle nor authority that can be discovered for regarding such an expression as all the questions involved in a suit appearing in a rule relating to joinder of parties as absolute and not relative.

The whole scheme of the Civil Procedure seems to me to point to a suit being regarded as a suit for relief as against definite defendants, as a trial being one only as between the parties and an adjudication as one only binding them. If a plaintiff should claim certain property, and it should be regarded that the question involved in the suit is generally whether he is the owner of the property and not whether as against any other particular person, he is entitled to certain rights over property, very serious consequences are sure to ensue and procedure in our Courts of law is certain to become exceedingly complicated and much more disastrously prolonged than it is at present.

At this stage I may with advantage refer to two decisions that have been cited at the Bar. Mr. S. Srinivasa Iyengar for the plaintiff referred to the case of *Moser* v. *Marsden* (3). In that case the plaintiff, the patentee of a machine, brought the action against the defendant for using a machine which he alleged was an infringement of his patent. One Montforts, the maker and patentee of the defendant's machine, applied to be added as defendant alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of appeal consisting of Lord Justice Lindley and Lord Justice Kay reversing the decision of the Court below, held that Montforts not being directly interested in the issues between the plaintiff and the defendant, but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. Lord Justice Lindley at pages 489 and 490 (1 *Ch.*) observes as follows :

But reliance is placed on the following words of the rule, which provide for adding the names of parties 'whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter.' But what is the question involved in this action ? The question, and the only question, is whether what Marsden is doing is an infringement of the plaintiff's patent.

And again, later on, that eminent Judge says :

Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the

(3) [1892] 1 Ch. 487=61 L. J. Ch. 319.

action? It appears to me that it does not. The counsel for the applicant grounded his argument on the allegation that Montfort's interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant?

And Lord Justice Kay at pages 491 and 492 (1 *Ch.*) observes as follows:

No doubt the judgment in the present case may indirectly affect Montfort's patent; but the answer to that is that whether it would affect it or not, this rule does not apply to such a case. Montfort says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that.

It seems to me that if ever a case can be conceived which would fall directly within the words of the rule already referred to this was such a case. There was a defendant, who, when sued by the plaintiff for infringement of a patent right, sought to justify his action on the patent right of a third party; and if the terms of Cl. 2 of R. 10 should be taken absolutely as contended for, it would have seemed to be a clear case in which, for the purpose of effectually and and completely adjudicating upon and settling all questions involved with regard to the patent right of the plaintiff, it was not only proper but necessary that this other patentee should have been added as party defendant. But the Court of appeal said no and decided that he was not a proper party on the ground, I take it, that the words of the rule should be construed not absolutely but relatively. It is a very strong case and I confess almost repugnant to common sense. But the words of the statute that their Lordships of the Court of Appeal were considering were identical with the words which I have to consider and it has not been shown that this decision of the learned Judges has ever been overruled. It must also be observed that their Lordships refused to make the other patentee a party to the action even though they came to the conclusion that by reason of the decision the commercial interest of the other party would be seriously affected.

Mr. Radhakrishnayya referred to *Norris* v. *Beazley* (4). It was an action on a bill of exchange against the acceptor, originally, and the defendant sought to add the name of a company which he alleged was the party really liable and which had also in the same matter a counter claim against the plaintiff. Justice Coleridge makes in that case observation which I may here re-produce. At p. 83 (2 *C. P. D.*) that learned Judge observes:

Now this, although it is not a case of making a person a plaintiff againt his will, is certainly the case of making a person a plaintiff in respect of a defendant as to which he does not desire to be a plaintiff without his consent.

Again that learned Judge at p. 81 (2 *C. P. D.*) lays down that

the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim and does not desire to prosecute any.

He proceeds thus:

It seems to me that this application is answered, and that it was not intended that persons in the position of this Company should be added as defendants, merely for the convenience of another defendant * * * It seems to me that it is the more important to construe this rule strictly because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing the plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights as against one person, with questions of a highly complicated nature arising between themselves and the others.

At p. 85 (2 *C. P. D.*) Justice Denman says:

I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed unless a very strong case is made out, shewing that in the particular case justice cannot be done without his being brought in.

The foregoing observations seems to me to lay down in very clear and unmistakable terms the principle applicable to such a case as the present. On these principles I cannot possibly see my way to add the applicant as a party defendant to the action. I am further unable to understand why the Secretary of State is sought to be made a party to the action at all. The only suggestion on which such a joinder can be supported is that it is necessary that the declaration that the Act is ultra vires should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil P. C. is concerned represents merely the Govern-

(4) [1877] 2 C. P. D. 80=46 L. J. C. P. 169=35 L. T. 845=25 W. R. 320.

ment or the Sovereign and can under the present system be regarded if at all only as part of the legislative machinery. There is no principle for even suggesting that any declaration as against him will be effectual and binding as against all other possible persons such as Committees and other bodies and officers that may be constituted or created under the Act now in question.

There is no cause of action alleged against the applicant, and no relief whatever claimed against him. On a proper construction of the rule I feel constrained to hold that the applicant is not a proper party to the suit. The plaintiffs have complained of certain actions by the Board of Commissioners which would undoubtedly be unlawful but for the Endowments Act. They, therefore, ask for an injunction on the ground that the Act which is held up as a shield by the defence is really not available to them because it is illegal and ultra vires.

The declaration, therefore, as against the defendants must be regarded as merely ancilliary to the relief claimed. On principle and authority I have, therefore, come to the conclusion that the Secretary of State is neither a necessary nor a proper party and that as the plaintiffs oppose his being joined as additional defendant I would not be justified in adding him as a party defendant even as a person brought in merely to look on and see fair play to use the words of Lord Macnaughten in the case of *Duke of Bedford* v. *Ellis* (5). Even as a sort of harmless and permissible party I am satisfied he could not be added when such addition is opposed by the plaintiff and more so when on behalf of the applicant, there has been an express refusal to submit to any condition as to costs.

Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of ultra vires are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them.

(5) [1901] A. C. 1 =70 L. J. C[illegible] 1[illegible]—1, T. L. R. 139=83 L. T. 686.

In the result the application must be dismissed with taxed costs for the plaintiffs in each of the cases and it is ordered accordingly.

Application dismissed.

A. I. R. 1926 Madras 841

KUMARSWAMI SASTRI AND KRISHNAN, JJ.

Purasawalkam Hindu Janopakara Saswatha Nidhi, Ltd.—Plaintiff—Appellant.

v.

Kuddus Sahib and *others*—Defendants—Respondents.

Original Side Appeal No. 111 of 1923, Decided on 23rd March 1925, from a decree of Coutts-Trotter, J., in Civil Suit No. 3 of 1923.

(a) *Principal and agent — Principal appointing agent with knowledge of his qualifications— If agent acts like any other reasonable man of his qualifications he is not guilty of negligence.*

Where a principal appoints an agent with knowledge of his qualifications and so far as the agent is concerned he does what he thinks to be the best, there can be no question of negligence unless he has done anything which any reasonable man with his qualifications would have omitted to do. [P 843, C 1]

(b) *Transfer of Property Act, S. 69 — Time for payment of mortgage money not fixed— There can be no default until demand is made.*

Where the amount due for principal is not repayable at any particular date nor is anything stated as to when it is to be repaid then until there is a demand made for the money, there can be no default in payment of the principal sum due within S. 69. [P 844, C 1]

(c) *Transfer of Property Act, S. 69 — Notice is necessary even when sale is for interest.*

Per Kumaraswami Sastri. J.—Notice is necessary whether the sale is for the amount due for principal or interest. [P 844, C 2]

Per Krishnan, J.—Obiter—In cases falling under S. 69 if interest amounting to at least Rs. 500 is in arrears and unpaid for three months the mortgagee, if he has got the power of sale under the mortgage, can exercise the power without notice to the mortgagor. [P 847, C 2]

(d) *Mortgage — Suit by mortgagee for mortgage money—Mortgagee can realize money only when he is in a position to give back mortgaged property—Wrongful sale of mortgage-property by mortgagee will deprive him of his right to claim mortgage money : T. P. Act, S. 68, Civil P. C., O. 34, R. 6.*

When a mortgagee demands payment of the mortgage money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem, and where there has been a wrongful sale it is not open to the mortgagee,

who has put it out of his power to allow the mortgagor to redeem, to sue the mortgagor for recovering the balance of the mortgage-money: (1859) 27 *Beav.* 349; (1925) *A. C.* 489, *Ref.*

Advocate-General and *K. Narasimha Aiyar*—for Appellant.

T. Pattabhirama Aiyar—for Respondents.

Kumaraswami Sastri, J.—This is an appeal from the decision of Justice Courts-Trotter dismissing the plaintiff's suit; the plaintiff, which is a fund, sued to recover Rs. 6,032-9-6 with costs and further interest. Plaintiff's case is that the 1st defendant applied for a loan to the fund of Rs. 10,000 on the mortgage of two of his properties: 17, Thacker Street, Vepery; and 17, Perambore Barracks Street. On his application the usual form and papers were filed with the 2nd defendant who is the appraiser and the 3rd defendant who is the surveyor of the fund in the usual course of business to value and appraise the properties; that they wrongfully valued the properties at about Rs. 12,000 and odd while the real value of the properties was much lower; that on the strength of their valuation the fund advanced Rs. 9,475 to the 1st defendant and got the mortgage deed, Ex. C, executed on the 8th February 1921; that as the defendant did not pay the money due on the mortgage the mortgaged property was sold under power of sale reserved to the plaintiffs under the deed of mortgage on the 13th and 21st October 1922 when the properties realized only Rs. 2,150 and Rs. 2,600 respectively as against the sum of Rs. 10,782-9-6 due on the mortgage at the date of the sale; that the 1st defendant has to pay Rs. 6,032-9-6, the difference between the amount due on the date of the sale and the amounts realized by private sale; that the 2nd and 3rd defendants, by their wrongfully appraising the property at an amount far in excess of the actual value, acted in conspiracy with the 1st defendant to defraud the fund and acted also with gross negligence in the valuation, and that they are, therefore, liable to pay the difference between the actual value of the property and the amount due on the mortgage. The 1st defendant denied the claim of the fund. He pleaded that the properties mortgaged were worth about Rs. 20,000, one property being worth Rs. 8,000 and the other Rs. 12,000. He sets up an agreement whereby the fund itself promised to lend the money in order to enable him to redeem a prior mortgage. He states that the power of sale was wrongfully exercised and the sale is not binding on him. He also pleads that the property was under-sold collusively by the fund.

The Defendants Nos. 2 and 3 denied that they over-valued the properties. They denied that there was any fraud or collusion between them and the 1st defendant. They stated that the property was correctly valued and that they are not liable for the deficiency if any. They also pleaded that the sale was not properly conducted.

Justice Coutts-Trotter dismissed the plaintiff's suit against Defendants Nos. 2 and 3. He held that there was no conspiracy or negligence; and as regards the 1st defendant he held that the power of sale was improperly exercised, that notice was not properly given and that consequently the plaintiffs have no right to claim any deficiency. So far as the 2nd and 3rd defendants are concerned the learned Advocate-General who appeared for the fund conceded that no case of conspiracy was proved; but he supported the appeal on the ground that the defendants grossly over-valued the property. Reliance was mainly sought to be placed on the evidence of Mr. Aiyaswami Mudaliar who was called by the plaintiffs to prove the value. I am not satisfied on the evidence that the Defendants Nos. 2 and 3 negligently over-valued the properties or that there was any conspiracy between the parties.

The 2nd and 3rd defendants have given evidence as to what they did so far as the valuation of the properties was concerned. There are some facts which to my mind make it rather clear that there could not have been over-valuation which is now sought to be suggested. I find on the evidence of the 1st defendant that there were previous mortgages on this property in favour of the Madras City Co-operative Bank at a time when there was only one item of property in existence and the other was only a vacant site. We find that at that time a sum of Rs. 5,000 was lent and under the rules of the Bank only 2/3rds can be lent, so that about a year before the suit mortgage the properties were

valued by that Bank at Rs. 7,500. I also find that a sowcar lent Rs. 3,000 on one item of property. The evidence is that after the mortgage to the Bank, the 1st defendant built on the vacant site at a cost of about Rs. 5,000, so that at the time of the mortgage to the fund it is difficult for me to believe that the property was worth only about Rs. 4,000, as Mr. Aiyaswami Mudaliar would have us believe. Under these circumstances I think that there has been no case made out against the 2nd and 3rd defendants either on the ground of conspiracy or on the ground of negligence. As pointed out by the learned Judge the 2nd and 3rd defendants were employed by the fund with knowledge of their qualifications and so far as they are concerned they did what they thought to be the best. There can be no question of negligence unless they have done anything which any reasonable man with their qualifications would have omitted to do. The fund which employed them was aware of their qualifications.

I may say in this connexion that I disagree with the learned Judge in the view he takes that there has been anything in the conduct of Mr. Sivagnana Mudaliar which is unprofessional. He got permission from the High Court to act as legal adviser and director of this fund. So far as the business of the fund is concerned, it appears that the fund consists of persons who take shares and borrow moneys and what the share-holders get is about 9 per cent. compound interest and it is only the balance that is divided. It is divided in such a way as to give a remuneration to the legal adviser, the director, the appraiser and others. In this case it cannot be said that the percentage allowed to Mr. Sivagnana Mudaliar is anything which can be said to be high or unreasonable. On the contrary it works out at a very low figure, about Rs. 200 a year.

As regards the directors I do not think they can be blamed for employing the 2nd and 3rd defendants because in their case also the qualifications will depend on the remuneration and they could not have gone and employed experts or men with high qualifications having regard to the very small remuneration paid to both of them. They had to fix the remuneration according to the funds in their hands. I do not think it can be said that in employing the 2nd and 3rd defendants the directors were guilty of negligence or were answerable for employing persons who ought not to have been employed, more especially as we find in this case that during all these years there have been no complaints made by the share-holders or anybody of any misconduct or any loss that arose to the fund by their employment.

So far as I have dealt with the case of the 2nd and 3rd defendants which seems to us to be fairly clear. The case of the 1st defendant is a little more complicated. So far as the sale is concerned the evidence of the Secretary is that this sale was conducted in pursuance of a notice, Ex. D, which was given on the 26th July 1921. The sale took place on the 13th and 21st October 1922 about 15 months after the date of the notice. It also appears that after the notice was given, the fund received payments of Rs. 300, while the amount due at the date of the notice was about Rs. 442. No payments were made subsequently. So far as the notice is concerned I have little doubt that the receipt of Rs. 300 after the notice and the staying of the sale as threatened was clearly an abandonment of any rights which the fund wanted to enforce by reason of the notice. They received the money and kept quiet 15 months after. I do not think that the fund could act on that notice at the expiration of such a long time. Fresh notice ought to have been given if they wanted to sell.

Then the question is whether the fund is entitled to sell without giving any notice. On this part of the case we have to see the Articles of Association and the mortgage-deed. The Articles of Association define the rights between the share-holders and the fund. This is clear from S. 21 of the Indian Companies Act. In this case the loan was to a share-holder. Article 72 runs as follows :

If any person who has received loans on mortgage of moveable or immovable properties fails to pay the monthly interest regularly and allows such interest at any time to accumulate to what shall be due for three months, the Secretary shall call upon him by notice in writing to pay the principal and interest due and in default of such payment the property shall be liable to be sold by public auction ; provided always that the Secretary may at any time before the commencement of the sale, at his discretion withdraw from sale any

property moveable or immveable the arrears of, interest on which shall be less than what shall be due as interest for three months.

It is argued by K. Narasimha Iyer that this is merely a direction to the Secretary and it confers no rights on the share-holder or the mortgagor. I do not think that this contention can be upheld. It is clearly a provision put in in the interests of both the fund and the mortgagor, the fund being entitled to sell if three months' interest is in arrears, the mortgagor being entitled to due notice to enable him to pay up. The deed of mortgage, Ex. C. provides for a power of sale. The clause runs as follows :

If with regard to the interest payable every month accordingly, three months' interest falls in arrears at any time, or if the Nidhi being in need of the principal and interest gives intimation by means of notice to pay off the same and I or my heirs fail to pay the principal and interest, the Nidhi itself shall sell the aforesaid houses and grounds by public auction or private sale under S. 69 of the Transfer of Property Act and credit the expenses in connexion with the said sale and whole of the amount due by me to the Nidhi ; and if there is excess it should be paid to me. If there is shortage I shall myself be responsible and pay the amount falling short together with interest as mentioned above.

It ends as follows :

Further, until this mortgage debt is discharged I shall be bound by the rules now in force in the Nidhi and the rules which may be framed from time to time.

This mortgage, therefore, incorporates the provisions of the Transfer of Property Act and of the Articles of Association. The amount due for principal is not repayable at any particular date. Nor is anything stated as to when it is to be repaid. Under these circumstances it seems to me to be clear that until there is a demand made for the money, there can be no default in payment of the principal sum due .No doubt the fund could have sued the next day for the money or the mortgagor might have offered to redeem the next day ; but that would not make non-payment a default within S. 69 of the Transfer of Property Act. I may refer in this connexion to the case in *Ramadh Bibi Ammal* v. *Kandasami Pillai* (1), where Justices Spencer and Krishnan have discussed the question of what is the meaning of default and they incline to the view that before there can be said to be default where no time is fixed there ought to be a demand. S. 69 of the Transfer of Property Act begins by stating that the power of sale in the mortgage-deed conferred on the mortgagee or any person in his behalf to sell or concur in selling, in default of payment of the mortgage-money, the mortgaged property or any part thereof without the intervention of the Court is valid in certain specified cases. Then it says in what cases such power of sale will be valid. There is to be a default in the payment of the mortgage-money. Now, in this case, reading S. 69 with the Articles of Association and the mortgage deed, I am clearly of opinion that before the sale is held for the purpose of recovering principal and interest due on the mortgage notice has to be given and the learned Judge was right in coming to the conclusion that the want of notice was an irregularity because the fund did not act in a manner that would entitle them to have sold the property rightly. There was no notice given before the sale. It is suggested that there was a notice of the date of the sale sent to the 1st defendant to his address but that was returned as he was not in Madras, and it cannot be said that that notice was not a notice required by the Transfer of Property Act or Art. 72.

It is unnecessary in this case to decide the wider question raised whether in case of interest alone being due notice is necessary ; because I think that if Art. 72 is also to be considered notice is necessary whether the sale is for the amount due for principal or interest. There having been, therefore, no proper notice under Art. 72, as regards sale of this property, the question is whether the plaintiffs can sue to recover the balance which is claimed under the sale. (His Lordship then discussed the evidence about the sales and came to the conclusion that they were not properly held.)

The next question is as to whether the plaintiffs are entitled to sue for the balance which they claim even though the power of sale was improperly exercised and even though there were irregularities in the sale, and low prices realized leaving the 1st defendant to file a counter-claim or a separate suit for damages, or whether the suit itself cannot be maintained. Before dealing with the question it must be remembered that the suit is not against the purchaser of the property as he is not a party to the suit, and it is not by the defendant to

(1) [1919] 9 L. W. 479=51 I. C. 724=(1919) M. W. N. 82.

redeem or get damages for wrongful sale, but it is a suit by the plaintiff against the defendant to recover the balance of mortgage-money. The case does not fall within S. 69 of the Transfer of Property Act and has to be decided on considerations as to the general law regulating the rights of mortgagor and mortgagee. It is clear that when a mortgagee demands payment of the mortgage-money, he should be in a position to give back the mortgaged property and allow the mortgagor to redeem. This is the effect of O. 34, Rr. 5, 6 and 8 of the Civil P. C. and mortgage-decrees are always drawn in the form that on payment of the money the mortgagee should return the title-deeds and, if, in possession, give possession to the mortgagor. Where he wrongfully disables himself from doing so the law in England seems to be that he cannot after a wrongful sale sue for the balance of the mortgage-money. The authorities on the subject are referred to in *Ellis & Co.'s Trustee* v *Dixon Johnson* (2). Lord Justice Warrington refers to the rule of equity at page 470 [(1924) 2 *Ch.*—Ed.] as follows :

A mortgagee who cannot or will not return the mortgaged property on payment is not entitled to sue for the debt.

He goes on to observe :

There can, I think, be no question that such was and is the rule in equity. In *Palmer* v. *Hendrie* (3) the rule was there stated by Romilly, M. R : 'These then are the relative duties and reciprocal obligations between mortgagor and mortgagee. The mortgagee has a right to make use of all his remedies against the mortgagor for obtaining payment of his money ; but as soon as the mortgage-money has been fully paid, he is bound to deliver over the mortgaged estate to the mortgagor. The question is whether, when the mortgagee has made it impossible to restore the property mortgaged, he can proceed against a mortgagor to recover the amount of the mortgage-money. He can, undoubtedly, at law, sue upon the covenant, and consequently, the executors of Hendrie are, at law, entitled to recover from the plaintiff the unpaid mortgage-money ; but the mortgagees must perform their reciprocal obligations ; they are bound, on payment, to restore the property to the mortgagor, and—this is a most important part—' if it appears, from the state of the transaction, that, by the act of the mortgagee, unauthorised by the mortgagor, it has become impossible to restore the estate on payment of all that is due, I am of opinion that this Court will interfere and prevent the mortgagee suing the mortgagor at law.

The learned Judge also says that this statement of the law was cited and adopted by Stirling, J., in *Kinnaird* v. *Trollope* (4) and refers to the rule being based on the very nature of a mortgage security and the reciprocal obligations of mortgagor and mortgagee and considers it as being in accordance with justice and common sense. Sargant, J., observes :

The cases of *Walker* v. *Jones* (5), *Palmer* v. *Hendrie* (3) and *Kinnaird* v. *Trollope* (4) have definitely recognized that, in general a mortgagee or his assignee cannot recover his debt from the mortgagor except upon performing his reciprocal obligation of reconveying the mortgaged property to the mortgagor and, accordingly, where the security for the debt was a specific estate, and through the unauthorized acts of the mortgagee it had become impossible to restore the estate at law, the mortgagee lost the right to sue for the mortgage-debt.

All the learned Judges of the Court of appeal are clear that a mortgagee who wrongfully disposes of property so as to prevent redemption could not sue for the mortgage-debt. In the case of moveables they thought that if he could purchase exactly similar stock and deliver he might do so. But in the case of immovable property it is clear that the principle could not apply as both under the Specific Relief Act and otherwise, it is presumed that the breach of contract to deliver immovable property cannot be compensated for by damages. This decision was affirmed by the House of Lords as appears from the note in the Weekly Notes of the 28th February 1925, page 61 [*Ellis & Co.'s Trustee* v. *Dixon Johnson* (6)] where the Lord Chancellor is reported to have held that a creditor holding securities which he has wrongfully disposed of could not have judgment for his debt. Reference was made to *Madras Deposit & Benifit Society* v. *Passanha* (7) and it is argued that a suit would lie to recover the balance. It was a reference from the Small Cause Court and all that the Judge held was that the provision giving 15 days' notice in the mortgage-deed was invalid, but it did not prevent a suit for the recovery of the debt. It also appeared there that more than three months' notice was, as a matter of fact, alleged to have been given. It does not appear that there was no default in the payment of the

(2) [1924] 2 Ch. 451=40 T. L. R. 680=93 L. J. Ch. 554.
(3) [1859] 27 Beav. 349.
(4) [1888] 39 Ch. D. 636=57 L. J. Ch. 905=59 L. T. 433=37 W. R. 284.
(5) [1865] 35 L. J. P. C 30=1 P. C. 50=12 Jur. (N. S.) 381=14 L. T. 686=14 W. R. 484.
(6) [1925] A. C. 489=69 S. J. 395.
(7) [1888] 11 Mad. 201.

mortgage-money and the report is so meagre that it is difficult to hold that a person who sells mortgaged property wrongfully can turn round and demand the balance of the money leaving the mortgagor to a separate suit for damages. As pointed out in *Ellis & Co.'s Trustee* v, *Dixon Johnson* (2), above referred to, it is not a question of set-off or counter-claim; it is a question of defence to the action itself on the ground that it is not maintainable. The latest decision of the House of Lords and the Court of appeal are clear so far as the law goes. The sections of the Conveyancing Act as to power of sale do not differ in any material part from S. 69 of the Transfer of Property Act, the sections of the Conveyancing Act being almost identical with the sections of the Transfer of Property Act. I think there is clear authority for holding that where there has been a wrongful sale it is not open to the mortgagee who has put it out of his power to allow the defendant to redeem to sue the mortgagor for recovering the balance of the mortgage-money. We think that the judgment of Justice Coutts-Trotter is correct and that the suit against the Defendant No. 1 also fails. In the result the appeal fails and is dismissed with costs three sets.

Krishnan, J.—(His Lordship stated the facts as given in the judgment of Kumaraswamy Sastri, J., and proceeded.) It is convenient to consider the case of these defendants separately as the plea of conspiracy has entirely failed which was the only common ground between all the defendants. The fund have not adduced any evidence of this conspiracy and no attempt has been made to controvert the finding of the learned trial Judge that the conspiracy is not proved. I will take the case of the surveyor first because that seems to be the easiest of the three. The learned Judge has found that the surveyor is not chargeable with any negligence at all and I think the learned Judge is right in the view. The surveyor is, as the learned Judge points out, an ex schoolmaster, who does not seem to be properly qualified to do the work of surveying which he has been appointed to do. The directors knew the qualifications of the surveyor when they appointed him. They must be taken to have accepted the best he could do in the discharge of his duty as a satisfactory discharge of his functions. What he usually did was, as I have said already, to go and value the property by looking at it generally and by finding out from the neighbourhood the rental value of the property. In this case the rental value which he found on inquiry justified him in coming to the conclusion that the estimate of the appraiser was correct. After all it must be understood that this appraising and checking are not expected to be very accurate, but only to give a rough idea of what the property is worth so that the fund may not lose money. As the surveyor did what he usually did in such matters, and as the directors must be taken to have known his practice and they never objected before, he cannot be charged with negligence at all. Therefore the case against him for negligence fails.

Next, as regards the appraiser, the Defendant No. 2: the learned Judge has come to the conclusion that he was negligent for he says:

> He saw thousands of cubic feet of bricks which were not there; he imagined the existence of concrete foundations which in fact did not exist; he measured joists and beams not with a tape but with an eye which made him find more than he saw.

I do not think that that is altogether a fair way of putting the case so far as he is concerned. He went there and took his measurements as usual. He was apparently never in the habit of measuring very exactly the walls and the joists and so on; but he was taking rough measurements of things and up to date no complaint had been raised against him, for doing his work in that manner, When the Engineer Aiyaswami Mudaliar went there he apparently found that those measurements were not accurate. He took very strict measurements evidently, but it seems to me that the differences between the measurements of Aiyaswami Mudaliar and of the Defendant No. 2 do not show such a disparity as to attribute negligence to the latter. If the appraiser had not gone to the place where those houses were, and merely made a fanciful estimate, one can say he was negligent; but when he did the very things he was expected to do and which the directors knew he was doing, and arrived at results which were perhaps not quite so accurate as one would have liked, I do not think it is correct to attribute negligence to him.

I am inclined to think that the finding that he was grossly negligent is not correct. The learned Judge dismissed the case against him in spite of his finding that he was negligent on the ground that the failure to realise enough money to cover the mortgage by the sale of these two properties was not due to any act of the appraiser. He was of opinion that the properties were under-sold in the auction that took place because at that time there was a slump in the value of property in the neighbourhood on account of certain disturbances in the Buckingham and Carnatic Mills. The evidence in the case shows that the properties must have been under-sold: for, as my learned brother has pointed out, they were worth at least Rs. 8,000 or Rs. 9,000. The two properties without the new house constructed on the second of them were accepted as sufficient security for a loan of Rs. 5,000 by a very careful money-lending body called the Madras City Co-operative Bank. That implies that they estimated the value at Rs. 7,500 before the new house was built as they advanced only 2/3rds of the value and the new house was built at an expenditure of about Rs. 5,000 by the 1st defendant. Making all deductions, I think one may very well value the properties at Rs. 9,000. I do not think, therefore, that there was very much loss caused by the report of the appraiser. However that may be, I prefer to put my judgment on the ground that he has not been proved to have been guilty of negligence and therefore, he is not liable:

Now, as regards the 1st defendant, as remarked by my learned colleague, his case is a little more difficult and raises some interesting questions of law. The learned trial Judge has dismissed the suit against him on the ground that the sale was carried through in defiance of the provisions of the Transfer of Property Act. He observes.

> As the 1st defendant has not secured the right given to him by the Transfer of Property Act, I think the suit against him must also fail.

He has not discussed the case of the 1st defendant, at any length and, therefore, it is difficult to be sure how the learned Judge dealt with it. It is argued before us by the 1st respondent that the properties were really worth about Rs. 20,000 or at any rate more than enough to cover the mortgage debt and that the sale of these properties without notice to him and in a manner which led to considerable loss because the sale was not conducted with that amount of publication and care as one would expect the mortgagee to take in selling the mortgaged property, was an improper sale and therefore, he was not bound to make good the balance of the mortgage debt. The first question that arises on the defence is whether it was necessary to have given him notice before the sale. If notice was necessary, I am in agreement with my learned brother in thinking that no proper notice was given.

The notice relied on by the Secretary to the fund sent 15 months before the date of the sale for the payment of a sum of interest then due but mostly repaid subsequently is not sufficient, in my opinion, to justify the sale 15 months after. It is stated—and I take it that it is correct—that at the time of the sale about Rs. 1,300 was due for interest alone and it is argued that under S. 69 of the Transfer of Property Act when interest on the mortgage amounted to at least Rs.500 and remained unpaid for three months after becoming due, the power of sale can be exercised by the mortgagee without any notice whatsoever given. It seems to me that it is not necessary to definitely pronounce upon this argument but I am inclined to think that the argument is correct that in cases falling under S. 69, if interest amounting to at least Rs. 500 is in arrears and unpaid for three months the mortgagee, if he has got the power of sale under the mortgage, can exercise the power without notice to the mortgagor but that is not the point here. The point here is that under the Articles of Association it is expressly provided under Art. 72 that

> the Secretary shall call upon him (the debtor) by notice in writing to pay the principal and interest due and in default of such payment the property shall be liable to be sold by public auction.

This article is certainly a binding provision between the mortgagor in this case who is a share-holder of the fund and the fund itself. The Secretary was bound under that article to call upon the defendant by notice in writing to pay up the principal and interest due and it was only in default of his complying with that demand that the properties could have been sold.

It was suggested that this article was only a sort of direction by the fund to its own Secretary as to how he was to act and that the mortgagor, the 1st defendant could not take advantage of the provision. I do not think that this suggestion is at all correct for it is one of the Articles of Association ; a rule in an Articles of Association can very well be relied upon by a person dealing with the fund knowing that the fund could not act without the provision of the article being complied with and here there is the further reason that the 1st defendant was himself a shareholder. Under these circumstances, it is perfectly clear that the Art. 72 should have been complied with by the Secretary. Now let us see what the result of his non-compliance is. Section 69 says that the power conferred by the mortgage-deed on the mortgagee to sell or concur in selling in default of payment of the mortgage-money is valid in the following cases and in no others. To start with, therefore, it must be established that the power of sale under the mortgage-deed has come into play, in other words that the mortgage-money has become payable, as Chief Justice Macleod has held in *Jerup Teja & Co.* v. *Peerbhoy Adamji* (8). There it was a case where a time was fixed for the mortgage-money to be repaid and as the sale was attempted within that time, the learned Chief Justice held that the money did not become payable and, therefore, the power exercised under S. 69 was improperly exercised. I am of opinion, that as notice should have been given before the power of sale could have been exercised by the fund, the absence of that notice makes it an improper sale.

Our attention was drawn to what is called a notice said to have been sent just before the sale to the address of the 1st defendant through post, but that notice came back undelivered to the fund and the fund knew perfectly well that the notice had not been served. If it did not come back, the fund might have been justified in presuming that it was delivered ; but it was returned. Furthermore the notice itself was not a proper notice calling upon the debtor to pay the principal and interest due as required under Art. 72, it was a printed copy of the notification to the public of the sale that was going to take place of the properties and nothing more. For both these reasons that notice was inadequate to serve the purpose of compliance with Art. 72 of the Articles of Association. It follows, therefore, that according to my view the mortgage-money had not become payable under the mortgage-deed with the result that, though the plaintiffs need not have served any notice for making sub-Cl. (e) of Cl. (2) of S. 69 applicable, they were not in a position to exercise the power of sale bacause of the initial difficulty of making out that there was a default in payment of the mortgage-money.

The question then argued was what effect should be given to this failure to give the necessary notice? On the one hand it was suggested that we should take no notice of it in this case, but that the 1st defendant should be referred to a new suit for damages if he had suffered any damage by the sale having been held in an improper manner without notice to him. On the other hand it was argued for the 1st respondent that, this being a suit for the balance of the mortgage-debt by the setting-off the sale-proceeds of a sale which was illegally held, the mortgagee's suit should be dismissed in toto because it was urged that a mortgagee who is not in a position to deliver over the mortgaged property because he has parted with it in a wrongful manner cannot sue the mortgagor for payment of the mortgage-debt.

So far as the English Law is concerned it is pretty clear from the authorities cited, and which have been referred to by my learned brother, that the law is that the mortgagee who wrongfully disposes of the property, and who is, therefore, unable to restore the mortgaged property when the mortgage-money is paid to him, cannot maintain a suit for the mortgage-debt at all and necessarily, therefore, for any balance of the mortgage-debt. For this the latest authority is the case in *Ellis & Co.'s Trustee* v. *Dixon Johnson* (2). The learned Judges have stated there the law on the point although in the particular case they stretched a point in favour of the mortgagee and made him liable only for damages as the case was one of wrongful sale of shares which could easily be purchased and replaced. In such a case they held that the strict

(8) [1921] 23 Bom. L. R. 1241=64 I. C. 634.

rule applicable to immovable property need not be applied and that the trial Judge was right in estimating the amount of damages arising from the action of the mortgagee and allowing that amount. Here this being a case of immovable property the rule would apply in all its strictness if it were in England. The question then is whether this rule should be applied in this country or not. There is nothing, so far as I can see, in S. 69 of the Transfer of Property Act or any other section of that Act which militates against the application of this rule. Sections 20 and 21 of the English Conveyancing Act of 1861 are very nearly in the same words as S. 69 of our Transfer of Property Act; and certainly the last clause of S. 69 is exactly in the same words. Nevertheless the learned Judges in England have applied that rule as between mortgagor and mortgagee when the latter lost the mortgaged property by some wrongful act of his.

The Lord Chancellor in his judgment affirming the decision in *Ellis & Co.'s Trustee* v. *Dixon Johnson* (2), above cited, lays down the rule in very broad terms as appears from *Ellis & Co.'s Trustee* v. *Dixon Johnson* (6). I must confess that I felt some hesitation in applying this rule here when we have no Indian authority on the point brought to our notice. However that may be, the rule seems to be based upon equity and good conscience and I think we must adopt it here as well. The case cited in the *Madras Deposit and Benefit Society* v. *Passanha* (7) has really no bearing on the present point. That is the only case under S. 69 which has been brought to our notice. There, certain property had been sold under the power granted under the mortgage deed. It appears from the statement made by the learned Judge of the Small Cause Court making the reference that in that case the sale had taken place as a matter of fact after proper notice to the mortgagor. But it was apparently argued in that case that because in the mortgage deed there was a covenant that the property might be sold after 15 days' notice, which was against the provisions of S. 69 of the Transfer of Property Act, the sale should be treated as invalid and the claim for the balance of the mortgage debt should be held to be barred. The learned Judges rightly held, if I may say so with respect, that the provision in the mortgage-deed did not constitute a bar at all. But they certainly did not consider the question as to what was to happen if the sale was an improper sale and if the mortgaged property had been parted with by the mortgagee by a wrongful act of his. That question was not before them at all. I am, therefore, of opinion that the learned Judge's decision that the plaintiff's claim against the 1st defendant also fails is correct in this case.

Before closing I should like to add that the strictures passed by the learned Judge against a well-known member of the Bar, Mr. Sivagnana Mudaliar, are, in my opinion, not justified. The vakil, it is now stated, had obtained the leave of the Civil Justice to become a director of the fund; and the fact that he became legal adviser to the fund does not, in my opinion, amount to anything unprofessional in his conduct. The fee he was getting was a very small one. I must, therefore. agree with my learned brother in holding that the learned trial Judge was not right in passing the strictures he passed on the vakil.

The directors of the fund also have a grievance because it is suggested by the learned Judge that the share-holders may make a claim against them. That is a matter with which we are not concerned at all. So far as I can see the directors have done nothing to justify a claim by the share-holders, but I do not wish to say anything more about it.

I agree that this appeal fails and must be dismissed with costs, three sets.

Appeal dismissed.

A. I. R. 1926 Madras 849

PHILLIPS, J.

M. R. Ry. Manavikrama Zamorin Raja Avl. of Calicut—Plaintiff—Appellant.

v.

P. Venkatagiri Pattar and *others*—Defendants—Respondents.

Second Appeal No. 1520 of 1922, Decided on 29th April 1925, from the decree of the Sub-J., South Malabar, in A. S. No. 9 of 1220.

Limitation Act, Art. 144—Suit to recover land from assignees of Adimayavana right is governed by Art. 144 and not Art. 148.

A suit to recover possession of land from assignees of Adimayavana right on the ground that

the right was not alienable is governed by Art. 144 and the limitation begins when the first period for which the right was created expired. Art. 143 does not apply to such a case. [P. 850, C. 1, 2]

K. Kuttikrishna Menon—for Appellant.

A. Sivarama Menon, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar*—for Respondents.

Judgment.—In this case the appellant-plaintiff demised the suit property to Krishnan Nayar and Kunju Nayar on Adimayavana right on 7th April 1898. In 1900 the lessees assigned their right to the first defendant and the father of the second defendant. The lease contains a provision that on the expiry of every 12 years a renewal fee of Rs. 125 shall be paid by the lessee and further documents exchanged between the parties. Accordingly the assignees brought a suit in 1913, for renewal fee. It was then held that the Adimayavana lease being inalienable the plaintiffs in that suit could not obtain a valid assignment and, therefore, their suit was dismissed. The plaintiff now brings the present suit in 1918, to recover possession of the suit properties from the assignee and their representatives. The facts are all recited in the plaint and the first prayer in the plaint is :

That a decree may be passed directing the defendants to surrender the schedule items to the plaintiff by virtue of the Kaichit of 1073, described in paragraph 2 and on the strength of title as the Adimayavana right has ceased.

Both the lower Courts have found that the plaintiff's suit is barred by limitation, because Art. 143 is applicable. That article provides for a suit in which the plaintiff has become entitled to possession of immovable property by reason of forfeiture or breach of condition. Had this suit been brought by the plaintiff against the lessees, Krishna Nayar and Kunju Nayar, the suit would undoubtedly have come under Art. 143, but as I understand that article it only applies to suits to enforce relief claimable by reason of forfeiture or of breach of condition under a contract and can only apply to suits brought against parties who have incurred that forfeiture or committed the breach. In the present case, the defendants are not parties to the lease-deed and have not themselves incurred any forfeiture, or broken any condition in a contract between them and the plaintiff. It seems to be, therefore, that Art. 143 is clearly inapplicable. In fact, when the plea of limitation was first raised in the defendant's written statement, Art. 144 was relied on and it was stated that Art. 142 is the article which is applicable.

The contention is raised for the respondents that they are taken by surprise by this plea that Art. 143 is not applicable ; but inasmuch as the defendants did not plead this article in bar in the first Court and both in the grounds of appeal to the lower appellate Court and in the grounds of appeal to this Court, the point has been taken that Art. 143 is not applicable ; and inasmuch as it was not in the first place the contention of the defendants that Art. 142 is applicable this plea of being taken by surprise cannot be upheld.

The question then remains whether the plaintiff's suit is barred by Art. 144, in which case the period of 12 years begins when the possession of the defendant becomes adverse to the plaintiff. The defendants got into possession by virtue of their assignment from the original lessees and the lessees were entitled to let anybody into possession during the term of their tenancy which enured for at least 12 years. During that period of 12 years from 1898 the possession of the defendants under the lessees was under the lessees who held under the plaintiff. There can, therefore, be no question of the possession of the defendants being adverse to the plaintiff from the date of their assignment. It could only become adverse after the 12 years' lease had expired and the legal origin of their possession had changed. In that view this suit is within time.

It is then contended that Art. 142 will apply and the plaintiff must prove that he has been dispossessed of the property within 12 years of the suit. During the 12 years subsequent to 1898 the property was in the possession of the defendants with the permission of the plaintiff's tenants and, therefore, it cannot be said that the plaintiff was dispossessed ; for his tenants were entitled to possession and would allow defendants to enter into possession. It is suggested that the defendants, by reason of the assignment in 1900, prescribed for an Adimayavana tenure as against the original lessees and also plaintiff. If that were so their title had become complete before the suit of 1913 was filed.

Inasmuch as that suit was based on the allegation that the defendants were the Adimayavana tenants of the plaintiff, the plea that they had obtained such a right by adverse possession should have been pleaded. Not having taken such a plea in that suit, the defendants are precluded under Expl. 4 to S. 11, Civil P. C., from raising it now.

The plaintiff's suit seems to have been very inefficiently conducted in the lower Courts and a large number of issues have been framed which seem to be quite irrelevant in view of the fact that the plaintiff does not claim by reason of any forfeiture incurred by the defendants. It is, however, argued that there are other points in the case which would be determined and, therefore, I think it is advisable to refer the appeal back to the lower appellate Court for decision on the other point which it considered unnecessary to decide and any other points that legally arise. The view of the case set out here does not seem to have been pleaded definitely in the lower Courts and, therefore, I think that the respondents are entitled to a further hearing.

I may also add that the plaintiff relies on the breach of another condition in the Adimayavana lease; namely that no renewal fee was paid on the expiry of the 12 years' time and consequently he is entitled to recover possession of the property on that ground.

I, therefore, set aside the decree and remand the case to the lower appellate Court for further hearing and for decision in the light of the above remarks on the other point or points which were not determined before. It is suggested for the respondents that additional evidence should be taken, but the respondent's vakil has been unable to point out in what respect evidence can now be admitted which should not have been adduced in the trial Court, as the case was understood there. I leave it to the discretion of the lower appellate Court to decide whether any additional evidence is necessary. Costs of this appeal will abide the result.

Court fee on the Memorandum of Appeal will be refunded to the appellant.

Case remanded.

A. I. R. 1926 Madras 851

SPENCER, J.

Natesa Pathar—Appellant.

v.

Ganapathi Subbu Pathar and *others*—Respondents.

Second Appeal No. 350 of 1924, Decided on 8th October 1925, from the decree of the Sub-J., Kumbakonam, in A. S. No. 54 of 1923.

Civil P. C., S. 100—*Mixed question of law and fact.*

Whether what the purchaser got at the Court sale was the entire family properties or only the father's share in a certain joint Hindu family, is a mixed question of law and fact: 13 *Mad.* 47; 27 *Mad.* 137 (*P. C.*). and 36 *Mad.* 325 (*P.C*), *Foll.*: 17 *Cal.* 584 (*P.C.*), and 22 *Mad.* 110 (*P. C.*); *treated as overruled by later rulings.* [P. 851, C. 2]

C. A. Sehsagiri Sastri—for Appellant.

K. S. Jayarama Aiyar and *S. Nagaraja Aiyar*— for Respondents.

Judgment.—The plaintiffs brought this suit for partition of their 4/5ths shares in the plaint properties which form the ancestral properties of themselves and their father, the 4th defendant. The 1st defendant brought a money suit against the 4th defendant in S. C. S. No. 1165 of 1908 on the file of the Kumbakonam Sub-Court and attached the defendants' properties and purchased them in Court auction subject to a usufructuary mortgage in favour of Swaminatha Pathan upon which Rs. 1,000 were due. The only question for decision in this case is whether the 1st defendant in the sale purchased the interest of the 4th defendant only or that of all his sons also. Both the lower Courts have decided in favour of the former alternative and have given the plaintiffs a decree for partition of their 4/5ths share. Whether what the purchaser got at the Court sale was the entire family properties or only the 4th defendant's share therein is a mixed question of law and fact. It has been so held by this Court in *Gnanammal* v. *Muthusami* (1) and by the Privy Council in *Abdul Aziz Khan* v. *Appayasami Naicker* (2) and in *Avalappa Naicker Murugappa Chettiar* (3). The statement in *Mahabir Pershad* v. *Mokes-*

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(1) [1890] 13 Mad. 47.

(2) [1904] 27 Mad. 131=31 I. A. 1=8 Sar. 568 (P.C.).

(3) [1913] 36 Mad. 325=23 M. L. J. 658=18 I. C. 49=(1913) M. W. N. 86.

war Nath Sahai (4) and in *Abdul Aziz Khan Sahib* v. *Appayasami Naickar* (5) that it is only a question of fact in each case may be disregarded in the light of the later pronouncements. As a Court of Second Appeal I have only to see that the Courts below have rightly applied the law to the facts found by them. A number of cases have been cited in which a similar question had to be decided as to the nature of the interest which passed in a sale of family property. I will not refer to them as Mr. Mayne in his Hindu Law, 9th Edn. p. 433, has summed up the effect of all these decisions. He says :

> The mere fact that the father might have transferred his sons' interest affords no presumption that he has done so, and those who assert that he has done so must make out not only that the words in the conveyance are capable of passing the larger interest, but that they are such words as a purchaser might be reasonably expected to require.

Then in R. 4 he says :

> "The fact that the sons have not been made parties to the proceedings in execution is a material element in considering whether creditor aimed at the larger of was willing to limit himself to the minor remedy.

Both the District Munsif and the Subordinate Judge appear from their judgments to have been quite alive to the effect of the rulings on the subject of the son's liability to discharge debts of their father which are not tainted by illegality or immorality from their shares of the family property. They have considered the frame of the suit, the terms of the decree and the sale certificate as well as the conduct of the parties and the character of the debt. The debt was a personal debt of the father due upon a promissory note as it appears from the judgment, Ex. A, in S. C. S. No. 1165 of 1908. In other proceedings between the parties it was found that the debt was not incurred for immoral purposes : See Ex. VIII A. The District Munsif came to the same conclusion in this suit. There can be no doubt about the creditors' right to proceed against the family property to recover the debt. But in the present case there are the following significant facts : At the trial of the suit the defendants were exonerated as no guardian was appointed to represent them. The decree directed payment of Rs. 110 by the 1st defendant alone. In the petition for transmitting the decree for execution, it was noted that the Defendants 2 to 5 had been exonerated and that no relief was asked against them. In the execution petition this fact was repeated and the prayer was for attachment of the immovable property belonging to and enjoyed by the 1st defendant. In the sale proclamation the interest of the judgment-debtor was described as certain survey numbers inherited and enjoyed by the 1st defendant. The sale certificate also contained a note that the Defendants 2 to 5 had been exonerated and the Subordinate Judge also relied on the fact that the property was bought for Rs. 75 which is much below its value even after allowing for the encumbrance. The price at which the auction-purchaser managed to secure the property is not, in my opinion, so important as the low upset price, viz., Rs. 50, at which the sale commenced. If there is no competition, a successful bidder naturally will not give more than is sufficient to secure the sale being knocked down in his favour. As against this there is nothing but the mere fact that the sale certificate mentions the survey numbers to be sold without stating that only the interest of the 4th defendant was made the subject of the sale. Under these circumstances, I am of opinion that the lower Courts were entitled to come to the conclusion that only the father's share in the suit properties was sold and I cannot say that their findings are wrong. I, therefore, dismiss the second appeal with costs of Respondents 1 to 3.

After the sale had been concluded one of the sons, Doraisami, died. The Subordinate Judge found that his share must go to the plaintiffs and the 4th defendant. Although the 4th defendant was not originally a party to the suit and did not claim 1/20th share on account of the death of his son, I think that the appellate Court had power, under O. 41, R. 33 to make this award in his favour. Appellant will pay the 4th respondent's vakil's fee and vakalat upon this item.

Appeal dismissed.

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(4) [1890] 17 Cal. 564=17 I. A. 10=5 Sar. 489 (P.C.).

(5) [1899] 22 Mad. 110.

A. I. R. 1926 Madras 853

PHILLIPS AND RAMESAM, JJ.

Thanappa Chetty and *others*—Appellants.

v.

Esuf Khan Sahib and *another*—Respondents.

Second Appeal No. 11 of 1922, Decided on 25th August 1925, from the decree of the Dist. J., S. Arcot, in A. S. No. 131 of 1918.

Madras Estates Land Act (1908), *S.* 3 (2)—*Ariya Goundan Jaghir is estate—Tenants therein are entitled to the minor produce of land under cultivation.*

Ramesam, J.—Ariya Goundan Jaghir, situated in the Kalroyan hills is an " estate " within the Act

By Court.—The relationship of landlord and tenant exists between the jaghirdar and the tenants who are entitled to the minor produce of olavakkadu lands and ponalkadu lands during the time they retain that character

[P. 853, C. 1, P. 857 C. 1]

A. V. Visvanatha Sastri—for Appellants.

T. Rangachariar, C. Padamanabha Aiyangar, T. D. Srinivasachariar and *T. Chakravarthi Aiyangar*—for Respondents.

Ramesam, J.—This appeal arises out of a suit for the declaration of the plaintiffs' right to the whole minor produce in the villages of Pudur Jaghir, and for injunction and damages. The Jaghir of Pudur otherwise known as Ariya Goundan Jaghir is one of the five estates situated in the Kalroyan hills. The hills are partly in the Salem District and partly in the South Arcot District. This suit Jaghir also is in the South Arcot District and partly in the Salem District. The 1st defendant is the present Jaghirdar or the proprietor of the estate. The plaintiff was the lessee for six years from the 1st defendant of the minor produce of the Jaghir under a registered lease deed, Ex. A, dated 24th August 1908, which took effect from 10th July 1909 to 9th July 1915. The lease has since been extended under another deed dated 5th December 1918, Ex. B, for 25 years, i. e., from 9th July 1915 to 10th July 1940. Defendants 6 to 63 are the cultivators of the entire lands in the Jaghir. They claim a right to the minor produce and Defendants 6 to 63 have entered into an agreement to sell it exclusively to the 2nd defendant The plaintiff alleges that the action of the defendants amounted to a denial of the plaintiffs' right and caused damages to him and sues for the declaration and the other reliels already mentioned. The 1st defendant Polighar, supports the plaintiff.

The lands in the Jaghir are classified as olavakkadu, i. e., (1) land that is actually cultivated permanently with ploughs, (2) ponalkadu, i. e., lands under shifting cultivation; (3) natham i. e., house sites and backyard, (4) alankadu, i. e., jungle. The suit originally is for a declaration of the plaintiffs' right to the minor produce in all the lands of the Jaghir and the defendants have similarly asserted their right to the minor produce in all the lands including even alankadu. But in the course of the trial before the District Munsif the defendants have given up their right to the lands comprised in the description alankadu.

Before us the plaintiff has given up the right claimed in respect of natham, so that the dispute before us relates only to olavakkadu and ponalkadu lands. Both the District Munsif and the District Judge granted the declaration and injunction prayed for by the plaintiff. As to damages while the District Munsif gave a decree the District Judge reversed it in appeal. In this second appeal the appellants are either Defendants 3 to 63 or their legal representatives.

The revenue of the Polighar is not derived on any system of land assessment. The land which each cultivator cultivates from time to time is not measured and assessed to rent, nor is the value of the produce he raises computed and a share taken by the Polighar. The cultivators pay a plough-tax, an impost of Re. 1-4-0 per plough being collected on the number of ploughs a man uses. They also pay a poll-tax levied on the individuals of the male sex. Married men pay Rs. 2 and bachelors As. 8. Each man cultivates where he likes and as much as he likes reclaiming the land by clearing away the jungle and leaving it for a new plot when the virgin fertility of the soil is exhausted. Land under such shifting cultivation is known as Ponalkadu. Near the village some more lands have

come under permanent cultivation and these are called olavakkadu, the natural development of shifting cultivation.

The first point raised before us by the learned vakil for the appellants is that the suit Jaghir is an estate within the meaning of the Madras Estates Land Act of 1908. The District Munsif held that it is not an estate. On appeal the District Judge thought that it was unnecessary to give any definite finding on this point and he discusses the question of occupancy right on both alternative positions, i. e., whether the Estates Land Act applies or does not apply. An estate is defined in S. 3, Cl. 2 of the Estates Land Act. As the suit Jaghir is not a permanently settled estate or a temporarily settled zamindari or a sub-division of such an estate or zamindari, it does not fall under Cls. (a) and (b). As it is not an unsettled Jaghir, it does not fall under Cl. (c). Therefore, it does not fall also under Cl. (e). The only possible clause under which the suit estate could fall is Cl. (d), Cl. (d). runs thus :

> Any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognized by the British Government, or any separated parts of such village.

Here there is no grant of a single village, but an estate consisting of several villages. The South Arcot Gazetteer says at page 30 that the Ariya Goundan Estate consists of fourteen villages. Assuming that the fact that the grant was of a number of villages and not of a single village does not stand in the way of their satisfying the definition in Cl. (d), we have next to see whether the parts of the clause are satisfied. The learned vakil for the appellants points out that the suit estate is a Jaghir. It has been so described in the Schedule to the Madras Impartible Estates Act, both under the heading of South Arcot and the heading of Salem. He refers to the decision in *Raghojirao Saheb* v. *Lakshmanrao Saheb* (1) where their Lordships of the Privy Council say :

> The lands had been formerly Jaghir. But this term implied no grant of the soil, but a personal grant only of the revenue to the grantee. The Marathi equivalent to the term Jaghir, namely "Saranjam", came in course of time to be applied to the lands.

He also refers to Baden Powell and Logan's Salem Manual (II). The suit estate was enfranchised in 1866 : see Exs. C and D. Ex. D is headed account relating to the villages which have been assigned and are being enjoyed by Polighar, Ramappa Ariya Goundan. Col. 3 referred to the 14 villages which are enjoyed in the hilly tracts. In Col. 12, we have got "There are no documents of title."

There is a footnote as follows :

> As the said 14 villages are situate on the hills they have never been surveyed and no tirva has been fixed.

Ex. C is the inam register and there is a footnote in it similar to that in Ex. D. Col. 3 is headed :

> The annual income derived from the 14 villages in the hilly tracts of Kallakurichi Taluk.

In Col. I the plough-tax and the poll-tax are mentioned. In Col. 22 the entry is :

> In the absence of any accounts showing the area of the villages and their assessment, the only course is to adopt the revenue raised by the Polighar as the assessment on the villages.

These documents, Exs. C and D, do not refer to the suit estate as a Jaghir, nor is there any trace in them of the fact that only the revenue of the hills was granted as inam to the original grantee. As the District Judge observes much reliance cannot be placed on a name especially where the earlier history of the Jaghir is involved in considerable obscurity. The District Munsif thought that the original grantee was a bandit or a robber chief, but as already observed we have no information as to the origin of the estate except that Ariya Goundan held no kavali under the Government, but he paid a small nazzar or peishkush of Rs. 37-5-2, which was probably imposed in consequence of his holding no office. On these facts I am unable to distinguish this case from the case in *Suryanarayana* v. *Potanna* (2) and the entries in Exs. C and D of this case from Oaks's Inam Register of that case : (see at page 1020). If so, all the villages must be regarded as granted to the original grantee and Cl. (d) becomes inapplicable. But assuming for a moment that the grant was of the revenue and not of the villages,

(1) [1912] 36 Bom. 639=39 I. A. 202=16 I. C. 239 (P. C.).

(2) [1918] 41 Mad. 1012=48 I. C. 689=45 I. A. 209 (P. C.).

the next question is whether the grant was to a person " not owning the kudivaram thereof." The burden of proving this is upon those who contend that the Estates Land Act is applicable: vide, *Naina Pillai Marakayar* v. *Ramanathan Chettiar* (3). There is no evidence in the case, nor can there be having regard to the history of the estate and the only information we have about the suit estate. In these circumstances it is difficult to hold that it has been proved that the suit estate is an estate to which the Estates Land Act applies.

The learned District Judge considered the question whether the defendants paid any rent to the Jaghirdar and whether the relationship of landlord and tenant existed between the Jaghirdar and the cultivating defendants; and he found that so far as olavakkadu lands were concerned there can be no occupancy right in them. As to the ponalkadu lands in connexion with this point the defendants relied on two former judgments of this Court, Exs. XVI and XVIII. Ex. XVIII was the only judgment considered by the District Judge. The District Judge after quoting the judgment of the High Court says:

> The actual circumstances of those suits are not disclosed. * * * In any case the ruling has no application here, where the poll tax is not the equivalent of rent.

Exhibit XVIII was a judgment in a batch of second appeals which arose in Salem District, where a number of suits were filed for enforcing acceptance of pattas, the plaintiff being a mortgagee from Annamalai Goundan, the owner of Chinna Kalrayan Nad which is also one of the estates mentioned in the Schedule to the Madras Impartible Estates Act under the heading of Salem. On a perusal of the South Arcot Gazetteer, p. 3, we find that the nature of the Jaghir in South Arcot or Salem is practically the same. It is observed that:

> A great part of the Kalrayans is indeed situated within the Salem District and the boundary line between the latter and South Arcot passes along the top of them.

Then the author gives the tradition of the five brothers dividing the hills among themselves: Then he observes:

> The south and south-western parts which happen to be the highest of the whole, were taken by Periya Kalvi Rayan and so were called after him the Periya Rayan or Periya Kalrayan Hills, the lower slopes to the west in Salem, which chance to be the least elevated part, similarly became the Chinna Kalrayan Hills. * * * Ariya Goundan becoming the name father of the northern part of the range.

Thus there is no doubt that the Chinna Kalrayan Hills and the suit Jaghir were similar in tenure, and Ex. XVIII, which related to the former, shows that the High Court regarded the relationship between the cultivators and the Jaghirdars as one of the tenants and landlord. It is true that Ex. XVIII was passed in second appeal by a single Judge of this Court under O. 41, R. 1, Civil Procedure Code. Benson, J., observes:

> I think the District Judge is right. The payments are evidently made as rent for the occupation of land calculated at so much per head, instead of so much per acre, which is the ordinary way in most cases. The second appeal is dismissed.

That this is the true view of the revenue derived by the Jaghirdar is also seen from the inam account, Ex. D, and and Register, Ex. C, already referred to. In Col. 3 of Ex. D. we have:

> The tirva which is collected in respect of the punja land-beriz for 53 ploughs at Re. 1-4-0 per plough is Rs. 66-4-0.

Then the poll-tax is referred to per head and both the items are totalled as Rs. 209-4-0, and referred to as the revenue though the revenue is described as the poll-tax, and it must be regarded as rent, this method of assessment being found convenient by the cultivators and the Jaghirdar. Ex. XVI was not referred to by the District Judge but was referred to by the District Munsif. It is the judgment in Second Appeals Nos. 2033 of 1919 and 260 and 261 of 1911. The suit was by the assignee of the Polighar for the enforcement of patta with certain restrictions relating to the cutting of trees and related also to the Chinna Kalrayan Hills. This judgment also lends support to the same conclusion as Ex. XVIII. In the face of Exs. XVI and XVIII it is difficult to say that there is no relationship of landlord and tenant between the Polighar and the defendants, and the District Judge is wrong in saying that

> the ruling has no application here where the poll-tax is not the equivalent of rent.

He has started with the assumption that the poll-tax is not the equivalent of rent, and having said this, was of opinion that Ex. XVIII has no application to the present case; but Ex. XVIII shows that the poll-tax should be regarded as the equivalent of rent. Thus his

(3) A. I. R. 1924 P. C. 65=47 Mad. 337.

judgment is vitiated by his misconstruction of Ex. XVIII.

We, therefore, start with the footing that the defendants are the tenants of the Jaghirdar and we have to consider the question of right to the minor produce from this footing. The lower Court found on a discussion of the oral and documentary evidence that the Poligar is entitled to all the minor produce in the Palayam. In the form in which the Courts below discussed the question, no doubt, it is a question of fact ; and if we are not satisfied with the findings of the lower appellate Court, we can only call for fresh findings. But as I have already pointed out the findings are vitiated by the conclusion of the Courts below that there is no relationship of landlord and tenant between the Poligar and the cultivators. I have come to the conclusion that there is such a relationship and starting from the footing, if there is any question of fact to be found, we have to call for a finding. But it seems to me that what remains is a pure question of law. Prima facie a tenant, whatever his status as a tenant may be, i. e., whether he is an occupancy tenant or a tenant from year to year or a tenant at will, is entitled to the produce of the land, included in the tenancy so long as the tenancy subsists. This is too elementary to need discussion. It is difficult to conceive what a tenancy is for, if the tenant is not to be entitled to the produce of the land. We are not concerned here with the right to cut trees, as to which the question may be a little more difficult. The suit before us relates only to the minor produce, viz.:

Myrabolams	Konnai bark
Muradu	Honey
Pungan seed	Honey wax
Nux vomica	Sombai bark
Takarai seed	Kapailipodi
Seeran seed	Surul bark
Poochan seed	

In the case of such produce which can be gathered from land, prima facie the tenant is entitled to it. Is there any reason why in this particular case the cultivating tenants are not entitled to it? If any question of usage or custom can arise in this case, it is the plaintiff who claims to be the lessee from the Poligar that has to show such usage or custom by which he and not the cultivating tenants are entitled to the minor produce of the land actually under the tenant. The District Munsif found that under the custom prevailing in the Jaghir the 1st defendant is entitled to the minor hill produce. The District Judge also gave a similar finding. The fact, that before cultivating the Ponalkadu land formal permission of the Jaghirdar is taken proves nothing, nor is there any question of acquiring prescriptive rights. Both the District Munsif and the District Judge rely on certain leases of certain minor produce. The District Munsif relied upon Exs. P and S which are dated 1866 and 1872 for the purpose of making out a usage extending over a considerable period of time. But these documents, Exs P and S, are so perfectly general that it is impossible to infer any right to minor produce from them. Ex. P is a lease for cutting teakwood, spokes for wheels and for selling vengai and other trees produced within certain boundaries. It makes no reference to the minor produce at all. Similarly Ex. S refers to all kinds of trees inclusive of those of galnut, surul, save those of jack fruit and tamarind as grown on "Pendukarainadu." Here again there is no specific reference to the minor produce. It is very difficult to see how these documents militate against the tenants' right to the minor produce. If these two are excluded, the documents relating to minor produce begin from Ex. Y dated 1890. But it is impossible to make out from the documents beginning from 1890 and ending with 1904 that any ancient. valid and binding usage is proved. We have got only four documents, Exs. Y, Y-1, M and N. Even these documents are general as to the area of land covered by them. For instance Ex. Y refers to the produce in certain villages in Irugarainadu of Jagirmalai in Pudumalai Ilaka. Particulars of villages are given ; about 21 villages are enumerated. But it is possible that the minor produce covered by the lease related only to Alankadu i.e., the hills and the jungle outside the cultivated land (Olavakkadu and Ponalkadu). Alankadu is so much more in extent than the cultivated land that it is scarcely worthwhile to specially mention Olavakkadu and Ponalkadu for the purpose of exclusion. At any rate a document like this does not bind the cultivating tenant, nor can it prove who took the produce of the lands under an individual tenant. Similar remarks

apply to Y-1, M and N. The oral evidence is useless as it was adduced to prove enjoyment in accordance with the documents. I have, therefore, come to the conclusion that it is impossible to find in the evidence any usage by which the ordinary presumption of law entitling the tenant to enjoy the produce of his own land was displaced and the Polighar 1st defendant became entitled to collect all the minor produce even in lands under the tenants. Of course, when I say that the tenants are actually entitled to minor produce on Ponalkadu, I refer to land which was actually under the cultivation of a tenant and, therefore, which has not been abandoned. The moment a Ponalkadu land is abandoned, it is absorbed into the general Alankadu.

For all the above reasons, the plaintiff is not entitled to the declaration of his rights to the minor produce of Olavakkadu lands and Ponalkadu lands during the time they retain that character. The plaintiff has given up his right to Natam. He is entitled only to a declaration in respect of the produce of Alankadu.

The decree in favour of the plaintiff will, therefore, be modified accordingly. The plaintiff will bear the costs of the appellants here and in the lower appellate Court. In the first Court each party will bear their own costs as they put forward extravagant claims which they afterwards had to modify.

Phillips, J.—I agree with the order proposed by my learned brother, but I prefer to reserve my opinion on the question whether the suit Jaghir is or is not an estate within the meaning of the Estates Land Act, as its determination is not necessary for the decision of this appeal which is based on the ordinary law of landlord and tenant.

Decree modified.

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* A. I. R. 1926 Madras 857

PHILLIPS AND MADHAVAN NAIR, JJ.

Sornam Pillai—Appellant.

v.

Thiruvazhiperumal Pillai and *others*—Respondents.

Miscellaneous Second Appeal No. 80 of 1924, Decided on 26th February 1926, from the order of the Sub-J., Tuticorin, D/- 10th May 1924, in A. S. No. 55 of 1923.

* (a) *Civil. P. C., S. 47—Proceedings between representative of decree-holder purchaser at auction sale and judgment-debtor are covered by S. 47.*

The proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree; and no distinction can be drawn in principle between such a case and one where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and a judgment-debtor: 28 *Mad.* 87 *held not overruled by* 43 *Mad.* 107 *and Foll.* [P. 858, C. 1]

(b) *Limitation Act, Art.* 180—*Application to set aside sale dismissed—Suit to set aside sale filed —Time during which the suit is pending cannot be deducted.*

In computing period of limitation under Art. 180 time during which an application under O. 21, R. 90, for setting aside the sale is pending will be deducted as the sale will be deemed to be absolute when such application is rejected, but the time during which a suit to set aside the sale, on rejection of an appiication under O. 21, R. 90, is pending cannot be deducted. There is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside a Court sale. [P. 859, C. 1]

V. Narayanam—for Appellant.

P. N. Marthandam Pillai—for Respondent.

Judgment.—This Civil Miscellaneous Second Appeal arises out of an application in execution filed by the 1st respondent for delivery of the properties sold to him by the decree-holder who had herself purchased the properties in execution of a mortgage-decree in O. S. No. 507 of 1911 on the file of the District Munsif's Court of Srivaikuntam. The Court sale was held on the 12th of September 1919, and was confirmed on the 15th of October 1919. The first respondent who held a mortgage over the suit properties was not a party to O. S. No. 507 of 1911. Having obtained a decree on his mortgage in a suit in which the prior mortgtgee-decree-holder was not impleaded as a party, he filed an application under O. 21, R. 90 of the Civil P. C. to set aside the Court sale on the 16th of October 1919. That application was dismissed on the same date. A day after the aforesaid Court-sale and two days before the said application, the 1st respondent instituted O. S. No. 494 of 1919 on the file of the District Munsif's Court of Srivaikuntam praying for the setting aside of the Court-sale in O. S. No. 507 of 1911, after declaring that the decree in that suit was not binding upon him. The said suit was eventually dismissed on the 27th of November 1922. In the mean-

time he purchased the suit properties from the decree-holder in O. S. No. 507 of 1911 and presented the application which has given rise to this appeal, on the 24th of January 1923, for delivery of the properties to him.

The appellant is one of the sons of the mortgagor. He contended that the execution application was barred by limitation under Art. 180 of the Limitation Act. Accepting that contention the 1st Court held that, since the application, dated the 24th of January 1923, was not made within three years of the date when the Court-sale had become absolute on the 15th of October 1919, as required by the article, it was time-barred, and dismissed it. On appeal by the 1st respondent the learned Subordinate Judge set aside that decision holding that the 1st respondent was entitled in computing the period of limitation under Art. 180, to deduct in his favour the period during which O. S. No. 494 of 1919 (renumbered as O. S. No. 118) was pending on the file of the Additional District Munsif's Court at Tinnevelly, as the cause of action for delivery of properties was suspended during that period, i. e., from the 13th of October 1919, to the 27th of November 1922.

It is urged before us that the Subordinote Judge's decision should be set aside because: (*a*) no appeal lay to the lower Court under S. 47 of the Code of Civil Procedure; and (*b*) under Art. 180 of the Limitation Act the respondent is not entitled to deduct in his favour the period from the 13th of October 1919, to the 22nd of November 1922.

As regards the first point, the argument advanced is that: (a) the right of the respondent to recover possession of the land is not a question relating to the execution, discharge and satisfaction of a decree; and (b) if it is, that the question does not arise between the parties to the suit or their representatives. In *Sandu Taraganar* v. *Hussain Sahib* (1), following the previous decisions of this Court, it was held that the proceedings between a decree-holder who has purchased at Court auction and the judgment-debtor are proceedings relating to the execution, discharge and satisfaction of the decree, and no distinction can be drawn in principle between such a case and one like the present where the proceedings are between a party who derives title from a decree-holder who has purchased at Court auction and a judgment-debtor. It was also held in that case that the purchaser from the decree-holder who has purchased at Court auction is a representative of the decree-holder within the meaning of S. 47 of the Civil P. C. If that decision lays down the law correctly, then it must be held that under S. 47 of the Civil P. C. an appeal lay to the lower Court in this case, but it is argued that in view of the Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan* (2) the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1) should no longer be followed. This argument cannot be accepted. In discussing the "representative character" of the various kinds of purchasers at a Court sale referred to in the three questions submitted to the Full Bench, the learned Judges, Abdur Rahim and Oldfield, proceeded on the assumption that the question that arose in that case related to execution, discharge and satisfaction of a decree within the meaning of S. 47 (see pp. 116 and 128) and nothing contrary to that assumption appears in the judgment of Seshagiri Aiyar, J. The 1st question decided in *Sandu Taraganar* v. *Hussain Sahib* (1) was thus left untouched in the Full Bench decision. As regards the second question it was no doubt raised in the second point referred to the Full Bench, but we are not able to say from the discussion of it in the judgment that the decision in *Sandu Taraganar* v. *Hussain Sahib* (1) on this point has been overruled by the Full Bench, though it is fairly clear that the opinions of Oldfield and Seshagiri Aiyar, JJ., lend some support to the appellant's argument. The decision in *Jainulabdin* v. *Krishna Chettiar* (3) following the Full Bench does not help to make the point clearer and does not refer to the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1). In this state of authorities, we feel bound to follow the rule of procedure laid down in the decision in *Sandhu Taraganar* v. *Hussain Sahib* (1) and hold that an appeal lay to the lower Court against the District Munsif's order under S. 47 of the Civil Procedure Code.

(1) [1905] 28 Mad. 87=14 M. L. J. 474.

(2) [1920] 43 Mad. 107=38 M. L. J. 32=54 I. C. 209=(1919) M. W. N. 881 (F. B.).

(3) [1921] 41 M. L. J. 120=14 L. W. 92=63 I C. 200=(1921) M. W. N. 491.

The second argument relates to the question of limitation under Art. 180 of the Limitation Act. That article prescribes "three years" from the time "when the sale becomes absolute" as the period of limitation for a purchaser of immovable property at a sale in execution of a decree to apply for delivery of possession. In this case, the application filed by the 1st respondent under O. 21, R. 90 to set aside the auction-sale having been dismissed the sale became absolute on the 15th of October 1919 and, therefore, the application for delivery dated 24th of January 1923, is barred under Art. 180. But it is urged on the strength of the decision in *Muthu Korakkai Chetty* v. *Madar Ammal* (4) that the appellant is entitled to deduct in his favour the period during which O. S. No. 494 of 1919 was pending in the Court in which case, his application would be within time. In our opinion, the principle of that decision is inapplicable to the present case. In *Muthu Korakkai Chetty* v. *Madar Ammal* (4) the period allowed to be deducted in favour of the execution-purchaser applying for execution was the time during which the application under O. 21, R. 90, to set aside the Court sale, was pending in the Court and it was held that the sale did not become absolute within the meaning of Art. 180 until the application to set aside the sale had been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made.

In the case before us, as already pointed out, the application allowed by the code to set aside the sale was made by the 1st respondent and dismissed on the 15th of October 1919, and the sale had, therefore, become absolute on that date under R. 92 of the Code and within the meaning of the third column of Art. 180 of the Limitation Act. There is no provision of law for excluding in favour of the auction-purchaser the period of the pendency of a suit filed by the judgment-debtor to set aside a Court sale which is what is claimed in this case on behalf of the 1st respondent. Time having begun to run against him from the 15th of October 1919, the application for delivery of possession filed on the 24th of January 1923 is time-barred and must be dismissed. The order of the learned Subordinate Judge is set aside and that of the District Munsif is restored with costs here and in the Court below.

Appeal allowed.

(4) [1920] 43 Mad. 185=54 I. C. 66=38 M. L. J. 1 (F. B.).

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* A. I. R. 1926 Madras 859

RAMESAM, J.

K. Raghava Ayyar—Appellant.

v.

C. Ramasami Ayyar—Respondent.

Second Appeal No. 438 of 1923, Decided on 11th March 1926, from the decree of the Dist. J., Madura, in A. S. No. 306 of 1921.

* *Civil P. C., O. 17, R. 3—Court ought not to be too technical in the matter of adjournments.*

The Courts ought not to be too technical in the matter of adjournments and should not refuse to adjourn for a solitary failure to produce witnesses : *A. I. R.* 1923 *Mad.* 63 *Ref.* [P. 860, C. 2]

K. S. Ramabhadra Iyer—for Appellant.

R. Ganapathi Iyer for *K. Rajah Iyer*—for Respondent.

Judgment.—This Second Appeal arises out of a suit to recover some land with profits.

The suit was filed in 1920, written statement was filed and issues were framed in October 1920. A commissioner was appointed to take a plan of the disputed locality. The commission was returned in March 1921. The suit was adjourned to 9th June. On account of the Judge's absence on casual leave it was adjourned to July. As plaintiff's witnesses did not come on that day it was adjourned to 5th August. It was then adjourned to 6th August on account of other works of the Court. On the 6th of August it was reached at 5 p. m. and as other work of the Court was not finished it was adjourned to 1st September. On 1st September it was adjourned to the 8th of September at the request of the plaintiff's vakil, It was then adjourned to 8th October on account of part-heard suits. On the evening of the 7th October a representation seems to have been made by the defendant's vakil saying that he could not go on with the case and an adjournment seems to have been resolved upon. On the

8th it was actually adjourned to the 11th. On the 11th the plaintiff's wit nesses were not present and he filed a petition for adjournment. This petition was rejected and the suit dismissed. In his order on this petition the District Munsif states : "It appears to me that he had not any witnesses even that day (i. e., 8th October.)" This inference he makes from the fact that the plaintiff did not produce his witnesses for being bound over by giving muchilikas undertaking to be present on the 11th. But if there is one thing clear in this case it is this namely, that 7 witnesses were actually present on the 8th of October. Whether the plaintiff's conduct in the case may be said to be negligent or not, this one fact cannot be gainsaid, because not only he stated in his affidavit for the adjournment petition and in his affidavit with the review petition I. A. 910-21, in his affidavits filed before the High Court dated the 15th of March 1923 and also in the vakil's affidavit dated July 1923, but it has never been contradicted by the opposite side up to this date : on the other hand it has been practically conceded in the affidavits of the defendant.

Now, as to the statement of the District Munsif that on the 8th he called upon the plaintiff to produce his witnesses but that the plaintiff did not produce them for executing muchilikas, the plaintiff denies this in his affidavit. But it is rather difficult on the plaintiff's denial only to come to the conclusion that the Munsif's statement is incorrect. The question, therefore, resolves itself into this. We have got here a suit for immovable property. From October 1920 up to October 1921 the plaintiff seems to have conducted the case with average diligence ; I do not want to put the case higher than this. It is true one adjournment was due to his witnesses not coming but several adjournments were due to the Court being not ready on account of its other work. Now the plaintiff states in paragraph 2 of his affidavit of 11th October that his witnesses were all farmers and that his vakil represented that "the posting may be made to a longer date so that the witnesses who were all farmers and just busy with manuring etc., may not feel difficulty." In paragraph 4 of that affidavit he states that his witnesses went away saying that rain was threatening and told him that if the case is to be posted it may not be posted for at least 25 days. Now that I have come to the conclusion that the witnesses were really present and it is not a case where there were no witnesses as the Munsif thought. There is no reason to disbelieve these other statements of the plaintiff especially as the vakil states in paragraph 4 of his affidavit that the plaintiff entertained the belief that the adjournment of 11th October would be granted especially as the previous adjournment was granted at the instance of the defendant's vakil. It is clear that all these witnesses were not witnesses who were at the beck and call of the plaintiff. They had to be summoned for the July hearing and batta was paid and he says he has to resummon the witnesses. It may be, he thought on the 8th, that to call them for executing muchilikas to be bound over for attendance on the 11th would be inconveniencing them and disobliging them and that they insisted on a longer adjournment than the 11th. If the witnesses told him that they will not come on the 11th there would be no use in getting muchilikas from them. The plaintiff is a Government servant aud there is some difficulty in obtaining leave to attend to business in Court.

It is clear from the history of the case up to now that this cannot be said to be a frivolous case. It is a case in which at least the plaintiff believes he has got something to prove before a Court of law and seek justice and I do not think the opportunity to adduce evidence ought to be refused on account of the solitary failure to produce witnesses for executing muchilikas on the 8th, accepting this statement of the District Munsif. It seems to me that this is not such a kind of misconduct as to deserve a refusal of a trial of his case. There is no question in the case of defendant being put to such a change of situation as to make it necessary to refuse the opportunity to the plaintiff. (See *Arunachala Iyer* v. *Subbaramiah* (1). In matters of this kind I think the Courts ought not to be too technical as if one is anxious to find excuse for cutting the work of Courts especially as there has been very little negligence on the part of

(1) A. I. R. 1923 Mad. 63.

the plaintiff up to 11th October or practically none. I, therefore, set aside the order of the Court below and remand the case for fresh trial to be disposed of according to law. Costs of the first two Courts to abide the result. But as might be said that the affidavits which have been filed in the Second Appeal might have been filed in the lower appellate Court, I would ask the appellant to pay the costs of the Second Appeal to the respondent. I do not mean by this that the matter in the affidavits in the Second Appeal is absolutely necessary for giving the relief which the plaintiff seeks. In my opinion it might well be given on the materials before the first Court.

Appeal allowed.

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* A. I. R. 1926 Madras 861

DEVADOSS, J.

Mahammad S. Chamnad—Appellant.

v.

Jainabi and *others*—Respondents.

Second Appeal No. 514 of 1923, Decided on 22nd October 1925, from the decree of the Sub-J., South Kanara, in A. S. No. 133 of 1921.

(a) *Deed—Construction—Document executed by Mohammedan—Mahomedan Law should be applied.*

Mohamedan Law has to be taken into account in construing documents executed by Muhammadans.

In the case of Muhammadans, unless there is an explicit statement to the contrary, the words "brother" and "sister" would include both half brothers and half sisters. [P. 861, C. 2. P. 862 C 1]

*(b) *Mahomedan Law—Wakf—Hereditary right of management does not exist with regard to trust property unless provided for.*

There is no such thing as hereditary right of management with regard to trust property. No doubt it is quite open to the author of the trust who creates a wakf, to provide for the devolution of the management in his line. But when he does not make such a provision, Court cannot apply the ordinary notion derived from the Hindu Law which favours hereditary rights even in the case of a wakf: 43 *Cal* 467 and 13 *Bom.* 555, *Rel. on.* [P. 862, C. 1]

(c) *Religious endowment—Alienation by trustee.*

An alienation by a trustee would not bind the trust. [P. 862, C. 2]

C. V. Anantakrishan Aiyar and *B. Pocker*—for Appellant.

B. Sitarama Rao and *K. P. Sarvothama Rao*—for Respondents.

Judgment.—The first point urged in this appeal is that the District Munsif should have granted an adjournment to enable the 4th defendant to give evidence in the case. No written application was made for an adjournment to the District Munsif, but an oral application is said to have been made by the 4th defendant's vakil on the ground that the 4th defendant was away in Delhi. The District Munsif refused to grant the adjournment and in appeal, this point, it is urged, was pressed before the Subordinate Judge. The Subordinate Judge has not adverted to it in his judgment. Though he sent down an issue to be tried by the District Munsif, he did not allow the 4th defendant to be examined with regard to some of the points in the case. I am not quite satisfied that the 4th defendant had sufficient excuse for not appearing before the District Munsif on the day the case was taken up for trial; and further I think his evidence will not be of much use in deciding the meaning of the word 'wakf' in construing Exs. A and B. The main points in the case relate to the construction of the wakf deeds, Exs. A and B. I do not think, therefore, non-examination of the 4th defendant has in any way prejudiced him. His clerk or kariastan could have given evidence as regards the income of the property and the amount spent by him for maintaining the charity. There is no reason why his kariasthan should not have gone into the box and should not have produced the accounts kept by him. I, therefore, consider that there is nothing in this point.

The next point urged by Mr. Anantakrishna Aiyar for the appellant is that under Ex. A only male heirs are entitled to be Nazars or managers of the wakfs. Reliance is placed upon the word "moktessan," masculine singular, for the purpose of making out that only the male heirs are entitled to manage the charity. But the portion of the document relating to the devolution of management is as follows:

In this manner if my heirs, after my lifetime, regularly make payments as detailed above they should conduct the management of the property.

I think the word "heirs" should be understood in the ordinary acceptance of the term. It cannot be said to mean heirs of heirs, but only heirs. In this connexion, the principle of Mahomedan Law has to be taken into account in construing

documents executed by Muhammadans. There is no such thing as hereditary right of management with regard to trust property. In the case of wakf, the management would depend upon the terms of the document. It is quite open to the author of the trust who creates a wakf to provide for the devolution of the management in his line. But when he does not make such a provision, we cannot apply the ordinary notion derived from the Hindu Law which favours hereditary rights even in the case of trustees, to the case of a wakf. In this connexion I may refer *Atimannessa Bibi* v. *Abdul Sobhan* (1) and *Sayad Abdula Edrus* v. *Sayad Zain Sayad Hasan Edrus* (2) where it was held that the principle of hereditary succession does not apply to the management of wakf property. So far as Ex. A is concerned, I am satisfied that the construction put upon it by the lower Courts is correct.

As regards Ex. B, the contention for the appellant is that the full brothers and sisters of Mammade, the elder son of the author of the trust, are alone entitled to manage the property. The expression used here is

> after him, his younger sisters and brothers in order of succession according to seniority.

This sentence is to be read along with what precedes it. The author of the trust directed that Mammade, his eldest son, should manage all the family properties till partition as well as wakf properties. That being so, it cannot be said that he had the intention to exclude the half brothers and sisters of Mammade. The Kanarese words are "tangigalu and Tama." Some stress is placed upon these two words as meaning full sisters and brothers. But as observed by the Subordinate Judge, these are generic terms for younger sisters and younger brothers. In the case of Muhammadans, unless there is an explicit statement to the contrary, the words, "brother' and "sister" would include both half brothers and half sisters. I, therefore, disallow this contention of the appellant.

The next contention is that the lower Court was wrong in decreeing mesne profits against the 4th defendant. 4th defendant has to thank himself for not putting the Court in possession of materials for arriving at the actual income from the property. The Court was obliged to send out a commissioner for the purpose of assessing the income from the property. The income was assessed by the commissioner at Rs. 695-14-0 per annum. I do not think that it would be right to allow this question to be re-opened as the 4th defendant is to blame for this. But I think that the 4th defendant is entitled to be given credit to for any sums which he spent for the upkeep of the trust and in giving credit for such amount as he spent, regard should be had to the terms of Exs. A and B, wherein the author of the trust has mentioned specifically what amounts should be spent for charities. The District Munsif will take an account of the expenses incurred by the 4th defendant on behalf of the trusts of which he was in charge from the date of the plaint till the date of delivery of the property to the plaintiff. He will be given credit for such amount as he spent, and the balance, if any, should be paid to the plaintiff.

The last point argued is as regards mulgeni tenure given by Mammade in favour of Respondents 5 to 7. The law is quite clear on this point. No trustee is entitled to alienate the trust property, and the plaintiff not having acquiesced in such alienation, he is entitled to get back the property free from mulgeni tenure. The plaintiff obtained a release deed from the 1st defendant who is the younger son of the author of the trust and it is not suggested by anybody that the plaintiff has acquiesced in the tenants being in possession of the property as mulgeni tenants were entitled to permanent possession by reason of their being in possession for 12 years. It is unnecessary to refer to any case on the point; for this Court had held consistently following *Vaidya Varuthi* v. *Baluswami Ayyar* (3) that an alienation by a trustee would not bind the trust. The tenants have made some improvements and they are entitled to be paid for the improvements effected. Mr. Ananthakrishna Aiyar does not contest their right to be paid for the improvements effected. I direct the District Munsif to value the improvements. The plaintiff is now in possession as landlord and he will be entitled to be put in possession of the property on his paying the

(1) [1916] 43 Cal. 467=20 C. W. N. 113=32 I. C. 21=22 C.L.J. 577.

(2) [1889] 13 Bom. 555.

(3) A.I.R. 1922 P.C. 123.

value of improvements which will be ascertained by the District Munsif.

With this modification I dismiss the appeal, but in the circumstances each party will bear his own costs. The order directing the 4th defendant to pay the costs of tenants (Respondents 5 to 7) is set aside. The District Munsif will pass a final decree.

Decree modified.

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* A. I. R. 1926 Madras 863

JACKSON, J.

Palikanji Chettiar—Defendant—Petitioner.

v.

Krishna Aiyar—Plaintiff—Respondent.

Civil Revision Petition No. 748 of 1923, Decided on 21st September 1925, against the order of the Dist. Munsif, Periyakulam, D/- 3rd February 1923.

* (a) *Civil P. C., O. 23, R. 1 (2) (b)—Leave to withdraw with liberty to bring fresh suit can be given only when the defect is of form and not of substance.*

In the matter of allowing plaintiff to withdraw from the suit with liberty to bring a fresh suit the Court has a limited jurisdiction. It is not unconditionally empowered to permit a plaintiff to withdraw his plaint under O. 23, R. 1. If the plaint is defective the only sort of defect which attracts this rule is a formal defect and the other sufficient grounds in R. 1 (2) (b) do not include defects of substance. [P 863 C 2]

* (b) *Civil P. C., S. 115—Civil P. C., O. 23, R. 1—Order allowing suit to be withdrawn for defect in substance is revisable.*

In allowing plaintiff to withdraw his plaint by reason of a defect, not in form but in substance, the Judge exercises a jurisdiction not vested in him by law. The fact that injustice is about to fructify inasmuch as the second suit has progressed is no argument in its favour. [P 864 C 1]

K. Rajah Aiyar—for Petitioner.

Watrap S. Subrahmanya Aiyar—for Respondent.

Judgment.—The petitioner seeks to revise the order of the District Munsif of Periyakulam in I. A. No. 273 of 1923 in O. S. No. 1395 of 1920.

The plaintiff sued in 1920 to set aside a sale effected by his guardian in 1895 four years before he reached his majority in 1899. In paragraph 8 of his plaint he has stated that his guardian informed him that she sold the property because she was deceived by plaintiff's elder brother. In paragraph 7 it is alleged that the sale deed contains fraudulent conditions. There is no other mention of fraud. In his written statement the defendant contended that plaintiff having failed to file a suit within 3 years of his attaining majority is barred by limitation (paragraph 11). Issues were framed, the second issue being: "Is the suit in time in so far as it seeks to avoid the sale?" One witness was examined and then plaintiff applied under O. 23, R. 1 Civil, P. C. to withdraw his suit with leave to institute a fresh suit. His difficulty was that he was bound to fail on the second issue. The District Munsif allowed the application because "to refuse him the liberty he asks for would be virtually to decide the question of fraud against him without an actual trial, and would work out manifest injustice." As the Munsiff observes in his opening sentence there is no allegation of fraud to bring the case under S. 18 of the Limitation Act and there is no such question of fraud in the case to be decided for or against the plaintiff. It cannot be said to be manifestly unjust to decide that no fraud has been proved as required by S. 18 when no such fraud has ever been alleged.

What really happened is that after the defendant had succeeded in showing that certain facts were lacking which were essential to the plaintiff's cause of action, the plaintiff said that if he was allowed to re-draft his plaint he would add those essential facts; and the Munsif thought it just to allow him to try a second plaint after the plaintiff had manifestly failed. It did not occur to the Munsif how very unjust it would be to the defendant, to allow the plaintiff to take up new ground on matters of fact in this fashion as soon as his original ground was proved untenable. The order has no merits and the only remaining question is whether this Court ought to interfere under S. 115 of the Code of Civil Procedure. In these matters the Court of trial has a limited jurisdiction. It is not unconditionally empowered to permit a plaintiff to withdraw his plaint under O. 22, R. 1, Civil P. C. If the plaint is defective the only sort of defect which attracts this rule is a formal defect. The other sufficient grounds in R. 1 (2) (b) do not include defects of substance, otherwise there would be no object in inserting the earlier clause. The statute could not run: (a) by reason of some defect in form

(b) by reason of some defect in substance; and if that were the intention it would simply enact by reason of any defect, and if an illustration were required explaining why defects are limited to formal defects, a better case could hardly be found than that now in question. It would be intolerable if, as soon as defendant had established that on the facts pleaded the plaintiff must fail, the plaintiff were at liberty to take back his plaint and supply additional facts. A law suit would then be like one of those combats in ancient mythology where the wound as soon as it is inflicted is miraculously healed.

I must find that in permitting the plaintiff to withdraw his plaint by reason of a defect not in form but in substance the District Munsif exercised a jurisdiction not vested in him by law. It is finally argued that this Court should not interfere because the fresh suit which the plaintiff was unjustifiably allowed to institute has progressed to some extent. The fact that injustice is about to fructify is no argument in its favour. As regards the legal rulings on this question I have nothing to add to my judgment in a similar case reported in *Venkataramayya* v. *Veeraswami* (1). The order of the District Munsif is set aside with costs to petitioner.

Petition allowed.

(1) A.I.R. 1925 Mad. 617.

A. I. R. 1926 Madras 864

JACKSON, J.

Koyyalamudi Chinnayya and *another* — Defendants Nos. 1 and 2 — Appellants.

v.

Koyyalamudi Mangamma — Plaintiff No. 1—Respondent.

Second Appeal No. 1686 of 1922, Decided on 28th July 1924, from a decree of the Addl. Sub-J., Ellore, in A. S. No. 181 of 1921.

Civil P. C., S. 100—Appellate Court admitting certain documents but not basing its finding upon them—Its finding is not challengeable.

Where an appellate Court admitted certain documents in appeal but did not base its finding upon them, its finding of fact will not be interferred with in second appeal: (1912) *M. W. N.* 821; (1921) *Pat. H. C.* 17; (1914) *M. W. N.* 795 and *A. I. R.* 1922 *Cal.* 185, *Dist.* [P 865 C 1]

P. Bapuraju—for Appellants.

V. Suryanarayana—for Respondents.

Judgment.—This is a second appeal from the decree of the Court of the Additional Subordinate Judge of Ellore in A. S. No. 181 of 1921 preferred against the decree in O. S. No. 262 of 1920 on the file of the Additional District Munsif of Ellore.

The lower appellate Court decreed the suit and Defendants Nos. 1 and 2 appeal.

The plaintiffs sue for recovery of possession of certain properties and for mesne profits alleging that the properties fell to the share of the 1st plaintiff's husband in a partition held in 1911, and the question whether there was such a partition (Issue No. 1) has been decided in the affirmative by the lower appellate Court. It is a question of fact which ordinarily cannot be raised in second appeal but the appellants contend that the lower appellate Court wrongfully admitted as evidence the documents Exs. P, P (1) and P (2) and was influenced by these documents without giving the appellants an opportunity of showing that they were forged. The District Munsif in his 4th paragraph rejected these documents with the following remarks:

> It is said that subsequent to his death partition lists were drawn up setting forth the properties which had been allotted to each of the brothers. These partition lists were sought to be exhibited in the case, but as they purported to be deeds of partition and not mere partition lists, and as they were unstamped and unregistered, they were not allowed to be filed in the case.

In his 7th paragraph the learned Subordinate Judge settles the question of rejection of these lists thus:

> On going through the lists, I find that the language used does not amount to a deed of partition declaring a divided status and allotting properties to the several coparceners. And the evidence shows that the actual partition took place a year before the lists were prepared and these lists were simply notes as regards the property that fell to each share. I do not think the lower Court is right in rejecting these documents.

Accordingly he admitted them as being simply notes as regards the properties which fell to each share. If they are nothing more than that, the documents can have no evidentiary value. Prosecution Witness No. 1, 1st plaintiff's next friend, merely states that partition lists were prepared and there is no evidence as to who wrote or signed Ex-P series. I am asked to find that the learned Subordinate Judge assumed, when he admitted these documents that they were signed

by the persons by whom they purported to be signed and treated them as important admissions by the defendants that there had been a partition. Of course, if he had made any such assumption without taking any evidence in the matter, this case would obviously have to be remanded. But I do not think that he did anything of the sort. I gather that he said the documents might be filed as mere notes and then considered whether apart from these documents there was sufficient evidence of partition. He refers to the evidence of P. Ws. Nos. 1 and 2 and Exs. A and A (1). He considers the discrepancies in the evidence of P. Ws. Nos. 1 and 2, but notes that the kist has been paid separately as appears from Exs. C and D series. He finds ample evidence as regards the separate enjoyment of the property and he observes that the evidence of defendants was discredited by the lower Court. In his summary of the evidence he makes no mention of Exs. P, P (1) and P (2), or of any admission contained therein. I find that he admitted them for what they are worth, and as in that stage of the proceedings they were worth nothing at all he dismissed them from his mind. Therefore, I do not find that the lower Court considered Exs. P, P (1) and P (2) or was in any way influenced by them. The finding of fact cannot be assailed on that ground.

The cases cited by the appellants are distinguishable. In *Govindan Nair* v. *Govindan Nair* (1) it was held that the Judge did not refer to two documents of importance and, therefore, the case was returned for a fresh finding; but in the present case the Judge referred, if at all, to documents of no importance. In *Sumitra Kuer* v. *Ram Kair Chowbey* (2) it was held that:

Where an appellate Court has relied for its decision upon a document which is inadmissible in evidence, a Court of second appeal would be justified in remanding the case for decision to the appellate Court with a direction to exclude that document from its consideration.

But here the Ex. P series are clearly admissible in evidence if they are treated simply as notes, and as I have observed the Court, as a matter of fact, did not rely upon them in coming to the decision. *Ariya Muthu Pillai* v. *Sennaya Pillai* (3).

(1) [1912] M.W.N. 821=15 I.C. 103.
(2) [1921] 5 Pat. L.J. 410=1 P.L.T. 702=57 I.C. 561=(1921) P.H.C.C. 17.
(3) [1914] 1 L.W. 771=28 I.C. 11=(1914) M.W.N. 795.

Here the Court had proceeded very largely on a consideration of evidence admitted during the hearing of the appeal in contravention of O. 41, R. 27, of the Civil P. C., which again has no application to a case where the Court has properly admitted evidence, and as a matter of fact, has not proceeded on the consideration of it. In *Ujir Ali Sirdar* v. *Shadhai Behara* (4) it is laid down:

The High Court cannot, on second appeal, look at the evidence to decide if the remaining evidence in a case after that which has been improperly admitted is rejected, is sufficient to warrant the finding of the Court below.

This principle will apply if we agreed with the appellant's assumption that the Court below had been materially influenced by Ex. P series and had regarded them as containing important admissions by the defendants. But since I hold that the Court below paid no attention to Ex. P series and certainly did not regard them as containing admissions, there is no need to decide whether the remaining evidence is sufficient to warrant the finding of the Court.

On all the questions raised the second appeal fails and is dismissed with costs.

Appeal dismissed.

(4) A.I.R. 1922 Cal. 185.

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* * A. I. R. 1926 Madras 865

Full Bench

COUTTS-TROTTER, C. J. SPENCER AND KRISHNAN, JJ.

Public Prosecutor—Appellant.

v.

Ratnavelu Chetty—Accused.

Criminal Appeal No. 551 of 1925, Decided on 24th February 1926, against the acquittal by the Asst. S. J., Salem, in Sessions Case No. 16 of 1925.

* * *Criminal P. C., S.* 190 (1) (*b*)—"*Report*" *is not limited to report in a cognizable case—Criminal P. C., S.* 200 (*aa*)—*A. I. R.* 1925 *Mad.* 672. **Overruled.**

The report of police officer mentioned in S. 190 (1) (b) is not confined to a report of a cognizable offence. It includes even the police report in a non-cognizable case. His examination on oath is not necessary: *A.I.R.* 1925 *Mad.* 672, **Overruled.**

[P 871 C 2

J. C. Adam—for the Crown.

C. S. Venkatachari and *D. Ramaswami Ayyangar*—for Accused.

Devadoss, J.—This is an appeal by the Public Prosecutor against the order of acquittal of the Assistant Sessions Judge of Salem. The accused was committed to the Court of Session under S. 211, Indian Penal Code. The Assistant Sessions Judge held that the proceedings were started on a police report before the Magistrate and the proceedings were void and therefore the committal to the Sessions Court was illegal, and acquitted the accused. The contention of the Public Prosecutor is that the initiation of the proceedings was not illegal and the committal therefore was right.

The simple question for decision is whether the charge sheet in a non-cognizable case is a report or not. S. 190 of the Criminal P. C. empowers a Magistrate to take cognizance of a case:

(a) upon receiving a complaint of facts which constitute such offence, (b), upon a report in writing of such facts made by any police officer, (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.

Does the report of a police officer come within Cl. (b) of S. 190 of the Criminal P. C.? The police are empowered to investigate the commission of a cognizable offence. When information is given of the commission of a non-cognizable offence, the police should refer the informant to the Magistrate. Under S. 155, Cl. (2), no police officer shall investigate a non-cognizable case without the order of a Magistrate of the first or Second Class, or a Presidency Magistrate. A police officer, therefore, is incompetent to investigate a non-cognizable case unless he is ordered to do so by a Magistrate of the First or Second Class, or a Presidency Magistrate.

When a police offieer does anything which he is not empowered to do, he cannot be said to act under the colour of his office. The investigation by a police officer of a non-cognizable case is no better than an investigation by a private individual. When a police officer investigates the commission of a cognizable offence, he has to send a report under S. 173, which lays down what particulars it should contain. The police are also ordered to report under S. 174 in cases of suicide, etc. A report under Cl. (b), therefore, is a report which a police officer is authorized to make. Any information given to a Magistrate by a police officer in a case wh ich is no cognizable by the police cannot be said to be a report. The contention of the Public Prosecutor is that when any police officer reports about a non-cognizable case, he reports as a police officer and therefore it must be considered to be a report. Such an argument, if upheld, would mean that a police officer can report about any offence, cognizable or otherwise.

Supposing a police officer reports about the commission of adultery or enticing away a married women, though under S. 199, the husband alone is competent to complain of such an offence, could it be said that the report is a proper report simply because the police officer came to know of the commission of the offence in his official capacity? The law requires that certain formalities should be gone through before criminal proceedings could be initiated. It would be doing violence to S. 190 to hold that a Magistrate is entitled to initiate proceedings upon the report of a police officer as regards a non-cognizable offence.

A Magistrate has power to initiate proceedings upon receiving a complaint, but when a person presents a complaint, certain formalities have to be gone through. A sworn statement has to be taken and if the Magistrate thinks that the police should be asked to enquire into it, he may act under S. 202, and he may dismiss the complaint after examining the complainant on oath under S. 203 if in his opinion no offence has been committed. But in the case of a police report no such formality need be gone through. Though it is open to a Magistrate not to take any action upon a report of the police, I am yet to see a Magistrate who has the temerity to do so. When the police send a charge sheet there is a presumption that the police have investigated the matter and that there is a case to be enquired into by the Court, and no Magistrate would think of dismissing a charge sheet after perusal on the ground that no offence has been made out. In fact there is no provision in the Act for dismissing a charge sheet without enquiry, whereas a Magistrate can dismiss a complaint after examining the complainant and after satisfying himself that the complaint does not disclose a criminal offence, or that he does not believe the complainant. The

charge sheet in a non-cognizable case does not come within the meaning of S. 190, Cl. (b) of the Procedure Code.

The next question is whether a Magistrate can take action upon such a report. He can take action provided he treats it as a complaint under Clause (1) (a) or Clause (1) (c). If he treats it as a complaint then he must require the police officer who sends in the charge sheet to give a sworn statement before him, for he has to be satisfied that an offence has been committed and that there is a case to be enquired into. If he treats it as information under clause (c) then he must transfer the case to some other Magistrate under S. 201. It is not competent to any Magistrate on receiving a charge sheet, or the report of a police officer, in a non-cognizable case, to proceed to enquiry without complying with the provisions of law with regard to a complaint under clause (a) or information under clause (c). This point was specifically decided by me and my brother Wallace, J., in *Perumal Naick* v. *Emperor* (1). I held the same view in another case, Crl. R. C. No. 823 of 1924. Notwithstanding the able argument of the learned Public Prosecutor I do not see any ground for changing my opinion expressed in the two cases mentioned above.

I shall briefly deal with the cases referred to by him. In *Bhairab Chandra Barua* v. *Emperor* (2) it was held that a police report in a non-cognizable case is either a complaint under S. 4, Cl. (h) or a police report under S. 190, Cl. (1) (b) of the Criminal P. C., and the Magistrate had jurisdiction to take cognizance of an offence under S. 211 of the Indian Penal Code disclosed therein. The learned Judges followed the decision in a previous case of their own and held that a police report in a non-cognizable case was either a complaint as defined in the Criminal P. C. or a report within the meaning of S. 190, Cl. (1) (b). With great respect I am unable to see how the report in a non-cognizable case can be a complaint. A complaint is defined as:

> An allegation made orally or in writing to a Magistrate, with a view to his taking action, under the Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer.

The argument is that the report of a police officer is a report which he is authorized to send in a cognizable case and that a report in a non-cognizable case being not a report in its strict sense, must be taken to be a complaint. If this argument is pushed to its logical conclusion, it would mean that whatever is not a report which a police officer is authorized to send is a complaint.

A complaint as defined in the Criminal P. C. means an allegation made orally or in writing to a Magistrate of the commission of an offence. It takes the place of an indictment under the English Law. To treat any letter or any report by any officer as a complaint is doing violence to the plain meaning of the word "complaint" as defined in the Criminal P. C. No Magistrate is entitled to take notice of a letter unless the person complaining of the commission of an offence appears before him and is prepared to support his statement on oath. If a police officer sends a report and is prepared to make a statement on oath, then it might be treated as a complaint, but not if he simply sends a letter to the Magistrate and asks him to take cognizance of a case and initiate proceedings. I have already discussed at some length the question whether a police report in a non-cognizable case comes within S. 190, Cl. (1) (b) or not. In *Bhairab Chandra Barua* v. *Emperor* (2) the complaint was not made to the village officer but at the police station to the police officer. In the present case information was given to the village munsif. In *Sarfaraz Khan* v. *King-Emperor* (3) similar argument was advanced and accepted. In *King Emperor* v. *Sada* (4), it was held that

> there is no section in the Criminal P. C., 1898, which empowers a police officer to make, of his own motion, any report to a Magistrate in a non-cognizable case,

hence, where he files a formal complaint in such a case, he cannot be said to "make a report" and his complaint falls within the definition of "complaint" in S. 4 (h) of the Criminal P. C., 1898. It was further held in that case that the Magistrate could direct such police officer to pay compensation to the accused.

The principle of this decision is that it is competent for a police officer to make

(1) A. I. R. 1925 Mad. 672.
(2) [1919] 46 Cal. 807=29 C. L. J. 318=53 I. C. 698=23 C. W. N. 484.
(3) [1913] 11 A. L. J. 331=19 I. C. 314.
(4) [1902] 26 Bom. 150=3 Bom. L. R. 586 (F. B.).

a complaint of a non-cognizable offence, and if he does make a complaint, he becomes an ordinary complainant, and if his complaint is false or frivolous, he can be ordered to pay compensation to the accused. If the report of a police officer of a non-cognizable case is to be treated as a complaint without the formality of the officer swearing to its truth, can such officer be made to pay compensation and can the accused, if the case is false, have a civil remedy? In the case of a police charge sheet, i. e., a report in a cognizable case, the police officer is protected, whereas a complainant is not. Therefore it is against the policy of the law to hold that a police officer who acts without jurisdiction should have the benefit of a police officer who acts within the limits allowed him by law. The case in *Chidambaram Pillai* v. *Emperor* (5) does not help either side. There it was held that it was competent for a police officer to file a complaint. In that case a complaint was filed by a police officer and he gave a sworn statement. When a police officer complains of the commission of a non-cognizable offence, he complains like any other private individual and if he wants to set the criminal law in motion, he must comply with the formalities for the purpose.

A Magistrate is empowered to act under S. 476. Can a Magistrate who loses his watch send a servant of his whom he suspects of theft under S. 476 to the nearest Magistrate? The mere fact that a person is empowered in his official capacity to act in a particular way does not enable him to act in the same way in his private capacity. To treat the report of a police officer in a non-cognizable case as a complaint without the formalities required for the initiation of proceedings would lead to gross irregularity, if not injustice. Supposing a police officer sends a letter to a Magistrate about the commission of a non-cognizable offence, would the Magistrate be entitled to refer it to the police for enquiry under S. 202 of the Criminal P. C.? Could he act without the security of a definite information being given him against the accused? These are some of the consequences that will ensue if an ordinary police report is treated as a complaint and the Magistrate is asked to take cognizance without the further formalities being gone through. Any person may complain of the commission of an offence and it is open to a police officer as to any private individual to complain of the commission of an offence; and if he does so, he comes under S. 190, Cl. (1) (a).

I therefore hold that a Magistrate is not competent to initiate proceedings against any person on a police charge sheet in a non-cognizable case. If he wants to take action he must treat it as a complaint and take a sworn statement from the police officer. In this case information was given to the Village Magistrate and was forwarded by him to the police. The police considered the information to be false and sent in a charge sheet and asked the Magistrate to take action under S. 211. The Magistrate enquired into the matter and committed the accused to the Court of Session. The proceedings before the Magistrate and the commitment were illegal. But the Sessions Judge was not justified in acquitting the accused. What he should have done was to have sent up the papers to the High Court for quashing the commitment. I would therefore set aside the order of acquittal and remit the case to him for such action as he may think necessary in view of the observations above made.

Waller, J.—This is an appeal by the Public Prosecutor. The accused in the case brought a charge of dacoity against a number of persons. It was investigated by the police, who reported it to be false and had it struck off the file. They then charge-sheeted the accused under S. 211, Indian Penal Code. The Magistrate committed him to the Sessions. The Assistant Sessions Judge, following the decision in *Perumal Naick* v. *Emperor* (1), held that the commitment was illegal and acquitted the accused.

The facts are almost exactly parallel to those of the case above cited. If the decision in it is right, the Public Prosecutor's appeal fails. What my brothers Devadoss and Wallace, JJ., held was that the police charge sheet was not a complaint within the meaning of S. 190, Criminal P. C., and that the offence under S. 211, Indian Penal Code, being non-cognizable, the police had no power to investigate it and charge the accused of their own accord. There has, of course, been no investigation of the charge under S. 211, Indian Penal Code. in this case

(5) [1909] 32 Mad. 3.

nor was there in the other. What was investigated was the original charge of dacoity, which the police had the fullest power to investigate.

Mr. Adam relies on *Bhairab Chandra Barua* v. *Emperor* (2), where it was held that a police report in a non-cognizable case is either a complaint under S. 4 (h) or a police report within S. 190 (1) (b) of the Criminal P. C. The Calcutta Bench refused to follow *King-Emperor* v. *Sada* (4) and *Chidambaram Pillai* v. *Emperor* (5). In the latter case it was decided that

> where a police officer files a complaint in a non-cognizable case or regarding an offence which it was not his duty to report, such a complaint is a complaint within S. 4 (h) of the Criminal P. C., and not a police report.

In the former the decision was to the same effect. What, it seems to me, these cases decided was that a complaint is none the less a complaint because it is made by a police officer.

The real question to my mind is whether the "police report" referred to in S. 190 (1) (b) of the Criminal P. C., is limited to reports made in cognizable cases. In an Allahabad case *Sarfaraz Khan* v. *King-Emperor* (3), Knox, J., held that it was not. As he pointed out

> the object of the Code appears to be that, before proceedings are taken against an accused person, such as would bring him to a Court of justice, a Magistrate must have before him knowledge, independent of his own knowledge, based either upon a complaint or upon a police report. If he chooses to take action without such independent report he is bound to inform an accused that he is entitled to have the case tried by some Court other than the Court of such Magistrate.

That is a perfectly correct statement of the law contained in Ss. 190 and 191 of the Criminal P. C. Section 190 says thst a Magistrate may take cognizance of an offence on a complaint, on a police report, on information from any person *other than a police officer* or on his own knowledge or suspicion. But if he acts on information from a person other than a police officer or on his own knowledge or suspicion, he must proceed under S. 191 of the Criminal P. C. It seems to me that sufficient attention has not been paid to the words I have above italicized. The Criminal P C., obviously contemplates the possibility of information other than a formal report under S. 173 being received by a Magistrate from the police. I cannot believe that the Legislature intended that a Magistrate, though empowered to take cognizance on information from any other person, must when he receives information from a police officer of a non-cognizable offence, hold his hand and decline to take cognizance. In the case we are now considering, the police investigated a complaint of dacoity and found that it was false—that is, that an offence under S. 211 of the Indian Penal Code had been committed. There was no informant whom under S. 155 (1) of the Criminal P. C., they could refer to a Magistrate. There was nothing to investigate and they required no order to investigate. I can see nothing in the Code which would prohibit them from giving information direct to the Magistrate themselves or prevent the Magistrate from taking cognizance on that information.

I think that the correct view is laid down in *Sarfaraz Khan* v. *King-Emperor* (3), by Knox, J., and also in *In re Asadulla Hussain Khan* (6). *Chidambaram Pillai* v. *Emperor* (5), was one in which a formal complaint had been preferred by a police officer and the decision was that a complaint presented by a police officer was not a police report, but a complaint. If it be held that the police report referred to in S. 190 (1) (b) of the Criminal P. C., is confined to reports in cognizable cases, I can see no reason why the report in this particular case should not be treated as a complaint. The fact that it was sent in a form designed for police reports under S. 173 of the Criminal P. C., can make no real difference. The definition of complaint in the Criminal P. C., excludes reports of police officers. If by that is intended the exclusion merely of reports under S. 173 of the Criminal P. C., there seems to be no reason why other information furnished by the police should not be treated as a complaint.

Whatever view is right, I think that the appeal should be allowed. If S. 190 (1) (b) does not exclude reports in non-cognizable cases, the Magistrate could take cognizance on the report in this case. If it does exclude such reports he could take cognizance on the report as a complaint. The non-examination of the complainant on oath is provided for by S. 200 (aa) of the Criminal P. C.

This appeal having been set down for final orders on Monday, the 11th day of January 1926, the Court (Devadoss and

(6) [1913] 6 M. L. T. 259=4 I. C. 1043.

Waller, JJ.) made the following order of reference to a third Judge :

Though we are agreed as to setting aside the order of acquittal, there is a difference of opinion as to any further proceedings that are to follow, viz., whether there should be a re-trial on merits or not, and we direct that the case be placed before a third Judge under S. 429 of the Criminal P. C.

The case was then referred to a Full Bench ; the opinion of the Full Bench was as follows :

Opinion of Full Bench.

Spencer, J.—This is an appeal against an acquittal. Upon a charge sheet charging the accused with an offence of making a false charge of dacoity (S. 211, Indian Penal Code) the Stationary Sub-Magistrate of Krishnagiri held a preliminary enquiry and committed the accused to the Sessions. The Assistant Sessions Judge of Salem being of opinion that the commitment on a charge of a non-cognizable offence upon a police report was illegal, acquitted the accused, instead of making a reference to the High Court, as he should have done if he held that opinion to quash the commitment under S. 215, Criminal P. C. The learned Judges (Devadoss and Waller, JJ.) who heard the appeal were agreed on the point that the Assistant Sessions Judge's procedure in acquitting the accused without a trial was wroug, but they differed on the question whether a re-trial should be ordered : there followed a reference under S. 429, Criminal P. C., to a third Judge, and he being the Chief Justice, ordered the matter to be placed before a Full Bench.

From Sch. 2, Col. 3, to the Code of Criminal Procedure, it is apparent that the offence of making a false charge with intent to injure a person is one for which the police may not arrest without a warrant; in other words, it is not a "cognizable offence" within the definition in S. 4 (1) (f) of the Criminal Procedure Code.

Mr. Justice Devadoss agreed with the Assistant Sessions Judge that the proceedings in the committing Magistrate's Court were illegal because the Magistrate took cognizance of the offence under S. 211, Indian Penal Code, upon a police report of a non-cognizable offence without taking a sworn statement from anyone. He followed a reported case decided by himself and Mr. Justice Wallace, *Perumal Naick* v. *Emperor* (1), and the case of *King-Emperor* v. *Sada* (4). Mr. Justice Waller was averse to putting a narrow construction on the word "report" in S. 190 (1) (b) as including only reports of cognizable offences. We consider the latter view to be the more correct. While the section itself speaks of "any offence," we think that an attempt to limit its application to one particular class of offences is not warranted by the language used. In *King-Emperor* v. *Sada* (4), the learned Judges were inclined to confine the expression "police report" to reports which the police were required by the Code of 1882 to make in the matter of cognizable offences and by certain other sections. Candy, J., noticed that though under the Code of 1872 police reports of non-cognizable offences were to be regarded as complaints, the Code of 1882 did not empower a police officer to report at all about such offences without the order of a Magistrate. Chandravarkar, J., observed that the expression "police report" did not occur in any section outside the chapter which deals with the investigation of cognizable offences, except Ss. 62 and 114.

The first of these sections provides for reports being sent to District Magistrates and Sub-divisional Magistrates whenever persons within their jurisdictions are arrested by the police without a warrant. The second provides for reports being sent in the case of threatened breaches of the peace when an immediate arrest is the only means by which peace may be preserved. The learned Judge might well have added to his list S. 145 which provides for the police reporting disputes as to immovable property. It would be easy to conceive of other circumstances where police officers may find occasion to convey information to the magistracy or obtain their orders as to the course of action to be taken by them for the preservation of the peace and the prevention and detection of crime besides those specifically mentioned in the sections of the Code of Criminal Procedure. It should not be assumed that on all those occasions for which the Code does not specifically provide, a police officer is not acting in the discharge of his duty if he sends a report. It was held by this Court in *In re Asadulla Hussain Khan* (6), that a police officer's action was not

ultra vires if, instead of referring a person who gave the police information of the commission of a non-cognizable offence to the Magistrate as provided by S. 155 (1), he reported the case to the Magistrate and asked for his orders under S. 155 (2) to investigate it.

In *Sarfaraz Khan* v. *King-Emperor* (3), Knox, J., held that reports of investigations made by the police into non-cognizable offences under orders of a Magistrate passed under S. 155 (2) fell under S. 173 and that Magistrates could take cognizance of the case upon receiving such a police report. The Bombay Full Bench which decided the case in *King-Emperor* v. *Sada* (4) were quite ready to take the view that information furnished by a police officer to a Magistrate, which did not come within the purview of a police report prescribed by some section of the Code, fell anyhow within the definition of a complaint in S. 4 (1) (h) which is defined as an:

> allegation orally or in writing to a Magistrate with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer.

In Calcutta also it was held that it must be either a report or a complaint: vide *Bhairab Chandra Barua* v. *Emperor* (2). The learned Judges of the Calcutta Court went on to say if a Magistrate, upon receiving a report from the police recommending the prosecution of a person who had lodged false information with the police as to the commission (as here) of a dacoity omitted to examine the complaint under S. 200 before issuing a summons to the accused, the omission was a mere irregularity which did not affect his jurisdiction. Upon this point they probably had in their minds the provision of S. 529 (e), Criminal Procedure Code, as that section is quoted in *Harihar Roy* v. *Emperor* (7), printed as a footnote to their judgment. Devadoss, J., does not in his judgment consider the effect of this provision. His comment upon this point is

> to treat the report of a police officer in a non-cognizable case as a complaint without the formalities required for the initation of proceedings would lead to gross irregularity if not injustice.

The law only requires that the Magistrate, who takes cognizance of an offence under S. 190, sub-S. (1), Cl. (a) or (b), without having jurisdiction, should act in good faith though erroneously, to make his proceedings valid. The learned Judge proceeds to consider the case of *Chidambaram Pillai* v. *Emperor* (5), and the effect of some other sections in the same Chapter XV, in which S. 190 occurs, notably Ss. 196 and 196-A and 198, and he puts the questions: (1) whether a Magistrate could take cognizance of an offence of adultery or enticing away a married woman upon a police report, and (2) whether if a police officer sent a letter to a Magistrate about the commission of a non-cognizable offence, could the Magistrate refer it to the police for investigation under S. 202.

The answers to these questions are contained in the Code itself; Ss. 196, 196-A, 198 and 199 clearly contain mandatory provisions as they declare: "No Court shall take cognizance of" (here follow the description of certain definite offences) "except" or "unless," etc. The amended Criminal Procedure Code of 1923, which was in force when the Sub-Magistrate took cognizance of the offence under S. 211, Indian Penal Code, as well as when Devadoss, J., delivered his judgment in this case and that reported in *Perumal Naick* v. *Emperor* (1) has made the question of the jurisdiction of Magistrates to take cognizance of non-cognizable offences upon a report made in writing made by any police officer without examining the police officer upon oath perfectly clear and free from all possible ambiguity. For S. 190 (1) (b) authorizes certain Magistrates to take cognizance of any offence upon a report 'in writing of facts which constitute such offence made by any police officer, and S. 200 (*aa*) provides that where a public servant acting or purporting to act in the discharge of his official duties makes a complaint of an offence, nothing shall require the Magistrate to examine him before taking cognizance of the offence. It is unfortunate that this change in the law was not brought to the notice of the learned Judges comprising the Bench, as the present reference might have thus been avoided. We overrule *Perumal Naick* v. *Emperor* (1), and we set aside the acquittal of the accused in this case, and direct him to be tried according to law for the offence under S. 211, Indian Penal Code, at the Sessions of the Salem Division on the first available date.

Acquittal set aside.

(7) [1919] 46 Cal. 810, footnote.

* A. I. R. 1926 Madras 872

DEVADOSS AND WALLER, JJ.

Sree Mahant Prayaga Doss Jee Varu—Appellant.

v.

Raja of Kalahasti and *others*—Respondents.

Civil Miscellaneous Appeal No. 31 of 1919, Decided on 14th September 1925, against the order of the Dist. J., Nellore, in E. P. No. 121 of 1917.

(a) Civil P. C., S. 73—Auction-purchaser making default in paying full amount—25 p. c. deposit is 'assets' within S. 73.

Where the auction-purchaser makes default in the payment of full amount of the sale, the 25 per cent deposit which is deposited in Court becomes 'assets' within S. 73 and are liable to rateable distribution. [P 875, C 2]

(b) Civil P. C., O. 21, R. 71—Defaulting purchaser becomes judgment-debtor by provisions of R. 71 after the certificate to recover deficit is granted.

There is a distinction between the capacity of the decree-holder who brings the property to sale and his capacity as a decree-holder by reason of the provisions of O 21, R. 71. In his capacity as original decree-holder he is entitled to be paid only the amount of his decree. As a decree-holder by reason of the provisions of O. 21, R. 71, he is entitled to execute the decree against the defaulting purchaser for the whole amount of the deficiency. He cannot partially execute the decree only to the extent of the amount due to him. In execution of the decree for the deficiency, the judgment-debtor is not the original judgment-debtor, but the defaulting purchaser. [P 873, C 1]

(c) Civil P. C., O. 21, R. 71—"Decree-holder" means only that decree-holder who brings property to sale.

The expression "decree-holder" in O. 21, R. 71 does not include all the decree-holders who are entitled to share rateably under S. 73. It only means decree-holder who brings the property to sale. [P 874, C 1]

T. V. Venkatarama Ayyar—for Appellant.

S. Varadachari—for Respondent.

Devadoss, J.—The taluk of Pamur in Kalahasti zamin was sold by the District Court of Nellore on 25th August 1914 in execution of the decree in C. S. No. 187 of 1912 and was knocked down for Rs. 6,90,000 to one Ramagarji Neelakanthagarji who made a deposit of 25 per cent. of the amount of his bid and subsequently defaulted to pay the balance. The property was again put up to sale, but did not fetch more than Rs. 1,01,000. The decree-holder in C. S. No. 187 of 1912 thereupon applied to the Court under O. 21, R. 71 for the recovery of the difference between Rs. 6,90,000 and Rs. 1,01,000 from the defaulting purchaser. The District Judge dismissed his application, but the High Court in L. P. A. No. 42 of 1917 set aside the order of the District Judge and directed him to dispose of the petition according to law.

Several persons who had obtained decrees against the Raja of Kalahasti applied to the District Court for attachment of the deposit made on 25th August 1914 and prayed in the alternative for a rateable distribution of the amount under S. 73, Civil Procedure Code. The District Judge held that the only person entitled to proceed against the defaulting purchaser was the decree-holder in C. S. No. 187 of 1912 and the other decree-holders were neither entitled to attach the amount in Court under O. 21, R. 52 nor to claim rateable distribution of the same under S. 73 and dismissed their applications. Decree-holders other than decree-holder in C. S. No. 187 of 1912 preferred these appeals against the orders of the District Judge.

The facts are not disputed. The only question for determination is: Are the appellants entitled to any relief, and if so, what? It is admitted by both the appellants and the respondents that the deposit of 25 per cent in Court belonged to the defaulting purchaser and that the decree-holder in C. S. No. 187 of 1912 made an application under O. 21, R. 71 for the recovery of the deficiency from the defaulting purchaser. It is common ground that the defaulting purchaser is a man of straw and there is no likelihood of any amount being recovered from him. Under O. 21, R. 86, if the auction purchaser makes any default in payment within the time mentioned the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold. Mr. Hughes, the then District Judge of Nellore, held that it was not a proper case for forfeiting the amount of the deposit to the Government and directed that the amount should be in Court pending the disposal of certain petitions.

Re-sale of the property was held under O. 21, R. 87, and as the property fetched a considerably lower sum than that for which it was first sold, a certificate was given as to the amount of deficiency by the officer conducting the sale. O. 21, R. 71, is in these terms :

Any deficiency of price which may happen on a re-sale by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree-holder or the judgment-debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

Under this rule the decree-holder became entitled to proceed against the defaulting purchaser for the difference between Rs. 6,90,000 and Rs. 1,01,000. From the terms of this rule it is quite clear that the decree-holder who brings the property to sale gets a decree against the defaulting purchaser for the deficiency and may recover the amount from him under the provisions relating to execution of decrees. If he does not choose to execute the decree, the judgment-debtor is entitled to execute the decree against the defaulting purchaser for the deficiency. A good deal of confusion has arisen from overlooking the distinction between the capacity of the decree-holder who brings the property to sale and his capacity as a decree-holder by reason of the provisions of O. 21, R. 71. In his capacity as decree-holder he is entitled to be paid only the amount of his decree. As a decree-holder, by reason of the provisions of O. 21, R. 71 he is entitled to execute the decree against the defaulting purchaser for the whole amount of the deficiency. He cannot partially execute the decree only to the extent of the amount due to him.

When he executes the decree for the deficiency he executes it for the whole amount of the deficiency. When the decree-holder in C. S. No. 187 of 1912 applied to the Court to proceed under O 21, R. 71, he did not ask for the execution of the decree in C. S. No. 187 of 1912, but he asked for the execution of the decree for the deficiency from the defaulting purchaser. In execution of what I may call the decree for the deficiency, the judgment-debtor is not the original judgment-debtor, but the defaulting purchaser. The position would be clear if the judgment-debtor himself applied to proceed under R. 71 against the defaulting purchaser. The defaulting purchaser is a judgment-debtor to the extent of the deficiency by virtue of the certificate of the officer holding the sale.

If the defaulting purchaser paid the amount of the deficiency into Court, what would be the character of the amount so paid ? Would it or would it not be assets within the meaning of S. 73, Civil Procedure Code ? The defaulting auction purchaser is to make good the deficiency caused by reason of his default in paying the balance of the purchase money. If he pays the balance without execution being taken against him, that would be assets in the same way as it would be if he had made no default at all. The mere fact that the defaulting purchaser is made to pay the amount of the deficiency by a coercive process, or by proceeding under the provisions relating to the execution of a decree for payment of money, would not change the character of the amount paid by him into Court.

In this case the defaulting purchaser is said to be a man of straw and nothing could be recovered from him. He had to his credit Rs. 1,72,500 being the amount of 25 per cent on the amount of his bid. When the decree-holder who brought the property to sale asked the Court to attach the money in Court under O. 21, R. 71, the money was attached as the money of the defaulting purchaser. Under O. 21, R. 52 :

Where the property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property and any interest or dividend becoming payable thereon may be held subject to the further orders of the Court from which the notice is issued.

Here the money was in the Court which effected the attachment. The effect of the attachment for an amount much larger than that in Court was to convert what belonged to the defaulting purchaser into assets within the meaning of S. 73. If a debt due to the defaulting purchaser was attached under O. 21 in execution of the decree for the deficiency and if the debtor of the defaulting purchaser pays the amount into Court would that amount not be assets in Court ? Whether the amount of the deficiency is paid by the defaulting purchaser, or

whether a debt of his is attached and the debtor pays the amount into Court or whether the money of the defaulting purchaser in Court is attached, the result is the same. The money paid into Court or in Court becomes the proceeds realized in execution of the decree for the deficiency and such amount is not only for the benefit of the decree-holder who brought the property to sale, but of all the other decree-holders who are entitled to rateable distribution under S. 73, Civil Procedure Code. It is difficult to see any difference between the proceeds of auction sale held at the instance of a decree-holder and the amount paid by a defaulting purchaser by reason of his not being able to pay the whole of the sale amount within the time fixed, so far as the rights of the other decree-holders are concerned.

It is not disputed that if the defaulting purchaser had not made any default and paid the whole amount of Rs. 6,90,000 into Court, the decree-holder who brought the property to sale as well as the other decree-holders entitled to rateable distribution under S. 73 would be entitled to be paid rateably, and the defaulting auction purchaser being forced to make good the deficiency by an execution against him cannot change the character of the amount which he either voluntarily pays into Court or is recoverable from him or from his property or funds belonging to him. In this view of the case, it is unnecessary to consider in detail the arguments advanced on both sides.

The contention of Mr. T. V. Venkatarama Ayyar for the appellants is that the expression "decree-holder" in O. 21, R. 71, should be held to mean all the decree-holders who are entitled to share rateably under S. 73, Civil Procedure Code. His argument is that under the old Code the expression "decree-holder" was held to include all decree-holders eatitled to share rateably under S. 73. He relies upon *Chakrapani Chetty* v. *Dhanji Settu* (1) and *Bejoy Singh Dudhuna* v. *Hukumchand* (2). Such a construction would no doubt be a beneficial one so far as the decree-holders are concerned. But reading O. 21, R. 71, it cannot be said that the Legislature intended by the expression "decree-holder" any decree-holder or all the decree-holders against the judgment-debtor. It cannot be that each decree-holder who was entitled to share rateably has the right to proceed under R. 71. From the juxtaposition of the expression "at the instance of either the decree-holder or the judgment-debtor," it is clear that the Legislature intended by the term "decree-holder" the decree-holder who brings the property to sale, for the right to proceed against the defaulting purchaser for the deficiency is given to the judgment-debtor as well as to the decree-holder. If it was intended that any other decree-holder should have the benefit, the Legislature would have made the matter clear by adding an explanation as in S. 64 or by using the expression "at the instance of any decree-holder" instead of the expression "the decree-holder."

It has been urged on the side of the respondent by Mr. Varadachari that the decree-holder in C. S. No. 187 of 1912 did not act for the other decree-holders and was not a trustee for the other decree-holders. No doubt he does not act for the other decree-holders nor is he a trustee for them; but he is entitled as a decree-holder to proceed against the defaulting purchaser for the whole amount of the deficiency; and when he does so the whole amount of the deficiency is recoverable and not only a portion thereof. As I have already remarked, when the decree-holder in C. S. No. 187 of 1912 applied under R. 71 for an order against the defaulting purchaser for the recovery of the deficiency he did not execute his decree but the decree for the deficiency under R. 71. He, having been given a specific decree against a specific individual, is entitled to have that decree executed, and all that R. 71 says is that at the instance of either the decree-holder or the judgment-debtor any deficiency shall be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money.

It has been urged that an application under O. 21, R. 71, was made by the judgment-debtor and that application was dismissed, and no appeal was preferred against that order, and therefore the amount in Court cannot become the assets within the meaning of S. 73. The District Judge of Nellore dismissed both

(1) [1901] 24 Mad. 311.
(2) [1902] 29 Cal. 548.

the applications of the decree-holder and the judgment-debtor under R. 71, and the decree-holder preferred an appeal to thr High Court, and the High Court in L. P. A. No. 42 of 1917 set aside the order of the District Judge and remanded the petition for disposal according to law. It is contended by Mr. Venkatrama Ayyar that this order enures for the benefit of the judgment-debtor as well under O. 41, R. 33. It is not necessary to consider this aspect of the question as I have already held that the amount in Court became assets by reason of the attachment at the instance of the decree-holder.

The argument is advanced on behalf of the respondents that an attachment could be raised by paying the attaching creditor the amount of his decree and the other decree-holders entitled to claim under S. 73 would have no remedy, and even if the property is sold and the amount of the decree due to the decree-holder who brings the property to sale is paid with the costs of the sale, etc., the sale could be set aside under R 89 But these arguments do not meet the real question in the case No doubt if the decree holder in C. S No 187 of 191- was paid the amount of his decree before the sale was effected, the attachment could have been raised, but if after the sale was effected and the sale proceeds were put into Court, the decree holder who brings the property to sale can only share rateably with the other decree holders under S 73 We are not concerned at present to consider what might have happened if he was paid off before the sale under R 55 or after the sale under R 89 Here the defaulting auction purchaser had funds in Court which have by reason of execution of the decree under O 21, R 71, become assets S 73 of the Civil Procedure Code runs thus

> Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets after deducting the costs of realisation shall be rateably distributed among all such persons.

The Legislature has considerably amended the old S 295 The assets were to have been realized by sale or otherwise in execution of a decree Under the present section if the assets are held by a Court, i e., the assets of the judgment debtor are held by a Court persons who have applied for execution before the receipt of such assets are entitled to share rateably. In this case the appellants did apply for execution against the Raja of Kalahasti before the decree-holder in C. S. No. 187 of 1912, brought the property to sale and the amount now in Court had been realized by means of the provisions of O. 21, R. 71 The money in Court therefore is assets held by the Court and all the appellants are entitled to share rateably along with the decree-holder in C S No. 187 of 1912 The learned District Judge has directed that the whole amount of his decree should be paid to him In the view we have taken he is only entitled to share rateably along with the other creditors

In the result the appeals are allowed and the petitions remanded to the lower Court for rateable distribution under S 73, Civil Procedure Code As the question involved in these appeals is not one free from difficulty, the appellants and respondent (1) i e, the decree holder in C S No 187 of 191- are entitled to their costs out of the amount in Court

Waller J I agree The position seems to me to be this It is clear that if there had been no default of the auction purchaser the whole of the purchase money had been paid appellants would have been entitled to rateable distribution. I can see no reason for holding that the auction purchaser's default alters the situation entirely to their detriment, so that they are not entitled to share in the percentage of the purchase price which he deposited.

Appeals allowed

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* A. I. R. 1926 Madras 875

PHILLIPS AND MADHAVAN NAIR (*Petitioners*) Appellants — Petitioner.

v.

(*Petitioner*) Ramayya and others Respondents.

Civil Revision Petition No. 65[illegible] of [illegible] Decided on 26th February 1926 from the order of the Dist. Munsif [illegible] D. Nos March [illegible]

✲ *Civil P. C., O.* 33, *Rr.* 5 (*a*), 7 *and* 15—*Rejection of application under R.* 5 (*a*) *does not bar a second application.*

O. 33, R. 15 contemplates dismissal on enquiry and therefore when there has been no enquiry under R. 6 and a consequent order under R. 7 the order rejecting the application under R. 5 (a) is not a bar to a second application: *A. I. R.* 1925 *Mad.* 986, *Appr.*; 20 *C. W. N.* 669; 20 *Bom.* 86 and *A. I. R.* 1924 *Cal.* 1039, *Dist.* [P 876 C 2]

B. C. Seshachala Aiyar and *B. C. Sankaranarayana*—for Petitioner.

M. Renganadha Aiyar for *N. Chandrasekara Aiyar*—for Respondents.

Phillips, J.—The question for decision is whether, when an application to sue in forma pauperis is rejected under O. 33, R. 5 (a), a second application is barred by the provisions of R. 15 of that order? The Calcutta High Court in *Atul Chandra Sen* v. *Peary Mohan Mukerjee* (1) held that there is no distinction between orders of rejection passed under R. 5 and orders of refusal passed under R. 7 and this view has been adopted in *Ali Afzal* v. *Purna Chandra* (2). There is also a case in *Ranchod Morar* v. *Bezanji Edulji* (3), where a similar view appears to have prevailed.

On the contrary, we have the authority of the Lahore High Court in *Bal Kuar* v. *Shib Das* (4) and of a Full Bench of the Burma Chief Court in *Howa* v. *Sit Shein* (5) that a distinction should be made between these two classes of orders. They have held accordingly that an order passed summarily under R. 5 (a) is not a bar to a second application. The leading case is the one in *Atul Chandra Sen* v. *Peary Mohan Mukerjee* (1) which distinctly holds that there is no distinction between orders under R. 5 and orders under R. 7. No reason is given for coming to this conclusion; and, as pointed out by the Burma Chief Court, there is at least a verbal difference between these two orders. I am inclined to think that there is more than a verbal difference. The orders are different in kind. Under R. 5 the Court rejects an application summarily and without enquiry, whereas under R. 7 an order is passed after due enquiry into the merits of the application. The principle underlying R. 15 appears to be that of res judicata, viz., that the Court will not entertain a second application when the first has been dismissed on the ground that the petitioner is not entitled to sue as a pauper. Any order passed under R. 5 (a) is of a summary nature based on the petition itself or on facts which are apparent at the time of presentation of the petition. For instance, if the petition does not contain a schedule of property or if it is presented by the alleged pauper's agent, it has to be rejected, and if we are to apply the ruling of the Calcutta High Court, it can never be represented. This goes a good deal further than the principle of res judicata for it gives the force of res judicata to a summary order passed without enquiry or contest and consequently, I think it is doubtful whether that is the intention of the legislature. It is noticeable that R. 15 refers to an order "refusing to allow an applicant to sue as a pauper" and these words are the identical words used in R. 7, Cl. (3) and it is clear that R. 15 applies to such an order rejecting an application when such order does not either in terms, or by implication, refuse to allow an applicant to sue as a pauper. For instance, the rejection and return of a petition presented by an agent can hardly be said to amount to a refusal to allow the petitioner to sue as a pauper for there is no provision specifically prohibiting its representation by the pauper himself. In the present case the order rejecting the application is very specific. The District Munsif states that he has to reject the petition but that he ought not to be understood as expressing any opinion on the question whether the plaintiff is a pauper or not, and there is clearly no adjudication on the merits by this order. I am therefore of opinion that such an order is not a bar to the subsequent presentation of a petition based on the same right to sue. This view was adopted by my learned brother in *Chinnammal* v. *Papathi Ammal* (6) which was a case where the first petition had been dismissed for default. I would therefore hold that when there has been no enquiry under R. 6 and a consequent order under R. 7 the order rejecting the application is not a bar to a second application.

I may mention here that both in *Ranchod Morar* v. *Bezanji Edulji* (3) and *Atul Chandra Sen* v. *Peary Mohan*

(1) [1915] 20 C. W. N. 669=33 I. C. 812.
(2) A. I. R. 1924 Cal. 1039.
(3) [1896] 20 Bom. 86.
(4) [1920] 1 Lah. 151=56 I. C. 207.
(5) [1917] 42 I. C. 803.
(6) A. I. R. 1925 Mad. 986.

Mukerjee (1) there had been an enquiry under R. 6 although the Court purported to pass an order under R. 5.

I would therefore allow the petition and remand the case for disposal on the merits. The respondent will pay the petitioner's costs.

Madhavan Nair, J.—I entirely agree. In my judgment in *Chinnammal* v. *Papathi Ammal* (6) I have indicated the view that O. 33, R. 15, Civil Procedure Code, contemplates an enquiry and dismissal of "the application to sue as a pauper" on the merits. Since that has not taken place in this case the present application is not barred under the provisions of that order. It must therefore be disposed of on the merits.

Case remanded.

A. I. R. 1926 Madras 877

VENKATASUBBA RAO AND REILLY, JJ.

S. K. Mariya Pillai and *another*—Petitioners.

v.

Muthuvelu Pandaram—Respondent.

Civil Revision Petition No. 311 of 1924, Decided on 13th July 1925, from the order of the Dist. J., East Tanjore, in Original Petition No. 6 of 1924.

(a) *Madras Local Boards Act* (14 *of* 1920), *S.* 56 (1) (*h*)—*Failure to attend for three consecutive months and not three consecutive meetings will entail discontinuance—Period begins from first meeting—There must be more than one meeting.*

A member ceases to hold office for failure to attend meeting for three consecutive months and not for failure to attend three consecutive meetings and the period is to be computed from the date of the first default. *Kershaw* v. *Mayor: Shoreditch etc. of*, 22 *T. L. R.* 302, *Foll.*

Further, there must be at least two meetings which a member has failed to attend for the sub-section to apply. [P 877 C 2, P 878 C 1]

(b) *Madras Local Boards Act*, (14 *of* 1920), *S.* 56 (1) (*h*) *and* (4)—*Non-compliance by President with sub-S.* (4) *does not affect cessation of membership under sub-S.* (1) (*h*).

The question whether the President of the Board has or has not reported the failure of the member to attend the meetings of the Board, cannot affect the question whether the member had or had not ceased to be a member of the Board. [P 878 C 2]

T. R. Ramachandra Ayyar and *K. S. Champakesa Ayyangar*—for Petitioners.

S. Panchanadha Mudaliyar—for Respondent.

Venkatasubba Rao, J.—This Civil Revision Petition raises an interesting question. The petitioners before us are two members of the Taluk Board of Tirutturaippundi. There was a meeting of the Board on the 6th September 1923, and they attended it. On the 19th September there was another meeting. They failed to attend it. On the 17th October there was a meeting and the petitioners were again absent. In November no meeting was convened. On the 19th December there was a meeting at which they failed to be present. On the 17th January 1924, a meeting was convened and the petitioners attended it. The question that we have to decide is: Did the petitioners cease to hold office by reason of the fact that they failed for three consecutive months to attend the meetings of the Local Board?

S. 56 (1) (h), so far as it is relevant to the present point, reads thus:

Subject to the provisions of S. 57, a member of a Local Board shall cease to hold his office, if he (h) fails for three consecutive months to attend the meetings of the Local Board.

The words are "three consecutive months," not "three consecutive meetings." The first default occurred on the 19th September 1923. Computing three months from that date, it is obvious that the petitioners failed for three consecutive months to attend the meetings of the Board. That the period is to be computed from the date of the first default is settled by *Kershaw* v. *Mayor, etc. of Shoreditch* (1).

Schedule 2, R. 1, enacts;

Every Local Board shall meet for the transaction of business at least once in two months.

This fixes merely the minimum and there is nothing to prevent the Local Board from meeting more often, say twice a month, if it chooses to do so. In this case, it met twice in September. The default having occurred on the 19th September, three months must be reckoned from that date.

A difficulty was suggested and it may be put in the form of an illustration. Supposing the Local Board does not meet in January, meets in February, does not meet in March; there is only one meeting held during the three months and it is asked, in such a case, does the sub-section apply? The answer is perfectly clear. The sub-section uses the word "meetings" and not "meeting." There

(1) [1906] 22 T. L. R. 302.

must therefore be at least two meetings which a member has failed to attend and S. 56 (h) will not otherwise apply. If, on the other hand, the three months should be computed not from the date of of the default, but the construction is that the month should be excluded when the petitioners attended a meeting (in this case the month of September); even then they committed default, because they failed for three consecutive months, October, November and December, to attend the meetings of the Board.

Another contention has been urged on behalf of the petitioners and it has reference to sub-S. (4) of S. 56 which runs thus:

In the case of a person who has ceased to be a member in consequence of failure to attend meetings, the matter shall be reported by the President at the next meeting of the Local Board, which may at that meeting restore such person to office.

It has been contended that this provision has not been complied with. The President reported to the meeting that the petitioners had failed to attend meetings for three consecutive months. But he gave a ruling at that meeting that they did not forfeit their seats on that account. It is argued that the petitioners were thus deprived of an opportunity of having the question of their reinstatement considered. I cannot accept this contention. The result has been unfortunate, but as I hold that they did commit default, the fact that the petitioners easily acquiesced in the wrong ruling of the President, which happened to be in their favour, does not absolve them. In the result, I am of the opinion that the decision of the District Judge is correct and the Civil Revision Petition is accordingly dismissed. We desire to make no order as to costs because the question raised is novel and of some difficulty and the petitioners have not acted improperly in taking the matter to this Court.

Reilly, J.—I agree that the petitioners ceased to hold office as members of the Taluk Board of Tirutturaippundi because they failed to attend the meetings of that Board for three consecutive months from the 19th September 1923. I understand the expression "three consecutive months" in S. 56 (1) (h) of the Act to be equivalent to a period of three months. I do not think that the question whether the President of the Board reported the failure of the petitioners to attend the meetings of the Board—as he should have done under S. 56 (4) of the act—can affect the question whether they had or had not ceased to be members of the Board. I agree that the petition must be dismissed.

Petition dismissed.

A. I. R. 1926 Madras 878

DEVADOSS AND WALLER, JJ.

K. Munisami Chetti—Plaintiff—Petitioner.

v.

A. Subbaroya Achari — Defendant — Respondent.

Civil Revision No. 895 of 1924, Decided on 25th February 1926, from an order of the Small Cause Court J., Madras, in F. B. A. No. 250 of 1923.

Civil P. C., Sch. 2, R. 12—Order of Small Cause Judge modifying award—Application to Full Bench is maintainable.

Where a single Judge of the Presidency Small Cause Courts Act modifies an award given by arbitrators, his decision does not amount to a decree passed on an award and, therefore, an application to the Full Bench of the Small Cause Court is competent. [P 879 C 1]

S. T. Srinivasa Gopalachari—for Petitioner.

K. V. Sesha Iyengar—for Respondent.

Judgment.—The only point urged in this revision petition is that no application to the Full Bench lay against the order of the trial Judge inasmuch as the decree passed by him was on an award. The matter in dispute between the parties was referred to arbitration and the arbitrator passed an award. When it came up before the Judge who remitted the case to the arbitrator, he held that the arbitrator did not consider certain facts and passed a decree modifying the award. Against his order an application to the Full Bench was made and the Full Bench held that the award was wrong, and set aside his order and directed a decree to be passed in terms of the award.

Mr. Srinivasagopalchariar's contention is that the decree of the trial Judge was passed on the award and, therefore, under S. 38 no application to the Full Bench lay. If the decree was on the award or in the terms of the award, no doubt his contention would be right, but

the learned trial Judge modified the award by going into the merits of the case and holding that the arbitrator did not consider certain facts and did not take into account certain payments made by the defendant. This we consider is a modification of the award and against such a modification an appeal lies in ordinary cases; in other words, a decree of this kind is one which would come under S. 522 of the old Code or R. 16 of Sch. 2 of the present Code. If the Judge thought that the award was not in accordance with the reference to arbitration, or not in accordance with the directions given by him he should have remitted the award under R. 14 for re-consideration.

Under R. 12 the Court may modify the award where it appears that the award is upon a matter not referred to arbitration, or where the award is imperfect, or where the award contains a clerical mistake or error. In this case two matters were referred to arbitration, one as regards dealings between the parties and the other as regards the partnership transactions. The arbitrator after taking evidence came to the conclusion that the claim in respect of the dealings was true and disallowed the claim as regards the partnership transactions. It cannot be said that the arbitrator acted outside the scope of the arbitration or omitted to consider any matter referred to him for arbitration. In these circumstances, we think the order of the trial Judge was one made under R. 12 of Sch. 2 and, therefore, an application to the Full Bench did lie under S. 38 of the Presidency Small Cause Courts Act. The Civil Revision Petition fails and is dismissed with costs.

Petition dismissed.

A. I. R. 1926 Madras 879

KRISHNAN AND VENKATASUBBA RAO, JJ.

C. Kanni Chetti—Plaintiff—Appellant.

v.

Kotah Raju Chetty and *another*—Defendants—Respondents.

O. S. A. No. 80 of 1923, Decided on 8th February 1926, from a judgment of Kumaraswami Sastri, J., D/- 10-7-1923.

Madras High Court Original Side—Accounts—Suit for.

In a suit for accounts on the Original Side the Official Referee has jurisdiction to enquire and report as to the quality of goods contracted and despatched and as to whether certain title-deeds were deposited by plaintiff with defendant for safe custody or as security. [P. 880, C. 1]

N. Swaminatha Iyer—for Appellant.

Short Bewes & Co—for Respondent.

Krishnan, J.—This is an appeal from a decree on the Original Side whereby the plaintiff's suit was dismissed and a decree was given against him in favour of the defendant for a certain sum of money. The plaintiff has brought this appeal. To understand the plaintiff's complaint, it is necessary to mention the facts. He brought the suit as a suit for accounts against the defendant who was his commission agent. That suit was referred by the learned Judge before whom it came on for hearing to the Official Referee to take accounts without deciding any question raised in it. The case was heard at considerable length before the Official Referee; when it was pending before the Official Referee, the plaintiff made an attempt to have certain questions raised for determination by the Official Referee brought into Court and decided by Court, but his application did not succeed. The Official Referee made his report in due course after taking all the evidence available and tendered. The plaintiff filed no objections to the report in time. He asked the learned Judge sitting on the Original Side to grant further time to file his objections. But the learned Judge in his discretion refused that application. The result of it was that the report of the Official Referee was unchallenged by the plaintiff and the learned Judge passed a decree which is now under appeal before us.

The point taken by the appellant (plaintiff) is that the Court had no jurisdiction to refer the whole of his suit to the Official Referee, but should have decided certain questions arising in the case itself. The Official Referee has set out the points for determination in his report. They are five in number and marked as A to E in the report. It is conceded that D relating to taking accounts was properly before the Official Referee, but it is argued that points A, B and C should not have been referred to the Official Referee. Points A and B are as follows:

(a) An enquiry as to whether 250 cases of cutch consigned by the plaintiff to the 1st defendant contain cutch of the quality mentioned in the plaint viz., Mimbu quality;

(b) An enquiry as to whether the said cases delivered to the 1st defendant contained or bore the marks referred to in the plaint.

The dispute was as regards 250 cases of cutch which the plaintiff had sent to the defendant. The defendant did not dispute his having received the cutch nor his liability to account for the cutch. His case was that he could not sell them and that the goods were still available to be returned to the plaintiff subject to the lien which he had for money advanced on such cutch to the plaintiff. The plaintiff then tried to make out that the cutch which the 1st defendant was willing to return was not the same cutch that he had sent but some substitute of a lower quality. This matter was enquired into by the Official Referee and found against the plaintiff. It is contended that this is not a question which could have properly been referred to the Official Referee.

I am inclined to think that this argument is not valid ; for after all the suit in itself is one for accounts and this is one of the points for determination in the suit. Just as, when a point arises in a pure case of accounts whether a particular entry in an account-book is a false entry or not, the Official Referee has to decide the question and to frame his report afterwards on the finding he comes to on such an issue, similarly in the present case he had to find if the 250 cases of cutch which the defendant was willing to return was the same cutch that he had received from the plaintiff and also whether the defendant failed in his duty as commission agent in not settling them for the plaintiff. I think that these are matters which are connected with the taking of accounts and it cannot be said that the Court had no jurisdiction to send these questions to be reported upon by the Official Referee.

The other point raised by the appellant has reference to the enquiry whether certain goods and title-deeds which he had entrusted with the defendant were so entrusted for safe custody or given to the defendant as security for re-payment of the amouut due to him. The defendant's case was that they were given to him as security whereas the plaintiff's case was that they were merely entrusted for safe custody. Here again, the plaintiff was asking the defendant to account for these jewels and title-deeds. It is quite open to the Court to ask the Official Referee to take evidence and report whether the jewels and title-deeds we given for safe custody or as security for re-payment of the dues. Here again, I am of opinion that the matter is not very distinct from the general accounts ordered to be taken that one could say that the Court had no jurisdiction to ask the Official Referee to report about it. After all, it must be remembered that, when the Official Referee's report is submitted, it is the Court that goes finally into the question and decides the rights of parties. In this very case, if the objections which the plaintiff now says he has to the report, were filed in Court in time there can be no doubt whatever that the Court would have determined the points after hearing the arguments and if necessary taking further evidence that may be tendered. That opportunity was missed because the plaintiff did not file his objections and the Court had, therefore, to include that there were really no objections to the report and that it was correct.

It is also argued before us that the learned Judge should have given further time to file objections, but I am not prepared on the facts of this case to interfere with the discretion exercised by the learned Judge in the conduct of proceedings. Nothing has been said before us which would justify interference with the learned Judge's discretion with regard to refusing further time. There was nothing preventing the plaintiff from filing his objections in time as he knew what the Official Referee's report was. He applied for a copy and obtained it. If he did not get it in time it would have been proper for him to have asked for time by Registrar's or Judge's summons. He did nothing of the sort. I, therefore, dismiss the appeal with costs.

Venkatasubba Rao, J.—On the very important question whether the objection taken to jurisdiction is such as would go to the nullity of the decree, I wish to express no opinion. The appellant has shown very little diligence and has been wasting his time and the time of the Court. His conduct is such that he is entitled to no indulgence. I agree in the order proposed by my learned brother dismissing the appeal with costs.

Appeal dismissed.

* * A. I. R. 1926 Madras 881

SPENCER AND VENKATASUBBA RAO, JJ.

Kesar Singh—Defendant—Appellant.

v.

Secretary of State—Plaintiff—Respondent.

Civil Appeal No. 334 of 1922, Decided op 6th January 1926, from a decree of the Sub-J., Kurnool, D/- 23rd December 1921, in Original Suit No. 11 of 1920.

* * (a) *Hindu Law—Adoption by widow—Absence of husband's authority—In absence of agnates consent of nearest cognates, will suffice.*

There being no agnate relation the consent of the nearest cognate relation who under the law would be the presumptive reversioner is sufficient. When it is said that assent of sapindas is necessary, sapindas include bhinnagotra sapindas as well as sagotra sapindas. The test of propinquity from the point of view of property is an unfailing test and a sure guide in this matter: *A. I. R.* 1925 *Mad.* 67, *Diss.*; 12 *M. I. A.* 397 (*P. C.*); 3 *I. A.* 154; 1 *Mad.* 69 (*P.C.*); 1 *Mad.* 174 (*P.C.*); 30 *Mad.* 50 (*P. C.*); *Ref.* 41 *Mad.* 998 (*P. C.*), *Expl.*

[P. 888, C. 2, P. 889, C. 1, 2]

* (b) *Hindu Law—Mitakshara — Succession among bandhus—Father's sister's son's daughter's son is heritable bandhu—Succession depends upon propinquity.*

The fathers's sister's son's daughter's son of the propositus is an heir entitled to succeed. The enumeration of bandhus as heirs in the Mitakshara is illustrative and not exhaustive: 48 *I. A.* 86 (*P. C.*), *Foll.*

The succession under the Mitakshara Law depends upon propinquity and upon religious efficacy and therefore cognates who trace their relationship through one or more females are not excluded. There are two known tests of capacity for inheriting among bandus which must bs satisfied and these are: (1) that sapinda relationship ceases in the case of bhinnagotra sapindas or bandhus after the 5th degree from the common ancestor when the descent is through a female and after the 7th degree from the common ancestor when the descent is through a male; (2) there must be an element of mutuality between the claimant and the propositus; in other words, they must be so related that they are sapindas of each other. *The "line theory" of bandhu relationship expanded by Dr. Sarwadhikari Dissented from*: *A. I. R.* 1925 *Mad.* 807; 48 *Mad.* 722; *Rel. on*; (*Case law discussed.*)

[P. 882, C. 2, P. 883, C. 2, P. 884, C. 2]

A. Krishnaswami Iyer and *W. Kothandaramiah*—for Appellant.

C. V. Anantakrishna Iyer—for Respondent.

Spencer, J.—I have had the advantage of seeing the judgment which my learned brother is about to deliver. On the questions of fact, I have nothing to add to what he will state beyond expressing my entire agreement with his conclusions. On the two questions of law arising out of the 5th and 6th points, I wish to express my concurrence with his opinion. His opinion on the 5th point agrees also with that of Ramesam, J., in *Anne Brahmayya* v. *Chelasami Rattayya* (1). I agree with them in respectfully dissenting from the view expressed by Oldfield, J., in *Vadreva Viswasundara Rao* v. *Ryali Somasundara Rao* (2) to the effect that the class of sapindas, whose consent should be obtained by a widow in order to supply the authority lacking in consequence of her husband having died without authorising her to adopt a son, is limited to agnates. In the judgment of Seshagiri Aiyar, J., in *Kristnayya* v. *Lakshmipathi* (3), *Kristnayya* v. *Lakshmipathi* (4) the Smrithi of Yajnavalkya which is the basis for the theory that a woman, who has no husband, father or sons, needs the advice of those who are her natural protectors is quoted:

रक्षेत्कन्यां पिता, विन्नां पतिः पुत्रास्तु वार्धके, अभावे ज्ञातयस्तेषां न स्वातंत्र्यं क्वचित्स्त्रियाः

[याज्ञवल्क्य आचाराध्याय ८५]

Let her father protect a maiden, her lord a married woman, sons in old age; if none of these, other gnatis, she is not fit for independence.

Here the word used is "gnatis." But temporal consideration cannot be left out of account. Proximity to the deceased with respect to rights of property is also an important factor in considering who should be consulted, for the reason that those persons who would succeed to the property if no adoption were made, are most interested in the protection of the inheritance and in restraining the widow concerned from acting capriciously: vide *Sri Virada Paratapa Raghunada Deo* v. *Brozo Kishore Patta Seo* (5) and *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (6). As regards the devolution of property the original text of Manu is:

अनंतरः सपिंडाद्यस्तस्य तस्य धनं भवेत्.

[Manu Ch. IX 187]

which may be translated literally:

"Whoever is unremote from the sapinda to him let his wealth belong." The word used here is 'sapinda'.

(1) A. I. R. 1925 Mad. 67.
(2) [1920] 43 Mad. 876=59 I. C. 609.
(3) [1916] 30 M. L. J. 265=32 I. C. 253.
(4) [1920] 43 Mad. 65[illegible]=56 I. C. 391=46 I. A. 99 (P. C.)
(5) [1877] 1 Mad. 69=3 I. A. 154=25 W. R. 291=3 Sar. 583 (P. C.)
(6) [1918] 41 Mad. 998=48 I. C. 706=45 I. A. 235 (P. C.)

Now neither the word 'gnati' nor the word 'sapinda is synonymous with the English word "agnate," whatever may be the suggestion conveyed by the common root *gna*. For sapindas undoubtedly include bhinnagotra sapindas who are cognates, and in Professor Monier William's Sanskrit Dictionary "gnati" is defined as a

> paternal relation, a Kinsman in general a father a brother, a distant kinsman, one who does not participate in the oblations offered to deceased ancestors (according to the School)—gnatis is a paternal and sambhandhin maternal relation; the original meaning of "gnati" may be intimately acquainted, cf. Greek (*gnotos gnotee*).

I am satisfied that in the passage where Mr. Ameer Ali observed at page 1004 of 41 *Mad.* [*Veerabasavaruju Pantulu* v. *Balasurya Prasada Rao* (6).]:

> The Ramnad case [*Collector of Madura* v. *Moothoo Ramalinga Sathupathy* (7)] established the proposition that in the Dravida country, under the Dravidian branch of the Mitakshara Law —'there in force'—in the absence of authority from her deceased husband a widow may adopt a son with the assent of his male agnates.

and in the other passage in *Kristnayya* v. *Lakshmipathi* (4) where Viscount Cave observed at page 654:

> The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter.

their Lordships had no intention of laying down the propositions (1) that in the absence of agnates available for being consulted no adoption could be made by a widow who had failed to obtain the authority of her husband; and (2) that in no circumstances should cognates be consulted. No doubt agnates should as a rule be consulted first, if there are agnates, because the principal agnates are the nearest kinsmen, but there appears to be no authority for limiting the class of gnati and sapindas, whose assent may be taken by a widow about to adopt a son, to agnates, except the judgments of my learned brothers Oldfield and Phillips, JJ., in *Vadreva Ranganayakamma Garu* v. *Ryali Somasundara Rao* (2) and of Jackson, J., in *Anne Brahmayya* v. *Chelasami Rattayya* (1) and I am unable to regard the reason given by them for excluding a daughters's son as convincing and well founded.

(7) [1868] 12 M. I. A. 397=1 B. L. R. 1=10 W. R. 17=2 Suther. 135=2 Sar. 361 (P. C.).

Now leaving the 5th point and turning to the 6th point, I find from the pedigree that Kesar Singh is the father's sister's son's daughter's son of Ananta Ram Singh, the propositus, and that Ananta Ram Singh, the propositus, is the mother's father's mother's brother's son of the claimant Kesar Singh. In other words Kesar Singh is towards Ananta Ram Singh in Class 3 of the matri bandhus Group 6 (d) mother's pitri bandhus; and Ananta Ram Singh is as regards Kesar Singh in Cl. 3 or matri bandhus, Group 6 (d) mother's father's own bandhus in the tables of heritable bandhus accompanying the article by Mr. Ganapathi Aiyar, at page 59 of Vol. 9, *M. L. J.*, quoted by the Subordinate Judge in para 44 of his judgment. They are also both within 5 degrees of the common ancestor Dhan Singh alias Kem Singh. In the genealogical table at page 785 of Mayne's 7th Edition of Hindu Law the owner's paternal aunts' son's daughter's son is shown as a heritable bandhu and the authority for his right is quoted in the footnote as *Parot Bapalal Sevakram* v. *Mehta Harilal Surajram* (8); but the decision appears to decide the right of inheritance of a paternal aunt's son's daugter's son. In the present case the claimant is one more degree removed from the propositus and the two females who intervene in the line of descent have a male intervening between them instead of being successive.

Parot Bapalal Sevakram v. *Mehta Harilal Surejram* (8) purports to follow the Full Bench case of *Umaid Bahadur* v. *Udoi Chand* (9) which was also followed by a Bench of the same Court in *Babu Lal* v. *Nanku Ram* (10) and is quoted with approval in the Privy Council decision in *Ramchandra Martand* v. *Vinayak Venkatesh* (11), but is stated by Sadasiva Aiyar, J., in *Chinna Pichu Iyengar* v. *Padamanabha Iyengar* (12) to contain a fallacious conclusion. The defendant in *Umaid Bahadur* v. *Udoi Chand* (9) was in the same degree of relationship to the propositus as E was to B in the table at page 128 [6 C.]. It was un-

(8) [1895] 19 Bom. 631.
(9) [1881] 6 Cal. 119=6 C. L. R. 500 (F. B.).
(10) (1895) 22 Cal. 339.
(11) [1914] 42 Cal. 384=25 I. C. 290=41 I. A. 290 (P. C.)
(12) [1920] 44 Mad. 121=12 L. W. 397=39 M. L. J. 417=59 I. C. 690=(1920) M. W. N. 609.

necessary for the purpose of that case to decide whether E's son F was a sapinda of B. The learned Judges observed that F was within six degrees from the common ancestor. He was actually fifth in descent from A, and the Acharakanda declares that sapinda relationship ceased only after the fifth ancestor on the mother's side in the mother's line and after the seventh ancestor on the father's side in the father's line, calculating from whence the direction of the line changes. So the statement as to B and F not being sapindas to each other was an obiter dictum and the reference to six degrees is not intelligible. The Sanskrit word for 'line' in verse 53 of the Acharakanda quoted in West and Buhler at pages 174-175 (pages 125-126 Cal.) is santana which means 'extending, spreading, lineage, race, family, progeny, offspring, a son or daughter.' It does not appear to denote male ancestors and male descendants exclusively. In Golap Chandra Sarkar's Hindu Law, 5th Edition, page 98 the learned author observes that each link is called a purusha which means "a generation, a person, a man" but that is not the word used in this text. He also observes that recent commentators confine the upward lines to male ancestors only although the downward lines according to them may pass through males or females, or either and that no reason is assigned by them for this distinction. He comments on the fact that the Mitakshara does not say anything about the lines passing through males only, or through both males and females without any distinction, and he thinks that the novel views which were propounded for the first time by the Tagore Law Lecturer of 1880 were embodied in the judgment of the Full Bench in *Umaid Bahadur* v. *Udoi Chand* (8) and that they are peculiar to Professor Sarvadhikari and unsupported by authority.

The Tagore Law Lecturer for 1883, Dr. Jolly, criticized Professor Sarvadhikari's theory in these words at page 216 "an essentially new system of bandhu relationship under Mitakshara Law has been recently proposed by Rajkumar Sarvadhikari. He takes the three bandhus each as indicative of the three principal classes of bandhus and not as embracing the nine bandhus specially named only. This theory has the advantage of giving a clue to the order of precedence among the bandhus. However, though it is developed with rigorous logic from the data put forth by its author, there is no sufficient foundation for these data in the Mitakshara to commend its ready acceptance."

Some general remarks on the subject of female successions follow.

Professor Sarvadhikari enunciates the proposition that in the case of bandhus on the paternal side there cannot be more than two females between the claimant and the propositus and that if there are two females, these two must be related as mother and daughter to each other. But the text of the writings of the ancient expounders of Hindu Law does not warrant the restriction of heritable cognates to those in the father's agnate line and the mother's agnate line. Supposing that is the correct interpretation to be placed on the passage from the Acharakanda to which I have referred above, the logical result would be to allow the intervention of no more than one female, and two females should not be allowed to intervene even though they may be related as mother and daughter.

Adit Narayan Singh v. *Mahabir Prasad Tiwari* (13) is a case in point. The suit of the purchasers of the estate of one Hanuman who was a *matri bandhu* (mother's paternal aunt's son) of the propositus, failed in the Privy Council because of the existence of the mother's sister's grandson (an *atma bandhu*) named Rajendra.

It was not considered by the Judicial Committee to be an objection to Rajendra's title that two females intervened between Rajendra and the propositus Dhanukdari even though those two females were not related as mother and daughter but as sisters. In the case before us two females intervene between Kesar Singh and Ananta Ram Singh, viz., Ganga Bai and Ammi Bai, who were related to the claimant as mother and maternal great-grandmother respectively and a male, viz., Jagannatha Singh, who is Kesar Singh's maternal grandfather, intervenes between them. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (13) the principle is once more recognized that the enumeration of bandhus as heirs in the Mitakshara is illustrative and not exhaustive. This is sufficiently evident from the fact that such obvious heirs as a sister's son and a maternal uncle are not specifically mentioned, although the

(13) 48 I. A. 86=60 I. C. 251—40 M. L. J. 250 (P. C).

maternal uncle's sons are among the cognate kindred enumerated in the text of Ch. II, S. 6, p. 11. This principle was established in *Muthusami Mudaliar* v. *Simambedir Muthukumaraswami Mudaliar* (14). In *Krishna Ayyangar* v. *Venkatarama Ayyangar* (15) quoted by the Judicial Committee in *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (13) the suggestion is thrown out that a party who is able to trace his descent with a lesser intervention of females than another might claim to be preferred, but it is not stated that two females are the limit, or that if there are two they must come one after the other as mother and daughter. The question was left open whether a preponderating male element in the lines of ancestors should prevail and the case was decided by giving preference to an atma bandhu over a pitri bandhu on the principle that the nearer line excludes the more remote. The same suggestion occurs again in *Tirumalachariar* v. *Andal Ammal* (16).

I have mentioned that among modern writers Sarkar does not adopt the views enunciated by Professor Sarvadhikari. Ghose also considers that the mode of computation from the propositus up to the common ancestor and then down to the claimant advocated by Professor Sarvadhikari is opposed to all the Hindu lawyers and to the express words of the Mitakshara, and he says at page 146 of his Principles of Hindu Law (3rd Edition) that the rule laid down in *Umaid Bahadur* v. *Udoi Chand* (9) has not been followed in later cases in the same Court, and in the High Courts of Madras, Allahabad and Patna and he cites several instances of bandhus whose claims as heirs have been recognized even though more than one female intervened in the line between them and the propositus including the case of *Babu Lal* v. *Nanku Ram* (10). On the other hand, Banerjee, appears to range himself on the side of Sarvadhikari (see page 68 of Banerjee's Hindu Law of Marriage and Stridhana) where the learned author says that a line of female ancestors is not regarded as a line in Hindu Law. Ramesam, J., in *Rami Reddi* v. *Gangireddi* (17) notices that some of Professor Sarvadhikari's views on priority of succession based on separation into four families have not been accepted by the Judicial Committee.

It has been long settled that succession under the Mitakshara Law depends upon propinquity and not upon religious efficacy, which is one reason for not excluding cognates who trace their relationship through one or more females.

But there are two known tests of capacity for inheriting among bandhus which must be satisfied and these are: (1) that sapinda relationship ceases, in the case of bhinnagotra sapindas or bandhus after the 5th degree from the common ancestor when the descent is through a female and after the 7th degree from the common ancestor when the descent is through a male; (2) there must be an element of mutuality between the claimant and the propositus; in other words, they must be so related that they are sapindas of each other.

Both these tests have been referred to in the most instructive case of *Ramchandra Martand* v. *Vinayak Venkatesh* (11). There the plaintiffs were Laxmun Rao's paternal grandfather's son's son's daughter's daughter's sons. As they claimed through a female, and as the common ancestor Timaji was more than 5 degrees removed from the plaintiffs, Timaji was not a sapinda of plaintiffs. It followed, therefore, that Timaji's descendants, among whom was the propositus Laxman Rao, were not sapindas of plaintiffs and thus plaintiffs' claim failed, although the plaintiffs were sapindas of Laxmun Rao, whose descent from the common ancestor Timaji was through males, as Luxman Rao could count seven degrees from the common ancestor in enumerating his sapindas. The principle is that when a man computes his relations (sapindas) through his father he has a wider range (7 degrees) than when he computes his relations through his mother, and those relations of his who are connected with him through their mothers have a smaller range (5 degrees) and will only include him among their sapindas if he comes within that limit. Applying this test to the pedigree in the present case we find that Dhan Singh alias Kem Singh, the common ancestor, is within 5 degrees of Kesar Singh, who claims relationship to Ananta

(14) [1896] 19 Mad. 405=23 I.A. 83=6 M.L.J. 113=7 Sar. 45 (P. C.).
(15) [1906] 29 Mad. 115.
(16) [1907] 30 Mad. 406=17 M.L.J. 285.
(17) A.I.R. 1925 Mad. 807=48 Mad. 722.

Ram Singh through his mother, and that Anantaram Singh who was related to Kesar Singh through his father, Mohan Singh, is easily within seven degrees of the common ancestor Dhan Singh. The plaint pedigree unnecessarily shows Bagirath Sing, the father of Dhan Singh, but he need not be reckoned in the counting which starts from the common ancestors. For these reasons I agree with my learned brother that the appeal must be allowed with costs of the appellant here and in the lower Court and the plaintiff's suit must be dismissed.

In view of the special difficulty and importance of this case we allow a vakil's fee of Rs. 2,500 in this Court.

Under O. 33, R. 10, Civil P. C., the Court-fee payable on the appeal may be recovered from the pauper appellant, either by deducting the same from the costs awarded to him and paying him the balance, or otherwise, from his properties.

Venkatasubba Rao, J.—The Government claim the suit properties on the ground of escheat. They originally belonged to Kurnool Anantaram Singh who died about 1864 or 1865, and on his death his inheritance devolved on his widow Ramabai. Kesar Singh, who is referred to as the 2nd defendant, resists the suit of the Government on the ground inter alia that he was adopted by Ramabai in the year 1900 and that his adoption was recognized and acted upon till her death in September 1915. The estate was also claimed by one Nuzvid Anantaram Singh who alleged that he was the heir entitled to the property after the widow's death. He also filed a suit and Kesar Singh was the principal defendant. There was thus a three-cornered contest, the claimants being the Government, Nuzvid Anantaram Singh and Kesar Singh. It is necessary to mention in this connexion that in 1895 a suit, O. S. No. 2 of 1895, was filed against Ramabai by certain persons who claimed to be the nearest reversioners of Anantaram Singh. Four plaintiffs instituted that suit, the object of which was to have certain alienations made by Ramabai declared invalid. Lakshmana Singh ,P. W. No. 1, and Umrao Slngh, P. W. No. 2, are two out of the said four plaintiffs. That suit was dismissed as it was found that the claimants were out the reversioners. Nuzvid Anantaram Singh now put forward in the lowed Court the same pedigree as the plaintiff in the suit of 1895 relied on and her claimed to be related to the last male owner in precisely the same manner as those plaintiffs claimed they were related. He availed himself of the fact that he was not made a party to the previous suit and sought to rely upon the pedigree wich was held to be false in that litigation. The twe suits, that of the Government and that of Nuzvid Anantaram Singh, were tried together by the lower Court and the claim of Nuzvid Anantaram Singh was rejected and that of the Government allowed. There is no appeal by Nuzvid Anantaram Singh and, therefore, the decree passed against him has become final. Kesar Singh has filed the present appeal, and the contest in the Court is, therefore, confined to Kesar Singh and the Government.

Kesar Singh pleaded that Ramabai adopted him and he, therefore, became entitled to the estate. The Government denied the factum of adoption as well as its validity. For the defence it was alleged that Ramabai had the authority of her husband to adopt and in any event the adoption was made with the consent of her husband's nearest kinsman Jagannatha Singh. The lower Court found in favour of the factum of adoption, but held that the consent neither of the husband nor of the kinsman was proved. Another ground taken by Kesar Singh was that the suit of the Government was bound to fail as there was in any event an heir of Anantaram Singh in existence. The Subordinate Judge has found on this point in favour of the Government. The third ground of defence was, that Kesar Singh, apart from this adoption was entitled to the property being a heritable bandhu of the late Anantaram Singh. On this point again the finding of the Subordinate Judge is against the defendant.

Six points arise for decision :

(1) Did Anantaram Singh have no heir and did the property, therefore, escheat to the Government ?

(2) Was the adoption in fact made ?

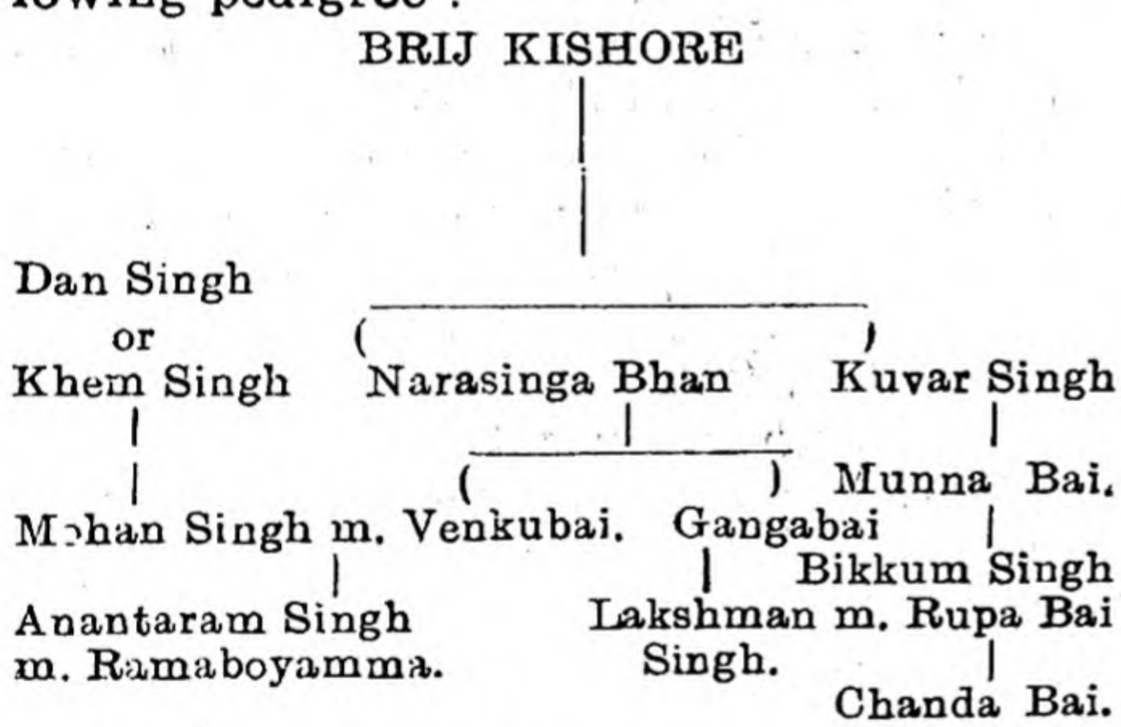
(3) Did the widow have her husband's authority or consent to make the adoption ?

(4) Did Jagannatha consent to the adoption ?

(5) Is his consent sufficient in law to validate the adoption ?

(6) Is the 2nd defendant a heritable bandhu of Anantaram Singh ?

The first point I proceed to consider is whether it has been made out that there was an entire absence of heirs, which alone would render the property escheat to the Government. The 2nd defendant Kesar Singh claims that he is the nearest heir. But for the present I shall assume that he has not made out his title. The question still remains, was there an heir to Anantaram Singh in existence and does the claim of the Government on that account fail ? On behalf of the defence one Beecum Singh has been put forward as the heir of the deceased—barring the 2nd defendant. If the relationship alleged between Beecum Singh and Anantaram Singh is true, it is not disputed that Beecum Singh would be a heritable bandhu and would thus exclude the Government. The relationship of Beecum Singh as gathered from the evidence may be set forth in the following pedigree :



(His Lordship then examined the evidence and held the pedigree to be proved. As regards point No. 2, the finding of the lower Court that the factum of adoption was proved was upheld. Point No. 3—whether Anantram Singh authorised his wife to adopt was found in the negative. Then the judgment dealt with the question whether Jagannath Singh consented to the adoption, and while discussing the evidence on the issue proceeded.) I am quite aware that, from the mere fact that Jagannath took part in the adoption, it cannot be inferred either that he supposed that he was giving the consent or that there was on his part such exercise of discretion as would render the consent effectual : see *Sri Virada Pratapa Ragunada Deo* v. *Brozo Kishore Patta Deo* (5). But what I desire to say is, that the Judge entirely overlooked the point that the evidence left no room for doubt, that if Jagannath's consent had been asked, it would not have been withheld. The Judge did not have an opportunity of watching the demeanour of some of the witnesses, notably, Lakshmana Singh. I am not for the reasons disposed to attach much weight to the finding of the learned Judge on this point. In my opinion, the consent of Jagannatha Singh has been proved.

Point No. 5—The next point that has to be considered is, whether the consent of Jagannatha Singh is sufficient. He was a bandhu, a binnagotra sapinda of the deceased being his father's sister's son. It has been contended for the Government that as Jagannatha Singh was not an agnate of the last male owner, his consent would not be sufficient. It is urged that the consenting relation must be a male agnate of the deceased. In this case the question whether the consenting relation must be a male or a female does not arise. But it is said that it is only the consent of an agnate that will avail and that although cognates, that is, binnagotra sapindas are recognized for purposes of inheritance, they must be disregarded for the purpose of giving consent to an adoption. The law on the subject of kinsmen's consent has gradually been developed in the decisions of the Judicial Committee and though there might have been some indefiniteness in the law at one time, the question is, in my opinion, now free from doubt. The consent that is referred to in the rulings is that of sapindas which term includes both agnates and cognates and not that of agnates alone. To elucidate this point I shall refer to certain rulings of the Privy Council and from them the right principle can be deduced and they incidentally also show how the law on the point has been gradually developed.

The first case where the point was fully considered is the *Ramnad* case. [*Collector of Madura* v. *Moothoo Ramalinga Sathupathy* (7)]. In that it was decided that in the case of an undivided family the consent of the widow's father-in-law is both requisite and sufficient. If the father-in-law be dead, the consent of the husband's brothers must be ob-

tained. Where the husband was divided from his co-parceners, the consent of the father-in-law would be similarly sufficient. Where no father-in-law is in existence, the case must depend upon the circumstances of the family. There should be such evidence of the assent of the kinsmen as suffices to show that the act of the widow was done neither capriciously nor from a corrupt motive. In the particular case, the family was a divided one and to examine the soundness of the argument now advanced, it is important to bear in mind that the relations whose consent was held to be sufficient were :

(1) Mootoo Veroyee, the adopting widow's mother-in-law.

(2) Muthuswami, the natural brother of Annasami, the widow's father-in-law and the nearest male relation alive.

Their Lordships after observing that Muthuswami was not a sapinda but only a samanodhaka, added that he was the natural brother of Annaswami and that circumstance might strengthen his title to be considered the natural male protector of Ramasami's widow.

I refer to this case for the purpose of showing that the contention urged by the Government, that it is the consent of a male agnate that is required, is utterly wrong. Mootoo Veroyee was an agnate but was clearly not a male. Muthusami, while being a male, was clearly not an agnate in so far as his position was referable to that of the natural brother of Annasami.

In tracing the development of the law, it is also useful to notice that their Lordships in this judgment advert to two considerations :

(1) Observance of religious duty.

(2) Heirship to property.

I shall presently show the later development of this branch of the subject. Before passing on from this case I need only observe, that the view was expressed in it that the consent of every kinsman, however remote, is not essential. The expression used in the judgment throughout is "kinsmen" excepting in the last paragraph where the word "sapinda" is used.

The next case is the *Chinnakimidi's* case : *Sri Virada Pratapa Ragunada Deo* v. *Brozo Kishore Patta Deo* (5). In this case the principle was re-affirmed that where the family is undivided the requisite authority is to be sought within the family itself. The relations, whose consent is necessary, are again described as the husband's kinsmen. While their Lordships recognize the importance of an adoption being a religious act, they again indicate that considerations regarding devolution of property cannot altogether be lost sight of. One of the propositions of Mr. Justice Holloway from which the Privy Council expresses dissent is that proximity to the deceased with respect to rights of property is not an element to be considered.

The next case is the *Gunuter* case: *Vellanki Venkatakrishna Rao* v. *Venkatarama Lakshimi* (18). The point actually decided was, that if the adopting widow has not acted capriciously or from a corrupt motive, the Court ought not to minutely examine the motives operating on her mind "There should be proof of assent on the part of the sapindas," their Lordships observed,

> as should be sufficient to support the inference that the adoption was made upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband.

The reference to "expediency" shows that an adoption is not considered wholly in the nature of a spiritual act and that temporal considerations cannot be disregarded. The relations indicated in this case are the deceased husband's "sapindas."

In the next case of *Venkamma* v. *Subramaniam* (19) : see *Subrahmanyam* v. *Venkamma* (20) : the facts that arose necessitated a more definite statement of the law. Besides deciding that the quality of the assent in question was bad, it further decided that the consent of one of the two cousins of the deceased was insufficient, the other of the same degree not having been consulted at all. The deceased's relations are again referred to in this judgment as his kinsmen.

We then come to the case of *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (6) where the doctrine of the kinsmen's consent is fully developed and takes a well defined and definite form. This case, after affirming the rule laid down in the *Ramnad* case (7), when the

(18) [1877] 1 Mad. 174=4 I. A. 1=26 W. R. 21=3 Suther 353=3 Sar. 669 (P. C.).

(19) [1907] 30 Mad. 50=34 I. A. 22=9 Bom. L. R. 89=17 M. L. J. 114 (P. C.).

(20) [1903] 26 Mad. 627=13 M. L. J. 239.

family happens to be undivided, lays down the following rules :

(1) Where the husband was at his death in a state of separation, the father-in-law's consent is essentially requisite to the validity of the adoption.

(2) If there is no father-in-law, the assent of the divided brothers is equally requisite.

(3) If a majority assent and one refuses his objection may be discounted. (The rule must on principle be extended to where the minority consists of more than one).

(4) The absence of the consent of the divided brothers, or in case there is only one, want of his consent cannot be made good by the authorization of distant relatives.

(5) The reasons which make the assent of the divided brothers a requisite condition apply mutatis mutandis to the case of the nearest sapindas other than brothers.

This case places the law beyond doubt. Where there are relations of various degrees, the consent of the nearest must be obtained. The consent of the majority will be sufficient, and if there is only one, his consent will be requisite. The reason for insisting upon the consent of the nearest sapindas is stated to be that they are interested in the well-being of the widow, (in other words, that they are her natural guardians or that they are interested in the spiritual welfare of the deceased or in the protection of his estate. I may, in passing, remark that if the nearest sapinda happens to be sufficiently remote the first two elements exist only in theory. The consideration that uniformly holds good is the third consideration, namely, that pertaining to the devolution of property. In this connexion it is useful to note, as indicating the development of the doctrine, the emphasis their Lordships lay upon the temporal aspect of adoption. They point out that although some expressions in the *Ramnad case* (7) might imply that the question of reversionary interest forms only a secondary consideration, there are other remarks in the same case coupled with the observation in the *Guntur* case (18) which show that rights to property cannot be left out of consideration. In this connexion, they cite, doubtless with approval, the words of Sircar Shastry to the effect that an adoption is more a temporal than a spiritual institution.

The last case of the Privy Council on this point is *Kristnayya* v. *Lakshmipathi* (4). The principles laid down in the previous cases are affirmed and the case is again a distinct authority for the proposition that the consent required is that of a majority of the nearest sapindas. None of these cases gives support to the theory that the consent must be that of agnates. Dealing with particular facts, their Lordships have sometimes no doubt used the expression "agnates," but it is scarcely right to attach importance to the casual use of a word and lose sight of clearly stated principles. As an instance, I may point out that for the respondent a passage was strongly relied on in the judgment in *Veerabasavaraju Pantulu* v. *Balasurya Prasada Rao* (6) [see where the effect of the *Ramnad* case (7) is stated to be] that in the absence of authority from her husband a widow may adopt a son "with the assent of his male agnates." Can it be said that these words were intended to control the actual decision in the *Ramnad* case (7), which, it is clear beyond doubt, as I have shown, is not that the assent of the male agnates is requisite ? Far from *Veerabasuvaraju Pantulu* v. *Balasurya Rao* (6) being an authority far any such position, it clearly shows that the consent that is deemed requisite is that of the husband's sapindas. Are we to ignore the repeated use of the words sapindas and kinsmen on the ground that the word "agnate" is in some places used? The reasons given and considerations adverted to apply equally to cognates, i. e. binnagotra sapindas, as to agnates or sagotra sapindas. In the later cases most distinct emphasis is laid upon the reversionary interest of the consenting kinsmen.

If the view urged for the Government is correct, it would follow that in the absence of authority from her husband when there are no agnates living the widow cannot make an adoption at all. A most distant agnate can by giving consent validate an adoption, whereas a very near kinsman if he happens to be a cognate, cannot give consent. Is this distinction based on any principle ? Though under the law cognates are postponed to agnates, several of the former class are

more closely related to the deceased than many of the latter class. If the consenting cognates are the immediate reversioners I fail to see why their assent should not be sufficient. They are interested in the protection of the estate and it is their reversionary interest that is affected. Some relations who are cognates are more directly interested in the well-being of the widow and the spiritual welfare of the deceased than many remote agnate relations.

There is nothing in these decisions which, expressly or impliedly, gives countenance, to the theory that in regard to consent, cognates stand on a footing different from that of agnates. In the scheme of the Mitakshara succession, cognates are, with the exception of the daughter's son, as a body postponed to agnates. As the consent of the nearer agnates is requisite and sufficient, so the consent, on failure of agnates, of the nearer cognates, would similarly validate an adoption. The rules laid down in the case of agnates, such as the view of the majority prevailing, must mutatis mutandis apply also to cognates. Judged from the standpoint of the particular relation being required to fill the position of the widow's natural guardian or to possess an interest in the spiritual welfare of her husband, several cognate relations as several agnate kinsmen, may be found to lack the necessary qualifications ; but the test of propinquity from the point of view of property will be found an unfailing test and a sure guide.

So far I find no difficulty as this conclusion is fairly deducible from the rulings of the Judicial Committee. The Privy Council, however, has had no occasion to make a pronouncement as regards the rank to be assigned to the deceased's mother, his brothers and his daughter's son, if a conflict arises amongst them. Although for purposes of succession the order is the daughter's son, the mother, the father, the brothers, it has now been decided that for the purpose of giving consent the father comes first.

The mother, according to the *Ramnand's* case (7) has a place but the question remains: Where does she come ? If the mother consents but the brothers refuse or the brothers consent and the mother refuses, what will be the result ? In this scheme, what is the place of the daughter's son ? When the contest has reference to limited group, the point may present some difficulty, and for an obvious reason. Each one of these relations, on account of close affinity to the widow's husband, holds an important position both from the spiritual and temporal standpoints ; but in the case of remoter kinsmen this element of difficulty does not exist. When the point I have indicated has to be decided, the observations of the Judicial Committee in regard to a family council may probably furnish a solution.

One aspect of this question actually presented itself in *Vadreva Rangnayakamma Garu* v. *Ryali Somasundara Rao* (2) and it was there decided that when the deceased's brothers assented to the adoption, the consent of the daughter's son was unnecessary. I refrain from expressing any opinion on the actual point decided in it, although I must confess, with the greatest respect to the learned Judges, that I am unable to agree with much of the reasoning which supports their judgment. To take only one of the reasons, to say that the daughter's son owes no spiritual duty to the deceased is against the spirit and the letter of the Hindu Law and is opposed to Hindu sentiment. I do not, however, wish to enter into a detailed consideration of the reason, as I am generally in agreement with the criticism of this judgment of Ramesam J., in *Anne Brahmayya* v. *Chelasami Rattayya* (1).

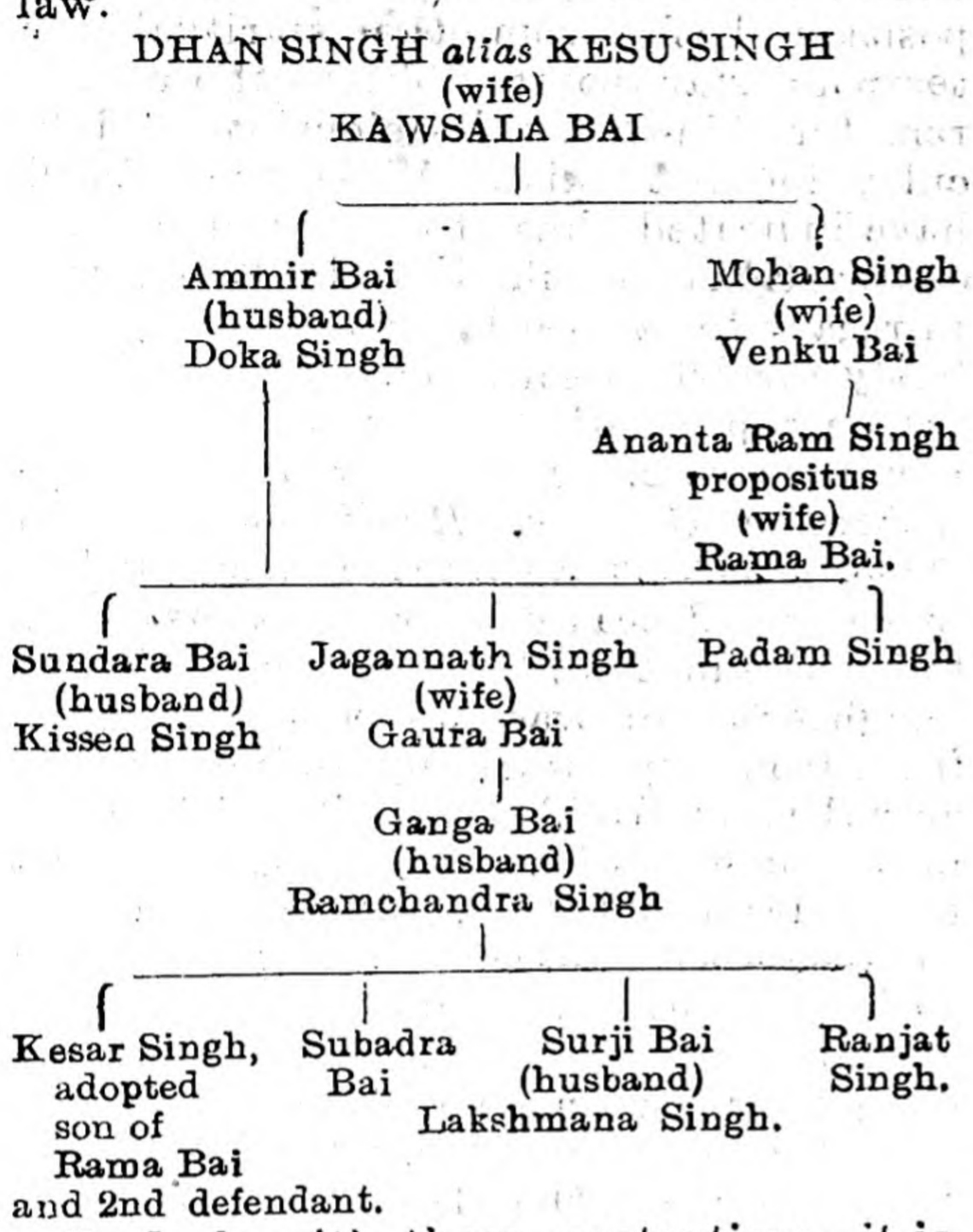
The point that has to be decided in the present case however is, there being no agnate relation and the nearest cognate relation who under the law would be the presumptive reversioner having assented to the adoption, does his consent validate it ? In my opinion, it clearly does.

I shall now deal with the sixth and the last point: Is Kesar Singh a heritable bandhu of Anantaram Singh ? The following pedigree explains the relationship of the parties.

(Pedigree next Page 890.)

It is contended on behalf of the Crown that Kesar Singh is not a heritable bandhu of the propositus. The contention is based on what is known as the "line theory" of Professor Rajkumar Sarvadhikari. It is urged on the other side that judged by the tests accepted in the rulings of the highest

authority, the appellant is entitled to succeed and the doctrine formulated by Sarvadhikari does not find support in the works of the ancient expounders of law.



To deal with these contentions it is necessary to glance briefly at a few of the leading principles in regard to the law of bandhu succession. The right of bandhus, or kinsmen related to the deceased through females, to succeed, is primarily based upon the text of Yajnavalkya which runs thus :

> The wife, daughters, both parents, brothers, likewise their sons, gotrajas, bandhus, a pupil and a fellow student. Of these, on failure of the preceding, the next following in order is heir to the estate of one who has departed for heaven leaving no putra (lineal male descendants).

Let us now turn to Vijnaneswara's commentary, the Mitakshara. The subject is dealt with in Ch. II, Ss. 5 and 6 of Mr. Colebrook's translation of that work. On failure of brother's sons, says the Mitakshara, S. 5 gotrajas or agnates share the estate. Paternal grandmother is said to take the inheritance first. Then the order of succession is given of gotraja-sapindas. By way of parenthesis Vijnaneswara says that he is dealing in this section with the succession of samana-gotra sapindas only as binna-gotra sapindas are indicated by the term bandhu. The Sanskrit words are.

> भिन्न गोत्राणाम् सपिंडानम् बंधुशब्देन ग्रहणात्

Here then do we find the definition of the word "bandhu." That word is used to indicate bhinna-gotra sapindas, the opposite of the term gotraja-sapindas or samana-gotra-sapindas. S. 5, as I have said, deals with the succession of gotrajas. In S. 6, the bandhu succession is dealt with. According to the text of Yajnawalkya cited above bandhus take the estate after the gotrajas and the order of succession among the bandhus is described in S. 6. In this connexion it is unnecessary to refer in more detail to this section to which I shall return later.

We have thus seen that the term "bandhu" is synonymous with bhinnagotra sapindas or sapindas belonging to a different family (gotra). Who then are sapindas ? To understand this term, we must first turn to Cl. 6 of S. 5. It is therefore, indicated that "the relation of the sapindas ceased with the seventh person." But we must bear in mind that S. 5 is confined, as I have said, to the laying down of the order of succession of gotraja sapindas. The limit of the seventh degree is thus expressly stated with reference to gotraja-sapindas of the same family. In the Chapter of the Mitakshara dealing with inheritance (Vyvaharadhayya) the word "sapinda" as it occurs in the expression "bhinnagotra sapinda" has not been defined. In Acharadhaya (Chapter on the rules of conduct) to which I must now advert, Vijnaneswara lays down the rules in regard to marriage.

The author says :

> He should marry a girl who is non-sapinda with himself. Non-sapinda means, not his sapinda. Sapinda-relationship arises between people through their being connected by particles of one body.

Vijnaneswara here recognizes that the word "sapinda" understood in this its etymological sense, may be applied almost to all men and it is necessary to limit in its signification, to certain definite individuals.

Vijnaneswara proceeds to say that with the object of so limiting it Yajnavalkya has laid down :

> After the 5th ancestor on the mother's and after the 7th on the father's side
> the relationship of sapinda ceases.
> पंचमात् सप्तमादूर्ध्वम् मातृत: पितृतस्तथा,
> [याज्ञवल्क्य आचाराध्याय विवाह प्रकरण ५३.]

This text means, says the Commentator, on the mother's side in the mother's

line after the 5th, on the father's side in the father's line after the 7th (ancestor) the sapinda relationship ceases.

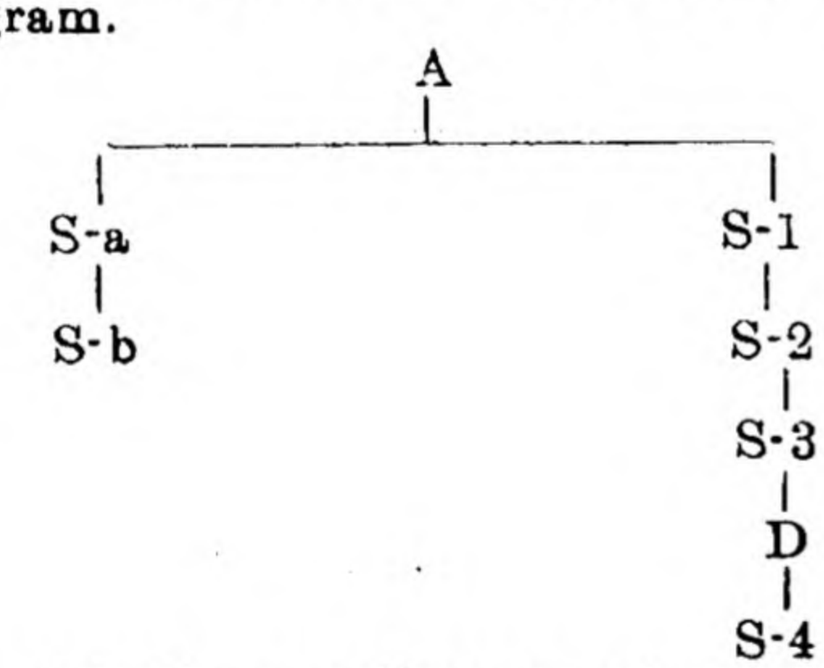
By this process we arrive at the meaning of the word "bandhu." In Vyvaharadhyaya we find that bandhus are described to be bhinnagotra-sapindas. This is the first stage. We then find it stated in the Acharadhyaya that the sapinda relationship ceases beyond the 5th in the mother's line and beyond the 7th in the father's line. This is the second stage. Putting these two parts of the definition together we arrive at the result that a bandhu is a relation belonging to a different family not removed beyond the 5th degree in the mother's line or beyond the seventh in the father's line. I have so far dealt with the text of Vijnaneswara's commentary upon it.

I shall now pass on to another text, the text of Manu which reads thus:

अनंतर: सापिंडाद्यस्तस्य तस्य धनं भवेत्.

Manu Ch. IX 187.

which has been understood sa meaning "the property of a near sapinda shall be that of a near sapinda." This is the foundation of the doctrine that the relation of sapindaship must be mutual. I shall illustrate this by the following diagram.



In this diagram S represents a male and D a female. Are S-b and S-4 sapindas of each other? S-b is connected through his father and is within the prescribed 7 degrees from the common ancestor, A but S. 4 who traces descent through his mother is beyond the limit of 5 degrees from A. There is, therefore, no mutuality of sapinda relationship between S-b and S-4. This element of mutuality being absent, they cannot inherit to each other.

Let me now apply the rules I have so far deduced, to the present case. Dhan Singh is the common ancestor, Kesar Singh the claimant and Anantram Singh the propositus. Kesar Singh claims relationship through his mother Gangabai and is 5th in descent from Dhan Singh. Anantaram Singh traces relationship through his father Mohan Singh and is third in descent from the common ancestor. The test of degree as well as the test of mutuality are thus satisfied. If these are the only two tests that are to be applied, Kesar Singh's claim to be a heritable bandhu must be upheld.

This leads me on to a discussion of what I have described as the "line theory" of Professor Sarvadhikari.

Chapter II, S. 6 of Mr. Colebrooke's translation of the Mitakshara must in this connexion be referred to.

After having dealt with agnates in S. 5 Yajnavalkya deals with bandhus in S. 6 He says:—

On failure of agnates, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father or to his mother as is declared by the following text:.

The text of Vridhasatatapa is then cited which groups bandhus under three headings.

(1) Atma bandhus, sons of his own paternal aunt, sons of his own maternal aunt and sons of his own maternal uncle.

(2) Pitribandhus, sons of his father's paternalaunt, sons ofhis father's maternal aunt and sons of his father's maternal uncle.

(3) Matri bandhus, sons of his mother's paternal aunt, sons of his mother's maternal aunt and sons of his mother's maternal uncle.

Vijnaneswara then proceeds:—

Here by reason of near affinity atma bandhus are his successors in the first instance, on failure of them pitri bandhus; or if there be none. matri bandhus. This must be understood to be the order of succession here intended.

Professor Sarvadhikari evolves a theory out of this,. He proceeds in this way. The bandhus specifically mentioned will, on an examination, be found to belong to certain families and he infers therefrom that heritable bandhus must be restricted to those families.

The families are the following:—

(1) The family of the propositus.

(2) The family of the mother's father of the propositus.

(3) The family of the father's mother's father of the propositus.

(4) The family of the mother's mother's father of the propositus.

To this Professor Sarvadhikari feels obliged to add the cognate descendants of the propositus.

I shall now state the five groups of bandhus prepared on this basis.

(1) His (propositus's) cognate descendants), family No. 1.

(2) Cognate descendants of his agnate ascendants, family No. 2.

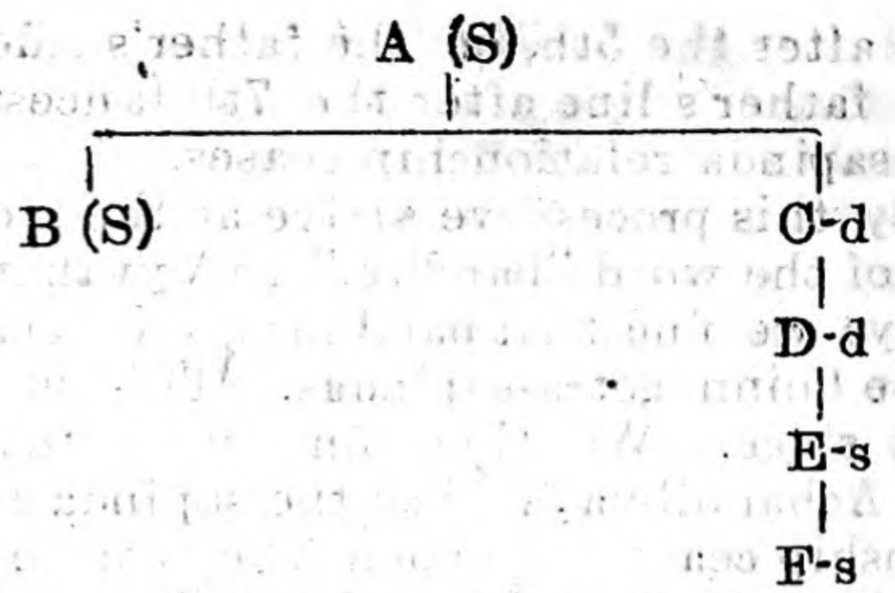
(3) Descendants of his mother's agnate ascendants, family No. 3.

(4) The descendants of his father's mothers's agnate ascendants, family No. 4.

(5) The descendants of his mother's mother's agnate ascendants, family No. 5.

In the present Edition of Sarvadhikaris work the bandhus belonging to the first three families are termed Atma bandhus, the bandhus belonging to the fourth family, pitru bandhus, the bandhus belonging to the fifth family, matri bandhus. As I have already said, according to this doctrine, a person who does not belong to these five families cannot be a heritable bandhu. First then we have to ascertain whether applying this rule the claimant is a heritable bandhu of the propositus. Then we have to apply the test of mutuality, that is, we have to determine whether applying the same rule, the propositus is a heritable bandhu of the claimant.

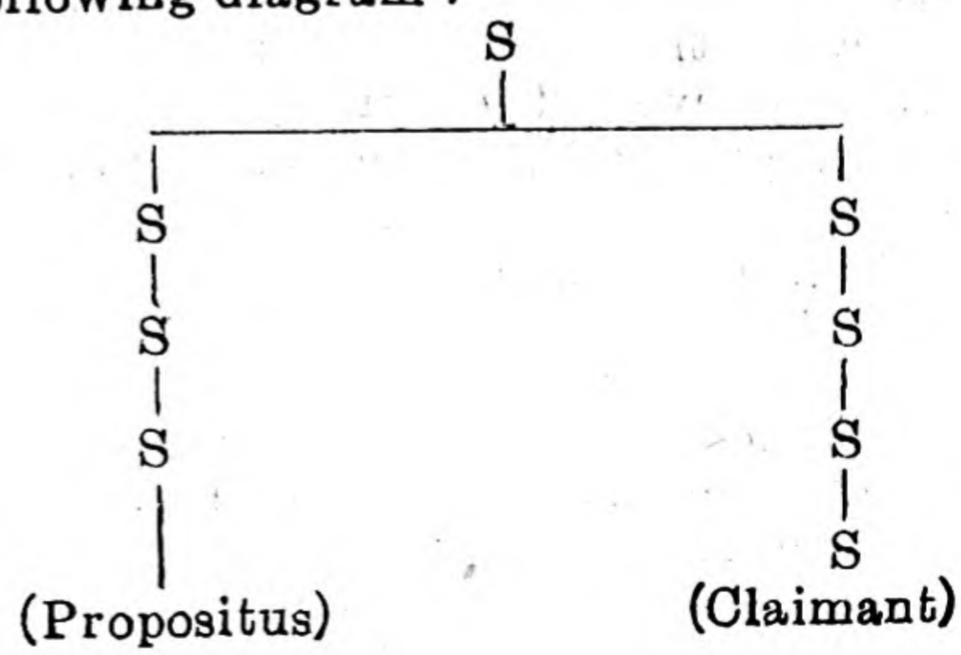
Now taking the facts of the present case, the claimant, from the point of view of the propositus falls within the five families. Kesar Singh is a cognate descendant of Anantaram's agnate ascendant. But Anantaram, from the point of view of Kesar Singh, does not belong to one of the five prescribed families. Thus, the test of mutuality is wanting. Kesar Singh's claim cannot therefore, be upheld if this theory is adopted. The question is, does this doctrine find support either in any ancient text or recognized commentary. No authority is relied on by the learned author. The result of applying the rule laid down by him is to further narrow the class of heritable bandhus. My remarks are not intended to be a criticism of his theory as such. It may be both logical and rational, but it is the duty of the Court to interpret and apply the law as it stands, and I find no justification for accepting the view of Professor Sarvadhikari. This rule has not received the approval of the Judicial Committee. The learned Government Pleader invites our attention to three cases. The first case he relies upon is *Umaid Bahadur* v. *Udoi Chand* (7).



E in the Diagram above given was the claimant in the case and the learned Judges held that he could succeed to the estate of B, the propositus. This was the point decided and so far there is nothing in the case to support the respondent's contention. Having held that E can inherit, the learned Judges went on to say, at the close of their judgment, that F would not be a bandhu and no reasons are given. This is clearly an obiter dictum. It is suggested, and this seems to be the case, that this decision having been given at the time Sarvadhikari delivered his lectures, the learned Judges adopted his view and in the illustration gave expression to it.

Nor did the present question arise in *Babu Lal* v. *Nanku Ram* (10), which is relied on merely because certain observations in the previous case *Sri Virada Pratapa Ragunada Deo* v. *Brozo Kishore Patta Deo* (5) were cited in the judgment. To remove any misapprehension, I must state that at page 345 [22 C.] certain relations are found grouped in five classes, and beyond the mere accident that the families mentioned by Sarvadhikari are also five in number, there is nothing in common between the five groups in this judgment and the five families of Sarvadhikari.

The third and the last case relied on for the respondent is *Chinna Pichu Iyengar* v. *Padamanabha Iyengar* (12). The claimant in that case is indicated in the following diagram :



The claim was disallowed on the authority of *Umaid Bahadur* v. *Udoi Chand* (9). Napier, J., expressly said that he would adopt the view of Sarvadikari for the reason that *Umaid Bahadur* v. *Udoi Chand* (9) had never been doubted. This view, however, did not commend itself to the other learned Judge, Sadasiva Iyer, J., but he agreed with Napier, J., in disallowing the claim on the somewhat curious ground that he is generally against claims by remote relations and that only by legislation the anomalies of the present law could be removed.

I do not think there is any such authority as will compel us to accept the view of Professor Sarvadhikari which finds no support in the texts or ancient commentaries and which has the effect of unduly limiting the bandhus who can inherit. Several modern commentators have refused to recognize the dictum of this learned writer as correct. I need only mention Ghose and Sircar Shastri. In the table given in Sir Sankaran Nair's edition of Mayne, a person is indicated as the heritable bandhu who occupies the position of Kesar Singh although in the table given in the present edition, which is apparently modelled upon Sarvadhikari, that relation is omitted. The subject of bandhu succession was considered at some length in *Ramchandra Martand* v. *Vinayak Venkatesh* (11). Among the tests laid down in the very instructive judgment, is not to be found the test now under discussion. Although their Lordships refer to passages in *Umiad Bahadur* v. *Udoi Chand* (9) and *Babu Lal* v. *Nanku Ram* (10), as also to the work of Sarvadhikari, there was no necessity to consider the present point.

It has been suggested that as the authority of Sarvadhikari as an eminent lawyer has been recognized by the Judicial Committee, we must adopt the rule formulated by him on this head. I do not think that this is a safe guide. Now turning to the five families as classified by Sarvadhikari, father's father's sister's son is described as atma bandhu whereas, according to the text, he is a pitru bandhu. And again, mother's father's brother's son and mother's father's sister's son are according to Sarvadhikari atma bandhus, whereas they are according to the text matri bandhus. According to Sarvadhikari again bandhus in the first two families must be exhausted before a bandhu in the third family can come in. This view has been dissented from the Privy Council in *Muthusami Mudaliar* v. *Simambedri Muthukumaraswami Mudaliar* (14). In that case mother's brother was preferred to father's father's sister's son, that is, a relation in family No. 3 (Sarvadhikari), was preferred to a relation in family No. 2 (Sarvadhikari). At p. 409 [19*M.*] their Lordships describe a father's father's sister's son as a pitru bandhu which is in consonance with the text, but is against the view of Sarvadhikari. It is noteworthy that in *Muthusami* v. *Muthukumarasami* (21), which is the decision of the Madras High Court affirmed by the Privy Council in the last-mentioned case of *Muthusami Mudaliar* v. *Simambedri Muthukumaraswami Mudaliar* (14), the grouping of Sarvadhikari was not accepted. In *Vedachela Mudaliar* v. *Subramania Mudaliar* (22) the dicta of Muthuswami Aiyar, J., in *Muthusami* v. *Muthukumarasami* (21) were approved by the Judicial Committee. I have arrived at the conclusion that the view of Profeseor Sarvadhikari on this point cannot be accepted.

I cannot conclude the discussion of this point without adverting to one matter which I think is of some importance. I have said in the course of this judgment that, in the case of bandhus, sapinda-relationship ceases beyond the fifth from the mother and the seven from the father. This is repeatedly referred to in the judgment of the Judicial Committee in *Ramchandra Martand* v. *Vinayak Venkatesh* (11). The question in that case was whether the plaintiffs who claimed through their mother, but who were bhinnagotra sapindas beyond the fifth degree could inherit. It was held that they could not. I refer to this point, because there are some observations in the judgment which may at first sight seem to imply that the limit of sapinda relationship in the case of bandhus ceases with the fifth degree irrespective of whether the claim is traced through the father or the mother. The District Judge has held

that the appellants claiming through their mother and being sixth in descent from their common ancestor Timaji Pant were outside the

(21) [1893] 16 Mad. 23 =2 M. L. J. 296.
(22) A. I. R. 1922 P. C. 33=44 Mad 753 (P. C.).

limits of heritable bandhus recognized by the Mitakshara Law and had no claim.

This was the view that was affirmed by the Privy Council. There is nothing in the judgment to suggest that their Lordships intended to do away in the case of bhinnagotra-sapindas the well-recognized distinction dependent upon whether the claim is traced through the father or the mother. The view which their Lordships refused to accept is that of Golapchandra Sircar Sastri, the view which was pressed before the Judicial Committee by Mr. DeGruyther to the effect that the word " bandhu " includes either all cognate relations without any restriction or at any rate all cognates within seven degrees on both the father's as well as on the mother's side. The distinction to which I have referred to is recognized in all works of Hindu Law whether the writer belongs to the school of Sarvadhikari or not. It was not suggested in the course of the argument before us that such a distinction does not exist, but I have considered it necessary to make these remarks as in what I have stated I have recognized this distinction.

My conclusion, therefore, is that Kesar Singh is a heritable bandhu of Anantaram Singh and the claim of the Government must fail on this ground also. In the result the appeal succeeds and it is allowed and the suit is dismissed. I agree in the order as to costs made by my learned brother.

Appeal allowed.

A. I. R. 1926 Madras 894

COUTTS-TROTTER, C. J. & KRISHNAN, J.

Veerasami Pillai—Appellant.

v.

V. S. T.N. Chidambaram Chettiar and *others*—Respondents.

Appeal No. 44 of 1922, Decided on 28th January 1925, from a decree of the 2nd Addl. Sub-J., Madura, in Original Suit No. 73 of 1921.

Right of suit—Where party would have lost a claim apart from conduct of another man the other man is not liable—Damages.

Where a certain pro-note was accepted though it was void as contravening S. 26, Paper Currency (Act 2 of (1910), and in discharge of that pro-note the agent of the creditor forged another pro-note and thus misled his principal into filing a suit on the forged pro-note which was dismissed on that ground, and where the creditor did not seek the alternative claim on the consideration of the orginal pro-note,

Held ; that the loss of the creditor was not due to the forged pro-note but to his acceptance of his original pro-note and therefore the agent was not liable for the loss of the debt.

[P 896 C 2 ; P 897 C 1]

C. V. Anantakrishna Iyer—for Appellants.

M. Patanjali Sastri—for Respondents.

Coutts-Trotter, C. J.—This case has been in a state of confusion from the outset and it is only at the very last moment of it that our attention is drawn to a point that I am not sure we did find for ourselves and which would have rendered about two-thirds of the argument unnecessary. I do not blame the Bar ; they had to pick out the facts from a tangled mess of documents and oral evidence. The judgment of the learned Judge is so confused that it is almost impossible to discover what he did find and what he did not. However, in the view we take of this case, it is unnecessary to scrutinize the findings of fact of the learned Judge, because, to all intents and purposes, we may accept them. The facts are quite simple. The plaintiff is a Nattukottai Chetti who lives somewhere in the Ramnad District and has a branch business conduted in his absence by an agent at Palni. During most of the material time in the suit that agent was the 4th defendant. A debt had been incurred by the 1st and 2nd defendants in the suit to his predecessor-in-agency and two promissory-notes had been given, Exs. A and A-1, dated the 12th January 1912 and 29th January 1912. Those promissory notes were for Rs. 900 and 100 respectively. After the 4th defendant had taken up his position as agent in succession to the other man, a very curious transaction took place. The 1st defendant, on the 4th October 1913, executed a sale deed transferring a certain piece of property to his mother-in-law for an expressed consideration of Rs. 2,000 ; and three days later, on the 7th October, the same piece of property was mortgaged by the mother-in-law to the plaintiff through the agent, the transaction being carried out on the spot by the agent. The consideration for the mortgage was expressed to be the discharging of the debts evidenced

on the promissory notes and a fresh advance of Rs. 403 which, according to the evidence, was actually made. The position apparently was that the original debtor, the 1st defendant (because the 2nd defendant is only a member of the family brought in under Hindu Law) was a well-to-do man and there would be no difficulty in getting the money. The position of the old woman was that, beyond this little bit of property, which came to her from the 1st defendant in circumstances that are not beyond suspicion, she had nothing else in the world and apparently her husband was as impecunious as she was. Undoubtedly the transaction was one which the principal would be very likely to look at with very great suspicion; and, accordingly, when the principal, as in due course of time he did, visted Palni, he took his agent very much to task for exchanging a good security against a very solvent man for a very risky mortgage on a piece of land entirely problematical in value and said to be of much less value than a reasonably safe margin would demand. So there we have the agent at this stage treated as guilty of a breach of duty; and it may be that, had he then and there sued his agent for neglect and breach of duty, he would have been able to prove that the property was not worth as much as the debt, and he would have got damages from the agent for his taking Ex. B instead of preserving the liability on Exs. A and A (1). But that cause of action is gone and hopelessly time-barred.

There is another suggested cause of action and that is a very curious one. When the 4th defendant was taken to task for releasing the 1st and 2nd defendants he said:

O; that is all right. They quite acknowledge their liability continues and to show you that that is so, I will get you a fresh promissory-note executed by the 1st defendant.

That he did and that promissory note figures in the case as Ex. H. Exhibit H has had a touring existence in various law Courts and the last pronouncement upon it was by the learned Subordinate Judge in this case who pronounded it to be a forgery, the theory being that the agent being frightened because of his misdeeds in regard to Exs. A and A-1 and B being found out sought to appease his principal by forging a promissory-note purporting to be executed by the original debtor the 1st defendant. The Subordinate Judge went into the matter at enormous length, but he entirely overlooked the point which cropped up at the end of the hearing here which renders the cause of action in our view untenable. The cause of action is this:

You represented to me that I was in possession of a new document on which I can sue you, the 1st and 2nd defendant, without recourse at all to the old promissory-notes.

And thereupon, he says, he brought a suit on Ex. H and was damnified owing to being lulled into security by the false representation that Ex. H was a genuine document, forewent his remedy on Exs. A and A-1 and let them be time barred.

It is obvious that, if he provod his case at all, he would have been able to say in these proceedings on Exs. A and A-1.

It is quite true that these things look on the face of the transactions between the parties to be merged in Ex. B and to be gone but I am not in a position to show that Ex. B was a fraud and in that therefore, the original liability on the promissorynote, Exs. A and A-1, was never truth andin fact extinguished.

We will assume that it is right. Speaking for myself, I think it would have been right, but there is one trifling flaw and it is this: By S. 26 of the Paper Currency Act of 1910,

No person in British India should draw, accept, make or issue any bill of exchange, hundi, promissory-note or engagement for the payment of money payable to bearer on demand

with certain exceptions; and the effect of the section is to make such instruments absolutely illegal. Now, what is the position? There are decisions of this Court which, while formally settling the principle that such instruments are illegal, nevertheless point out that in certain cases the payee of the promissory-note can nevertheless bring proceedings on the original consideration. Some of them say that the promissory note may be relied upon as evidentiary of the original debt and consideration. It is unnecessary to discuss that matter here, because I do not think it arises in this case; but I should like to guard myself from being understood to say that I assent to that view of the law without further consideration and direct argument about it. But here, what was the position? If the plaintiff could have said:

You, by your representations about the genuineness of this note prevented me from suing on the consideration.

then there might be a great deal to be said but he has not said that. The note is payable to a named payee or bearer; and the contention at one time put forward was that that was not the mischief that it was intended to be hit by the Act. But there are several decisions of this Court which clearly decide otherwise; and, indeed, speaking with respect, I do not see how any Court could decide otherwise when it has really looked with any care at the statute, what did the plaintiff do who, we have assumed, has been misled by the defendant's misrepresentations about the note? He did not come before the Court and say,

> This is a promissory-note bad on the face of it and illegal, but it has a perfectly good consideration behind it and I ask you to let me sue you on that debt. I put in a plaint purporting to sue on it and I ask you to let me sue on the promissory-notes merely as evidence of the debt.

He brought a suit entirely framed on these promissory-notes and nothing else and the District Munsif decided against him on the ground that the notes were vitiated by the provisions of the Act. During the trial I suppose the District Munsif must have given him some intimation of what was in his mind. At the trial he did not ask for an amendment of the plaint and he did not apparently amend, or was at any rate allowed to amend, only when the case came on in appeal. The only conclusion is that, assuming the plaintiff to have been misled by the false representation made to him, assuming that the defendant acted with a fraudulent intent and knew that the representations he was making were false, the chain of causation breaks down. It was not those representations that brought the plaintiff's case ill luck, but it was the fact that he took an instrument which the law presumes him to know to be bad on the face of it instead of his old remedy, and that, having that instrument, he stuck to it as his sheet anchor and did not attempt to revive the original consideration. I may add that he would have been no better off on the finding of the learned Judge if in addition to suing on the promissory note, Ex. H, he had added an alternative claim on the consideration for that note for the simple reason that the learned Judge in this case—and it looks very much as if he was right—has found a fact that this promissory-note, Ex. H, was forged. Therefore the only thing on which he could possibly have sued was the original consideration of the two old promissory-notes, Exs. A and A (1), and it was never suggested from first to last of this trial that it was any representation of the 4th defendant that prevented him from doing that. In my opinion this appeal must be allowed but, in view of the revelations of the 4th defendant's conduct, and, I may add, in view of the fact that the real point in the case was never taken until it had progressed several hours, we should not allow any costs.

Krishnan, J.—In this case the facts have been very clearly and fully set out in the judgment just delivered by the learned Chief Justice and it is unnecessary to state them again.

The 4th defendant is sued by the plaintiff on the ground that by giving him a forged note, Ex. H., he induced him to bring a suit on that note and as it was forged, he failed on the note and incurred the costs of that litigation unnecessarily and further that he was misled into giving up his claim under Exs. A and A (1) for the time being till that claim became barred by limitation. He contends before us, therefore, that on the finding that Ex. H is a forgery he is entitled to get from his agent, the 4th defendant, damages calculated partly on the costs of the litigation in which he failed and partly on the loss he suffered by not being able to claim against the 1st and 2nd defendants the amount due under the notes Exs. A and A-1. The prinicipal difficulty in his way is that Ex. H was not a document on which he could have based any action at all as it is a document rendered illegal by S. 26 of the Paper Currency Act. Even if it had been a genuine document, a suit on that document must have failed. That being so, it cannot be said that the loss of that litigation was due to the action of the 4th defendant, in forging the note The plaintiff should have seen when he got Ex. H that, whether it be a genuine or a false one, it was not a document on which he could have maintained a suit, and, if he brought one, it was due to his own fault and I do not see how under the circumstances he could turn round and say that he lost his litigation on account of the action of the 4th

defendant and that he should be made liable for the costs. It is contended before us that, even if we treat Ex. H as a document on which no action could have been brought, still if it had been a genuine document he could have asked the suit to be converted into one on the original cause of action, namely, the loans for which Exs. A and A (1) were given and got relief against the 1st and 2nd defendants. The answer to it is that if he had taken proper care to see what his rights were he could have in the very first instance, instead of suing on Ex. H, brought the action as he might have then done on the original loans for which Exs. A and A (1) were taken ; Exs. A and A (1) themselves were promissory-notes which are hit at by S. 26 of the Paper Currency Act and hence could not have been sued upon. If any loss occurred to the plaintiff, it is clearly, therefore, due to his own neglect in not seeing what his rights were under the documents which are in question here. So far as any claim could be based upon the defendant's action in taking Ex. B in supersession of Exs. A and A-1 and a sum of money advanced at the time Ex. B was executed, that claim is now barred by limitation ; and no suit could be maintained by the plaintiff on any cause of action based upon the misconduct of the 4th defendant in taking Ex. B. It is only if he can sustain his present action on a ground based upon Ex. H that he has got any claim at all. As I have already stated I do not think that he is entitled to base any claim on Ex. H for the reasons I have already stated. That being so, it is clear that this action as against his agent, the 4th defendant, fails. The 4th defendant's appeal must, therefore, be allowed and I agree to the order proposed by the learned Chief Justice. The suit is dismissed as against the 4th defendant.

Appeal allowed.

A. I. R. 1926 Madras 897

RAMESAM, J.

Rajah Saheb Mahabhan Doostan Sri Rajah Rao Venkata Kumara Mahipati Surya Rao Bahadur Garu, Rajah of Pittapuram—Petitioner.

v.

Avala Govindayya and *another*—Respondents.

Civil Revision Petition No. 189 of 1924, Decided on 11th March 1926, for revision of the decree of the Dist. Munsif of Peddapuram, D/- 16th July 1923, in Small Cause Suit No. 1278 of 1921.

Landlord and Tenant—Kattubadi—No privity of contract—Tenant is liable only for kattubadi for land in his possession.

Where there is privity of possession and no privity of contract the tenants are liable only for the kattubadi for land in their possession ; 11 *L. W.* 523, *Rel. on.* [P 898 C 1]

S. Srinivasa Aiyangar and *S. V. Narayana Aiyar*—for Petitioner.

G. Lakshmanna—for Respondents.

Judgment.—The plaintiff sues to recover the kattubadi on three items of land with separate survey numbers, separate pattas, separate extents and separate kattubadis (see schedule to the plaint.)

The Defendants Nos. 1 to 6 are said to be connected with Items Nos. 1 and 2 and Defendants Nos. 8 and 9 are, it is now conceded for the plaintiff, the purchasers of item No. 3. Therefore they are certainly liable to pay the kattubadi of this item separately i. e., Re. 1-11-3. Now the plaintiff admits in the plaint schedule that he recovered Re. 1-11-2 (in two parts of Re. 0-13-7 each) for the properties sued for and gives credit for the payments though he did not allege who paid it. The Defendants Nos. 8 and 9 said that it is they that paid it and produce their receipts. I asked the plaintiff to state on affidavit who paid it. He now admits that Defendants Nos. 8 and 9 paid it. Thus the Defendants Nos. 8 and 9 have completely paid off the kattubadi fixed on their items except a pie for each fasli. If the claim for this pie was proved in the Court below, there would have been a decree against them for that amount. But this was overlooked and the Civil Revision Petition is filed for setting a joint and several decree against Defendants Nos. 8 and 9 along with Defendants Nos. 1 and 6 for the kattubadi

of other items and the claim is sought to be substantiated by adding a new plea in the affidavit (now filed in response to my demand for information as to who paid Rs. 1-11-3), that the kattubadis, though originally fixed separately were afterwards consolidated by an arrangement, a case not set up in the original plaint.

Both on the ground that the kattubadis were fixed separately for the three items (according to the plaint schedule) and on the ground that the Defendants Nos. 8 and 9 are only liable for the kattubadi of item 3, by privity of possession (there being no privity of contract) see *Venkatusubramaniyam* v. *Rajah of Venkatagiri* (1) I dismiss the claim of the petitioner against the Defendants Nos. 8 and 9 as to Items Nos. 1 and 2 and give a decree for 4 pies as to Item 3. As the petition is frivolous it is dismissed with costs subject to the above modification.

Petition dismissed.

(1) [1920] 11 L. W. 523=56 I. C. 552.

A. I. R. 1926 Madras 898

DEVADOSS AND WALLER, JJ.

B. S. Ammani Ammal—Appellant.

v.

T. S. Ranganayaki Ammal—Respondent.

Letters Patent Appeal No. 74 of 1925, Decided on 20th November 1925, against the judgment of Phillips, J., D/- 3rd March 1925.

Specific Relief Act, S. 54—Openings on southern side of a house are necessary for comfort in South India—Plaintiff acquiring a right to light and air ought to be given a permanent injunction.

The existence of windows and openings on the southern wall of a house is necessary for the comfort of the inhabitants of the house ; for, the southern breeze is very much valued in South India.

Where certain windows and the aperture over a certain courtyard have been in existence for more than 20 years and the plaintiff has acquired a right to light and air through the windows and the aperture.

Held : that it is a fit case in which the plaintiff ought to be given a permanent injunction restraining the defendant from obstructing the windows and the aperture over the courtyard by raising a wall on his land ; 21 *M. L. J.* 313, *Foll.* [P 899, C 1]

T. R. Ramachandra Iyer—for Appellant.

T. M. Krishnaswami Iyer—for Respondent.

Judgment.—The plaintiff's suit is for a permanent injunction restraining the defendant from interfering with the right of easement to light and air through four openings. The City Civil Judge decreed the plaintiff's suit. On appeal Mr. Justice Phillips has reversed the decree of the City Civil Judge and dismissed the plaintiff's suit. The plaintiff has preferred this Letters Patent appeal.

The plaintiff's case is that her house No. 135 Govindappa Naick Street, George-Town, has three windows on the southern wall and an aperture over the southern wall through which light and air came into her courtyard. The windows are Nos. 1, 3 and 4 and the aperture is No. 2 and the windows and aperture have been in existence for over 20 years and she has acquired an easement for light and air through them ; and the defendant, the owner of No. 136, is building flush with the southern wall and thereby threatens to inferfere with her easement right.

The defence is that the windows were put up and the aperture came into existence only ten years ago and the plaintiff has not acquired a right to have free access of light and air to her house through the windows and the aperture. The City Civil Judge, after a careful consideration of the evidence and the inspection of the plaintiff's house came to the conclusion that the windows and the aperture had been in existence for more than 20 years and that the plaintiff had acquired a right to have free access of light and air through them.

Mr. Justice Phillips differed from the finding of the City Civil Judge mainly on two grounds (1). That the roof over the court-yard and the sun-shades came into existence within 20 years and the evidence as to its existence in 1887 was disbelieved and that it is difficult to credit the evidence with regard to the windows. (2). The City Civil Judge did not say anything about the character or the trustworthiness of the plaintiff's witnesses and consequently there was nothing to guide him in estimating their evidence. (Their Lordships after setting

out the evidence proceeded.) Taking all the circumstances into consideration, we have no hasitation in coming to the conclusion that the three windows and the aperture over the courtyard have been in existence for more than 20 years and the plaintiff has acquired a right to light and air through the widows and the aperture. The next question is, whether the plaintiff is entitled to a permanent injunction.

Mr. T. M. Krishnaswami Iyer contended that this is not a case in which permanent injunction ought to be granted restraining the defendant from putting up a wall on his own land. The windows are necessary for the convenient enjoyment of the plaintiff's house. If the windows are blocked up, the plaintiff's house would become almost uninhabitable and the aperture over the courtyard is necessary for the purpose of light and air coming into the plaintiff's kudam. The plaintiff is not bound to remove the tiled covering over the courtyard in order to help the defendant to put up a high wall close to it. Even if there was no covering over the court-yard, the defendant's wall raised as high as 20 feet would materially affect the quantity of light and air that would come into the plaintiff's house. As already observed the existence of windows and openings on the southern wall of a house is necessary for the comfort of the inhabitants of the house; for, the southern breeze is very much valued in this part of the country.

We, therefore, hold following the principle laid down in *Ramanuja Naidu* v. *Apparanji Ammal* (1) that this is a fit case in which the plaintiff ought to be given a permanent injunction restraining the defendant from obstructing the windows and the aperture over the courtyard by raising a wall on his land. In the result the appeal is allowed, the decree of the learned Judge is set aside and that of the City Civil Judge is restored with costs throughout.

Appeal allowed.

(1) [1911] 1 M. W. N. 251=9 I. C. 417=21 M. L. J. 313.

A. I. R. 1926 Madras 899

PHILLIPS AND MADHAVAN NAIR, JJ.

Omayachi—Appellant.

v.

O. S. Ramchandra Iyer—Respondent.

Appeal No. 394 of 1924, Decided on 18th March 1926, from the order of the Dist. J., West Tanjore, D/- 4-11-1924.

Succession Certificate Act, S. 4—Payment of dividend by Receiver under S. 64, Pro. Ins. Act —S. 4 does not apply—Pro. Ins. Act, S. 64.

Under S. 64 of the Pro. Ins. Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent and S. 4 is not applicable to the payment of dividends by the Receiver. [P. 899, C. 2]

T. M. Krishnaswamy Iyer—for Applt.

M. S. Ramchandra Iyer—for Respdt.

Judgment.—This is an appeal against an order of the District Judge confirming an order of the Official Receiver requiring a succession certificate from the appellant before payment of her claim. Under S. 64 of the Provincial Insolvency Act a creditor entered in the schedule is entitled to be paid his dividend out of the assets of the insolvent, and S. 4 of the Succession Certificate Act does not appear to be applicable to such payments because it is only applicable to decrees or orders for the payment of debts. In the Civil Procedure Code of 1882, the framing of the schedule under S. 352 was deemed to be a decree in favour of the creditors as held in *Arunachala* v. *Ayyavu* (1), but in the Insolvency Act of 1907, and the later Act of 1920 there is no such provision. Consequently, it would appear that S. 4 of the Succession Certificate Act is not applicable to the payment of dividends by the Receiver. This is only natural, for, in paying out the debts due by the insolvent the Receiver has always to investigate the claims and adjudicate upon them. The claim has been proved and no other person has come forward to claim the same debt. The adjudication of the Receiver is sufficient protection to the estate of the insolvent for no further creditor can come in to prove against the insolvent's estate.

We must, therefore, set aside the order of the Official Receiver and allow this appeal with costs. The Official Receiver will pay the dividend to the appellant and also interest at 6 per cent. for the period it has been withheld.

Appeal allowed.

(1) [1884] 7 Mad. 318.

A. I. R. 1926 Madras 900

PHILLIPS AND MADHAVAN NAIR, JJ.

Paidapati Venkatanarasu —Plaintiff —Appellant.

v.

Vikram Kotayya and *others*—Defendants—Respondents.

Letters Patent Appeal No. 178 of 1925, Decided on 19th March 1926, from the decision of Wallace, J., in Second Appeal No. 672 of 1921.

(a) *Civil P. C., Ss.* 105, *Cl.* (2), *and* 104 (2), *and O.* 43, *R.* 1 *and O.* 7, *R.* 10—*Order under O.* 7, *R.* 10—*Appeal—Remand—No second appeal lies against the order of remand—Correctness of remand can be raised in second appeal from the decree in suit.*

An order returning the plaint under R. 10 of O. 7 is not a decision of the case on a preliminary point and an appeal is provided against such an order under O. 43, R. 1, Cl. (a) and as the order passed by the appellate Court becomes final under S. 104 Cl. (2), S. 105 does not preclude the aggrieved party from disputing the correctness of the remand order in second appeal if he is otherwise entitled to do so: 2 *L. L. J.* 587; 33 *All.* 479; *A. I. R.* 1925 *Bom.* 431, *Rel. on.* [P. 900, C. 2, P. 901, C. 1]

(b) *Civil P. C., S.* 105 (1)—*Appeal from order under O.* 7, *R.* 10—*Remand ordered on appeal —Order of remand does not affect decision of case and cannot be questioned in second appeal.*

An order of remand in appeal from an order returning plaint under O. 7, R. 10, is not an order affecting the decision of the case within S. 105 (1) and therefore its propriety cannot be questioned in second appeal under S. 105 (1). [P. 902, C. 1]

Ch. Raghava Rao—for Appellant.

V. Ramadoss—for Respondents.

Madhavan Nair, J.—The plaintiff-appellant sued to establish his right to, and to recover possession of, the suit land on the ground that it formed part of the "Shroff-Service inam land" of the village. The defendants contended that questions relating to Shroff's Service are governed by Madras Act III of 1895 and that civil Courts have no jurisdiction to try the suit. Accepting their contention the District Munsif returned the plaint for presentation to the revenue Court. On appeal, the District Judge, holding that the suit is triable in a civil Court, set aside the District Munsif's order and remanded the case to the lower Court for disposal. The District Munsif then gave a decree to the plaintiff for possession of the suit lands and past profits. This decree was confirmed by the Subordinate Judge. In second appeal the question as regards the jurisdiction of the civil Court to try the suit was once again raised and the learned Judge, Wallace J., after calling for findings from the lower Court, came to the conclusion that the subject-matter of the suit fell within the purview of Act III of 1895. He, therefore, set aside the decree of the appellate Court and restored the original order of the District Munsif returning the plaint for presentation to the revenue Court. This Letters Patent appeal has been preferred against the decree passed in the second appeal setting aside the decree of the lower appellate Court.

The main argument of the appellant is that, since respondents (defendants) did not prefer an appeal against the order of remand passed by the District Judge, they are precluded, under S. 105 Cl. 2 of the Civil P. C., from disputing its validity in second appeal. This is met by the reply that the Code does not provide for an appeal against an order of remand of the nature passed by the District Judge in this case, and that the respondents can question the correctness of that order in proceedings in appeal under S. 105, Cl. 1 of the Code. To this the appellant rejoins by saying that, since the "remand order" does not "affect the decision of the case," the respondents cannot invoke the aid of such section. The questions arising for decision are: (1) Whether the order of remand passed by the District Judge in this case is appealable, and (2) whether the order, if not appealable, is an order affecting the decision of the case within the meaning of S. 105, Cl. 1 of the Code.

The appellant relies on O. 43, R. 1, Cl. (u) in support of his contention that the order of remand passed in this case is appealable. This argument cannot be accepted. Cl. (u) of R. 1, O. 43, contemplates an appeal from an order of remand under R. 23 of O. 41. Rule 23 enables the appellate Court to pass an order of remand in an appeal against a decree in a suit which has been disposed of on a preliminary point. In the case before us, the appeal before the District Judge was not against a decree, but against an order passed by the District Munsif returning the plaint under R. 10 of O. 7. An appeal is provided against such an order under O. 43, R. 1, Cl. (a), and the order passed by the

appellate Court becomes final under S. 104, Cl. (2). It follows that it was not open to the respondents to prefer an appeal against the order of remand passed by the District Judge. This conclusion is supported by the decisions in *Firm Bhawani Sahai-Kanshi Ram* v. *Firm Harbans Singh-Gopal Das* (1); *Naubat Singh* v. *Baldeo Singh* (2) and *Nilkanth* v. *Balvant* (3). Section 105, Cl. (2) did not, therefore, preclude the respondents from disputing the correctness of the remand order before the learned Judge in second appeal if they were otherwise entitled to do so. The respondents rely on S. 105, Cl. (1) in support of their right to re-open the question as regards the correctness of the remand order before the learned Judge. S. 105, Cl. (1) provides that :

No appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction ; but, where a decree is appealed from any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

The section applies to appealable orders. Applying that section, the remand order in this case could be objected to in second appeal if the order is one " affecting the decision of the case. " Cases brought to our notice by the respondents show that the orders referred to in S. 105, Cl. (1) refer to any erroneous order which affects the decision of the case on the merits or otherwise ; while those referred to by the appellant show that the erroneous order must be an order affecting the decision of the case on the merits. It is unnecessary to enumerate these cases and discuss them in detail as all of them have been considered in a recent judgment by Wallace and Jackson, JJ., in *Athamsa Rowther* v. *Ganesan* (4) wherein the question arose as to whether an order setting aside the ex-parte final decree in a mortgage suit retaining the ex-parte preliminary decree therein is an order affecting the decision of the case within the meaning of S. 105, Cl. (1) Civil P. C. In the course of their judgment, holding that the propriety of such an order can be challenged in appeal against the decree finally passed in the suit, the learned Judges, after referring to the cases now brought to our notice, make the following observation :

It is clear that, when the result of the setting aside of the order has been the hearing of the suit de novo on its merits, no injustice would be done to anyone by the decision of the case and the final result is not affected.

Then referring to the merits of the case before them they state that :

So far from courting a decision on the merits he (defendant) is trying to burke such a decision altogether. In such circumstances we cannot but hold that an order setting aside the ex-parte final decree, while returning the ex-parte preliminary decree is an order ' affecting the decision of the case'.

It seems to us that these observations made with reference to an order setting aside ex-parte decrees may well be applied as tests in considering whether a remand of the nature we are dealing with " affects the decision of the case " within the meaning of S. 105, Cl. (1), Civil P. C. Does the order in question lead to an enquiry and investigation of the case as a result of the enforcement, or does it prevent such an enquiry ? In the former case the final decision of the case is not affected merely by reason of the enquiry being held by one Judge rather than another, whereas in the latter the result is different. In arriving at a decision as to whether an interlocutory order affects the decision of the case within the meaning of S. 105, Cl. (1), Civil P. C., the nature of the order in relation to the facts of the particular case has to be considered. This is what can be gleaned from the decisions. Orders setting aside ex parte decrees may not, in very many cases, as held in *Chintamani Dasi* v. *Raghunath Sahoo* (5), *Gulab Kunwar* v. *Thakur Das* (6), *Tassadduq Hussain* v. *Hayat-un-nissa* (7) and *Sundar Singh* v. *Nighziya* (8), be attacked in appeals in the suits ; but if they are of the nature mentioned in (*Gopala Chetti* v. *Subbier* (9) and *Athamsa Rowther* v. *Ganesan* (4) they will affect the decision of the case and can be challenged in appeal against the final decree.

In the present case the result of the enforcement of the remand order was the trial of the suit and an adjudication of the rights of the parties according to

(1) [1920] 2 L. L. J. 587=63 I. C. 304.
(2) [1911] 33 All. 479=9 I. C. 656=8 A. L. J. 12.
(3) A. I. R. 1925 Bom. 431.
(4) A. I. R. 1924 Mad. 890.
(5) [1895] 22 Cal. 981.
(6) [1902] 24 All. 434=(1902) A. W. N. 136.
(7) [1903] 25 All. 280=(1903) A. W. N. 39.
(8) A. I. R. 1925 Lah. 466=3 Lah. 94.
(9) [1903] 26 Mad. 604=13 M. L. J. 303.

the merits. The eventual decision of the case is not affected by it and its propriety cannot, therefore, be questioned in second appeal under S. 105, Cl. (1), Civil P. C. We must therefore set aside the decision of the learned Judge and restore that of the Subordinate Judge with costs here and before the learned Judge.

Appeal allowed.

A. I. R. 1926 Madras 902

ODGERS, J.

Roy Musal Naidu—Appellant.

v.

Thandalam Virasami Reddi and *another*—Respondents.

Second Appeal No. 1130 of 1923, Decided on 8th March 1926, from the decree of the Dist. J., Chingleput, in A. S. No. 279 of 1922.

Limitation Act, S. 20—*Words of S. 20 are mandatory—Payment must be made by person liable or his agent—Appropriation by creditor is not a payment as such.*

The words of S. 20 are mandatory and interest must be paid as such by the person liable to pay the debt or by his agent. An appropriation by the creditor to interest is not such an indication as would enable a Court to hold that the payments were made towards interest : (1914) *M. W. N.* 910 ; 31 *All.* 495 and *A. I. R.* 1924 *Mad.* 123, *Rel. on.* [P. 902, C. 2]

P. Satyanarayana Rao—for Appellant.
S. Rangachari—for Respondents.

Odgers, J.—This is a suit on a promissory note. The plaint sets out a lending of Rs. 550 to the 1st defendant and also that a sum of Rs. 99 for interest and Rs. 83 for principal, in all Rs. 182, was paid on 17-3-1917, Rs. 39-8-0 towards interest on 1-3-20, etc. ; and in his account at the end of the plaint he shows Rs. 99 credited towards interest on 17-3-1917. The defence was that the whole amount had been paid and that the plaintiff's suit was barred. This was so held by the District Munsif. There the contest turned on whether a certain endorsement evidencing the payment of this Rs. 182 on the back of the pro-note was genuine or not and he came to the conclusion that it was genuine.

On appeal to the District Judge this endorsement was found to be a forgery, but before the District Judge and before me in second appeal it has been argued that a part at least of this Rs. 182 must be taken to have been paid towards interest. There is no oral evidence on the point that has been placed before me, but the learned vakil for the appellant relies on what he says is an admission in paragraphs 11 and 13 of the written statement. In paragraphs 11 and 13, as I read them, the defendant admits that Rs. 182 was paid on 17-3-1917, but he says Rs. 159 of it should go towards the principal as the interest stipulated for was only at the rate of 12 per cent. per annum which could only absorb Rs. 33. He is, I think, taking objection to the appropriation of Rs. 99 for interest at the end of the plaint which has been set out above. The question is : Can this be taken as an admission that the defendant paid Rs. 33 out of Rs. 182 towards interest ? It is no objection that he paid towards principal and interest at the same time.

This has been decided in *Ramakrishna Annavi* v. *Pichandi Chettiar* (1) though there it must be noted that the learned Judge held that the evidence of the plaintiff's witnesses showed that payment was made towards principal and interest, and it has been of course established in *Muthu Pillai* v. *Maria Sundaram Pillai* (2) that there need be no writing for the payment of interest. But it must be pointed out that the words of S. 20 are mandatory and interest must be paid as such by the person liable to pay the debt or by his agent. The question is then whether any sum in this case was paid as interest and as such. An appropriation by the creditor to interest has been held in *Muhammad Abdulla Khan* v. *Bank Instalment Co., Ltd. in liquidation* (3), not to be such an indication as would enable a Court to hold that the payments were made towards interest. I do not think there is here any evidence from which I can say that any portion of Rs. 182 was paid as interest by the person liable to pay the debt and that therefore the lower appellate Court was right and the appeal must be dismissed with costs.

Appeal dismissed.

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(1) A. I. R. 1924 Mad. 123.
(2) [1914] M. W. N. 910=26 I. C. 507=16 M. L. T. 505.
(3) [1909] 31 All. 495=2 I. C. 379=6 A. L. J. 611.

* A. I. R. 1926 Madras 903

RAMESAM, J.

A. G. Sambasiva Iyer—Plaintiff—Appellant.

v.

Venkatarama Iyer and *others*—Defendants—Respondents.

Second Appeal No. 893 of 1923, Decided on 20th January 1926, from a decree of the Dist. J., East Tanjore, in A. S. No. 194 of 1922.

* (a) *Transfer of Property Act, S.* 55 (4) (b)—*Money left by vendor with vendee to satisfy creditor of vendor and not accepted by the creditor is unpaid purchase money—Purchaser in execution of the right of such unpaid money is entitled to a lien.*

A sold his property to B and left a part of purchase money to be paid to C in satisfaction of a pro-note executed by A in his favour. B offered the amount to C but it was refused. C got a decree against A on his pro-note and attached the balance amount kept with B. In the suit by C to recover the amount claiming a lien on the property sold ;

Held : that the amount was unpaid purchase money and not unaccepted purchase money. C was entitled to a lien on the property.

[P. 903, C. 2]

* (b) *Registration Act, S.* 17—*Transfer of right to a mortgage—Registration is necessary.*

The right of a mortgagee can be transferred only by a registered instrument : 41 *M. L. J.* 267 and 41 *M. L. J.* 453, *Ref.* [P. 904, C. 1]

* (c) *Transfer of Property Act, Ss.* 100 *and* 58 —*Charge and mortgage—Charge is not transfer of property.*

The distinction between a mortgage and a charge seems to be that whereas a mortgage amounts to a transfer of property, a charge does not amount to one. [P. 904, C. 1]

* (d) *Registration Act, S.* 17—*transfer of charge —Registration is not necessary.*

The assignment of the charge not being a transfer of property need not be made by a registered instrument. [P. 904, C. 1]

(e) *Transfer of Property Act, S.* 8—*Transfer of lien.*

Where the right to unpaid purchase money is purchased at Court sale, the lien for unpaid purchase money also goes with it to the purchaser and S. 8 is no bar. [P. 904, C. 2]

* (f) *Civil P. C., O.* 21, *Rr.* 46 *and* 54—*Charge is moveable property.*

A charge is not immovable property but a moveable property within the meaning of R. 46. [P. 904, C. 2]

T. S. Ramaswami Iyer—for Appellant.

N. Sivarama Krishnier—for Respondents.

Judgment.—The facts of this case may be stated as follows :

One Perambalachetti owed the present plaintiff a sum of money on a promissory note, dated 13th November 1913. The said Perambalachetti sold some of his properties on 16th October 1914 to Doraiswami Iyer, the father of the defendants and left Rs. 560, out of the purchase money in the vendee's hands with instructions to remit the same to the plaintiff towards his promissory note debt. Doraiswami Iyer remitted Rs. 625 to the plaintiff on 11th December 1925, but the plaintiff refused to accept the amount on the ground that more sum than what was remitted was due. He afterwards institutad a suit against Perambalachetti on the promissory note and obtained a decree and in execution of that decree he attached the debt due to Perambala from Doraiswami Iyer, consisting of the unpaid purchase-money with interest and purchased it himself. He now sues to recover the amount claiming also a lien on the suit properties. Unless the lien is upheld, the plaintiff's suit would be barred by limitation.

The District Munsif held that as the amount was remitted by Doraiswami Iyer to the plaintiff and the plaintiff refused to accept it, it is not unpaid purchase-money but it is only unaccepted purchase-money and the plaintiff is not entitled to the lien. With this view of the District Munsif, I do not agree assuming that the allegations of the plaintiff are true. It is true that Doraiswami Iyer has followed the instructions of his vendor and has remitted the amount to the plaintiff. If Doraiswami Iyer has not chosen to inform the vendor of the fact that the amount was returned and of his readiness to pay it to the vendor himself, I do not see how it ceased to be unpaid purchase-money. I, therefore, think that the ground on which the Munsif decided against the plaintiff cannot be accepted.

On appeal, the District Judge confirmed the decree of the District Munsif on another ground. He refers to *Moti Lal* v. *Bhagwan Das* (1) and says that the present case is covered by that decision. He comes to the conclusion that the plaintiff is not entitled to any charge relying on that judgment. I think the case has been entirely misunderstood by the learned District Judge. That case far from being against the plaintiff is in

(1) [1909] 31 All. 443=3 I. C. 497=6 A. L. J. 645.

his favour. That case only lays down that where a plaintiff attaches a portion of the purchase-money due to his judgment-debtor, under a sale-deed by him, he cannot cause the property to be sold without previously bringing the debt to sale and purchasing it himself. The plaintiff in this case has followed the course indicated in that decision.

The learned vakil for the respondent concedes that the judgment of the District Judge, in so far as it rests on *Moti Lal* v. *Bhagwan Das* (1), cannot be supported but he seeks to support the decree on other grounds. His contention is that the charge has not been validly transferred to the plaintiff. He relies on *Kunchithapatham Pillai* v. *Palamali Pillai* (2) and *Elumalai Chetty* v. *Balakrishna Mudaliar* (3). The former case only says that the charge must be assigned by a proper conveyance. The latter case only decides that where a promissory note has been endorsed, the right to an equitable mortgage connected with the promissory note does not pass by the endorsement.

It seems to be now settled that the right to a mortgage can be transferred only by a registered instrument: see *Balagurmoorthy Chetty* v. *Nagulu Chetty* (4) and *Official Receiver, Trichinopoly* v. *Lakshman Aiyar* (5): but I do not think that these cases help the respondent. In the present case we have not got to do with a mortgage, but only with a charge. "Charge" is defined in S. 100 of the Transfer of Property Act thus:

> Where immovable property...is by act of parties or by operation of law made security for the payment of the money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property.

The distinction seems to be that whereas a mortgage amounts to a transfer of property, a charge does not amount to one. If there is no transfer of immovable property, the assignment of the charge need not be made by a registered instrument. The right to the debt being an actionable claim can be transferred only by an instrument in writing under S. 130 of the Transfer of Property Act. In the present case we have an instrument in writing, namely, the sale certificate issued by the Court. It is conceded by the learned vakil for the respondent that the sale certificate need not be registered with reference to the exceptions of S. 17 of the Registration Act. It seems to follow that the right to the charge passes along with the debt.

The learned vakil for the respondent relies on a dictum in *Penumeta Subbaraju* v. *Veegesena Seetharmaraju* (6), and contends that S. 8 of the Transfer of Property Act does not apply to Court sales. The passage relied is not quite intelligible to me. I do not see why, under S. 8 of the Transfer of Property Act, the vendor's lien does dot pass with the right to the money. It is true that S. 2 (*d*) of the Transfer of Property Act provides that the Act does not affect transfer by operation of law. But in the present case the contention of the appellant does not seek to affect the effect of the execution sale. The effect of applying S. 8 is to strengthen the sale certificate by transferring the lien along with it. I am, therefore, of opinion that the right to the lien passed under S. 8 of the Transfer of Property Act along with the debt.

It is next contended that the execution proceedings which culminated in the sale certificate to the plaintiff were irregular and cannot operate to transfer the right to the lien in favour of the plaintiff. He relies on O. 21, R. 54, Civil P. C., and contends that the charge is immovable property within the meaning of that rule and not moveable property within the meaning of R. 46. The appellant in reply relies on a decision in *Nataraja Iyer* v. *South Indian Bank of Tinnevelly* (7). That decision related to a mortgage and was followed by the Allahabad High Court in *Lal Umrao Singh* v. *Lal Singh* (8). The respondent contends that these decisions cannot be regarded as good law after the other decisions above referred to by me which held that a right to a mortgage can be transferred only by a registered instrument, being immovable property. It is unnecessary for me to express any opinion here whether these decisions are correct in so far as they apply to mortgages. But I do not see any reason to doubt their correctness so far as they

(2) [1917] 32 M. L. J. 347=39 I. C. 405=(1917) M. W. N. 163.
(3) A. I. R. 1922 Mad. 344=44 Mad. 965.
(4) [1921] 41 M. L. J. 267=14 L. W. 191=60 I. C. 473=(1921) M. W. N. 602.
(5) [1921] 41 M. L. J. 453=68 I. C. 752.
(6) [1915] 39 Mad. 283=28 I. C. 232=(1915) M. W. N. 174.
(7) [1911] 37 Mad. 51=22 M. L. J. 105=13 I. C. 91=(1911) 2 M. W. N. 590.
(8) A. I. R. 1924 All. 793=46 All. 917.

relate to charges which do not amount to mortgages or transfers of immovable property.

I am, therefore, of opinion that the attachment was correctly made under O. 21, R. 46, but, apart from this, I think it is not open to the defendant to raise questions relating to the regularity or otherwise of the execution proceedings taken by the plaintiff against his judgment-debtor. The proceedings are final between the plaintiff and Perambala and whether they are regular or irregular, the title to the debt and the charge have passed to the plaintiff, and it is not open to the defendant to question the plaintiff's title on the ground of mere irregularity in the execution proceedings.

The result is I must hold, that the plaintiff is entitled to the lien on the facts alleged by him in the plaint and the ground given by the Courts below for dismissing the suit cannot be supported. As the first Court did not go into the merits of the case, but only tried two preliminary issues, the case will go back for being regularly tried on the merits. The appeal is, therefore, allowed, the decrees of the Courts below are reversed, and the suit is remanded to the District Munsif's Court for disposal according to law. The costs here and in the lower appellate Court will be paid by the respondents and the costs of the first Court will abide the result. The Court-fee paid by the plaintiff here and in the lower appellate Court will be refunded to him.

Appeal allowed.

A. I. R. 1926 Madras 905

ODGERS, J.

(*Komandur*) *Srinivasacharlu* and *others* —Appellants.

v.

(*Koduru*) *Munirathna Naidu*—Respondent.

Second Appeal No. 1046 of 1923, Decided on 16th February 1926, against the decree of the Sub-J., Chittoor, in A. S. No. 40 of 1922.

(a) *Minor— Decree against—Setting aside—Gross negligence.*

The failure to put forward a valid defence at the trial is gross negligence. [P 905 C 2]

(b) *Civil P. C., S. 100—Question of law—Gross negligence.*

Whether particular facts found constitute gross negligence is a question of law. [P 905 C 2]

C. V. Anantakrishna Iyer and *T. K. Srinivasa Thathachariar*— for Appellants.

B. Somayya—for Respondent.

Judgment.—This is a suit to declare that a certain decree in O. S. 327 of 1925 is null and void and not binding on the plaintiff or his properties. The plaintiff was a minor in that O. S. and his mother was his guardian-ad-litem. This suit is brought by the plaintiff who is still a minor with his maternal uncle as his guardian-ad-litem. The Munsif dismissed the suit. The Subordinate Judge allowed the appeal holding that there was gross negligence on the part of the minor's mother in not presenting a defence to the suit in O. S. 327 of 1925. The mother put in a written statement, Exhibit D, in which she pleaded that the minor's father was only a simple mortgagee and not a mortgagee in possession and therefore the 3rd defendant (the minor) could not be liable in a rent suit. She did not instruct anybody to appear for her or appear herself in person at the time of the hearing though she afterwards filed an application to set aside a decree that had been passed ex-parte against her minor son.

Now the only question that arises in this case is whether the failure to put forward a valid defence at the trial is gross negligence. This point is covered by the decisions in *Punnayyah* v. *Viranna* (1) and *Venkata Lakshmi Kantaraju Garu* v. *Peda Venkata Jagannatha Raju Garu* (2) to which decision I was a party. It has been held in L. P. Appeal 2 of 1925 that in these cases it is only a question of law in so far as the facts found constitute gross negligence. The finding of the learned Subordinate Judge is that the facts did constitute gross negligence and he is undoubtedly right.

The second appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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(1) A. I. R. 1922 Mad. 273=45 Mad. 425.
(2) A. I. R. 1924 Mad. 281.

** A. I. R. 1926 Madras 906

Full Bench

COUTTS-TROTTER, C. J., PHILLIPS, KRISHNAN, BEASLEY AND MADHAVAN NAIR, JJ.

Tiruvengada Mudali—Accused—Applicant.

v.

Tripurasundari Ammal—Complainant—Opposite Party.

Criminal Revision No. 490 of 1925 and Civ. Rev. No. 66 of 1925, Decided on 15th February 1926, referred for orders by the S. J., North Arcot, on 28th July 1925.

** (a) *Penal Code, S. 499, Excep. 8 and Illustration—Privilege defined in Exceptions is exhaustive—Libellous statements in complaints are not absolutely privileged—Good faith is necessary*: **36 Mad. 216;.37 Mad. 110 Overruled.**

The privilege defined by the exceptions to S. 499 must be regarded as exhaustive as to the cases which they purport to cover and recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. A complainant making libellous statements in his complaint is not absolutely protected so far as criminal proceedings are concerned. Under the 8th exception and the illustration to S. 499 the statements are privileged only when they are made in good faith; **36 Mad. 216 and 37 Mad. 110 Overruled; 44** *Mad.* 913, *Dist.* [P. 909, C. 1]

* (b) *Interpretation of statutes — Codifying statute—Penal Code is codifying statute complete in itself—Earlier case law can be referred to only to find true interpretation of and not to add to a codifying statute.*

The Indian Penal Code is meant to be a codifying statute, as a statute intended to be complete in itself with regard to the subject-matter with which it deals. No doubt a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions, but it cannot be argued that matter outside of the statute can be invoked, not by way of construing its provisions but of adding something to it which is admittedly not to be found within it. [P. 908, C. 2]

J. C. Adam—for the Crown.

A. S. Sivakaminathan—Amicus curiæ.

Waller, J.—This is a reference by the Sessions Judge, North Arcot. Petitioner filed a complaint against three persons charging them with offences under Ss. 448 and 323, Indian Penal Code. In that complaint he described the first of them as being the paramour of the second, the description being quite unnecessary for the purpose of the complaint, which had itself been preferred as a counterblast to a prior complaint presented against the complainant by one of the persons defamed. Respondent thereupon charged petitioner with defamation. The Sub-divisional Magistrate convicted him. The Sessions Judge has made a reference to this Court, pointing out that the conviction is illegal in view of the decision in *In re Muthusami Naidu* (1). That decision follows the well-khown case in *In re Venkata Reddy* (2), in which it was ruled that neither party, witness, counsel nor Judge, could be held liable for defamation on account of words written or spoken in any proceeding before a Court recognized by law. The Judges remarked:

> We do not think that that a statement in a complaint which initiates a proceeding should be held to be entitled to less privilege than other statements made by parties in the subsequent stages of the proceedings. If the complaint is false, then the dsfendant would be entitled to prosecute the complainant for preferring a false charge.

I must confess that I am unable to see the force of the last argument in a case like this. This is not a case in which the charge is that the substance of the complaint itself is defamatory. What is charged is that, into a complaint of house-trespass and hurt, a malicious and irrelevant libel has been introduced. To suggest that the defamed person's sole and sufficient remedy is to prosecute the complainant for bringing a false complaint of house-trsspass and hurt is to deprive him of any remedy whatever against the defamatory statement. The other argument is based on *Venkata Reddy's* case (2). I have elsewhere in Cr. A. No. 218 of 1925 expressed the view that it must now be held that the authority of that case has been severely shaken by a later ruling of this Court: *Gopal Naidu* v. *King-Emperor* (3). The earlier case was based on the Common Law of England; but it was pointed out in the later that the Criminal Law of India must be looked for in the Penal Code and that the Common Law of England should not be imported into it. The 8th Exception to S. 499, Indian Penal Code, refers to what are described as "accusation." The illustration appended to the exception shows that in that term are included complaints to Magistrates, which are, therefore, entitled

(1) [1912] 37 Mad. 110=14 I. C. 757=11 M. L. T. 431.
(2) [1912] 36 Mad. 216=23 M. L. J. 39=14 I. C. 657=(1912) M. W. N. 576 (F. B.).
(3) A. I. R. 1923 Mad. 523=46 Mad. 605 (F. B.).

to no more than the limited privilege granted by the exception:

It is the duty of a Court to accept, if that can be done, the illustrations given as being both of relevance and of value in the construction of the text: *Md. Syedol Ariffin* v. *Yeoh Ooi Gark* (4).

Reading together Exception 8 and its illustration, there can, I think, be no doubt as to the contruction of the text that the privilege accorded to persons who make complaints to Magistrates is of a limited character. If the privilege accorded to the complaint itself is not absolute, libellous statements made in the course of it are entitled to no greater protection. The law has, in my opinion, been correctly laid down in *Satish Chandra Chakravarti* v. *Ram Doyal De* (5), which expressly differs from the view hitherto taken in this Court. It is not for us to overrule the decision of another Bench of this Court, but it seems to me that, in the light of *Gopal Naidu* v. *King-Emperor* (3), the decision relied on by the Sessions Judge requires reconsideration. I would, therefore, refer to a Full Bench the question whether a defamatory statement made in a complaint to a Magistrate is absolutely privileged.

Madhavan Nair, J.—I am also of the opinion that in view of the dcision in *Gopal Naidu* v. *King-Emperor* (3), the case *In re Muthuswami Naidu* (1) requires reconsideration. I agree to the reference proposed by my learned brother.

Opinion of the Full Bench.

In this case the petitioner filed a complaint against three persons charging them with offences of simple hurt and house-trespass under Ss. 323 and 448 of the Indian Penal Code. In that complaint he described two of them as being paramours. Thereupon he was charged with defamation and was convicted. The Sessions Judge referred the case to the High Court on the view that the decision in *In re Muthuswami Naidu* (1) following *In re Venkata Reddy* (2) established the position that statements such as that on which the conviction was founded were absolutely privileged. The correctness of the ruling in *In re Venkata Reddy* (2) has undoubtedly been questioned in the Full Bench case, *Gopal Naidu* v. *King-Emperor* (3). The learned referring Judges, therefore, very rightly took the view that the matter should be settled and that a Full Bench should reconsider the question and decide whether *In re Venkata Reddy* (2) was rightly decided.

We do not think that any useful purpose would be served by an exhaustive examination of the authorities such as was made by Mookerjee, Offg. Chief Justice, in *Satish Chandra Chakravarti* v. *Ram Doyal De* (5). It is not contested that the general trend of the Madras and Bombay authorities is to regard such statements as absolutely privileged and that the Calcutta and Allahabad Courts have taken the opposite view that the privilege is qualified only and should be taken as confined to the exceptions appended to S. 499 of the Indian Penal Code. The Rangoon Court also has recently in *MacDonnell* v. *King-Emperor* (6) adopted the Calcutta view. Our task is to consider the words of the statute and to say whether it leaves it open to the accused to contend that it is not exhaustive of all the cases of privilege which can be put forward. The suggestion is that the statute only concerned itself with cases of qualified privilege conferred by the English Common Law on Judges, advocates, parties and witnesses.

Two propositions appear to us to be indisputable on the facts of the case as stated. The first is that the petitioner cannot bring himself within any of the exceptions to S. 499 for the simple reason that there is a finding against him that the statement that he made was not made in good faith. The only exception to the Indian section under which he could bring himself is the 8th and that expressly lays down that the privilege conferred by it on persons who prefer accusations against others extends only to those who make them in good faith. The second proposition (and the Crown does not contest it) is that, if the Common Law of England is to be held to apply to this case, the action of the petitioner would be absolutely privileged. The words of the section itself as distinct from the explanations and exceptions are quite clear in their definition of what is prima facie to be regarded as defamatory:

(4) [1916] 43 I. A. 256=39 I. C. 401=(1916) 2 A. C. 575 (P. C.).

(5) [1920] 48 Cal. 388=59 I. C. 143=32 C. L. J. 94=24 C. W. N. 982 (S. B.).

(6) A. I. R. 1925 Rang. 345=3 Rang. 524.

Whoever . . . . . makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

We have next to consider the decision in *In re Venkata Reddy* (2) which was a considered pronouncement of the then Chief Justice, Sir Arnold White, and two other Judges and it lies upon us closely to scrutinize the grounds on which that decision was based before we venture to dissent from it. As we follow that reasoning, it is based mainly on two considerations. The first is that it was not to be inferred that the framers of the Indian Penal Code intended to depart from the English law which is substantially reproduced in the statute unless they did so expressly or by necessary implication; the second, that, as the code confined itself to dealing with cases of qualified privilege, it might be supposed that its authors intended to leave the provisions of the English Common Law regarding absolute privilege intact. The first line of reasoning is summarized in the observations of the Chief Justice at page 222 (36 *M.*) of the report:

It is not to be supposed that the framers of the Penal Code had not before their minds the doctrine of the English Law with regard to the question of absolute privilege: and it seems to me that, in dealing with a matter of such importance, if they had intended to exclude its application, they would have made their intention clear and would not have left it to be a matter of negative inference.

The second line of reasoning is of course closely allied to the first but, as it seems to us, it is based on a misapprehension. Although S. 499 is silent as to absolute privilege, the code as a whole is not; for it confers absolute privilege by S. 77 on a Judge "in the exercise of any power which is, or which in good faith he believes to be, given to him by law." That perhaps is a wider privilege than is given to an English Judge, because there are expressions in the English cases which lend colour to the view that the existence in fact of jurisdiction and not merely the honest belief in the possession of jurisdiction is a condition precedent to the privilege. But the first line of reasoning is not abnoxious to this objection and raises a question of gravity and importance. It is undoubtedly remarkable that the draftsman of the statute who must have been familiar with the English Common Law made no reference to the position of witnesses or advocates nominatim but confined himself to the perfectly general language of the 8th and 9th exceptions. The inference drawn in *In re Venkata Reddy* (2) was that it was inconceivable that the statute should have been silent on such obvious topics unless it meant to leave the English Common Law relating to them intact. That is a line of reasoning which seems to us to be wholly inapplicable to a codifying statute and the Indian Penal Code is obviously meant to be a codifying statute, an expression which may sufficiently for our present purposes be defined as a statute intended to be complete in itself with regard to the subject-matter with which it deals. Indeed the very title 'Indian Penal Code' involves the conception of a codifying statute. As we understand the principles of construction applicable to such matters, a codifying statute does not exclude reference to earlier case-law on the subject covered by the statute for the purpose of throwing light on the true interpretation of the words of the statute where they are, or can be contended to be, open to rival constructions. We are unaware of any instance other than the present where it has been argued that matter outside of the statute can be invoked not by way of construing its provisions but of adding something to it which is admittedly not to be found within it. We agree with Sir Arnold White, Chief Justice, that these matters must have been present to the mind of the draftsman. We differ from him in the inference to be drawn from the silence of the statute regarding them. It seems to us inconceivable that that silence can be interpreted otherwise than as a deliberate refusal to incorporate that part of the Common Law of England into the law of India.

In re Ramaswami Aiyar (7), a decision to which one member of this Court was a party, was cited as authority for the proposition that the Common Law of England could be imported into the Indian Penal Code and render acts that would prima facie be offences under the Code into acts not criminal or punishable. That was a case of a conviction under S. 341 of the Indian Penal Code for wrongful restraint and the restraint

(7) [1921] 44 Mad. 913=61 I. C. 652.

was held not to be wrongful within the meaning of the section because the restraint exercised in that case would not be civilly wrongful by the Common Law of England. The Court therefore thought itself entitled to treat the word 'wrongfully' as meaning 'tortiously' and it is not disputed that the law of this country with regard to torts must in the main be guided by principles derived from English Law and English cases. The English authoritjes relied upon in that case were relied upon merely for the proposition that a restraint in such circumstances as there appeared would not be tortious in English Law. It may very well be that a consideration of English Law was excluded by the definition of 'wrongful restraint' contained in S. 339 of the Indian Penal Code, which was not brought to the notice of the Court and that therefore the case was decided on a wrong footing. Be that as it may, the case is not an authority for the proposition that the English Common Law can be imported into an Indian statute unless words are used which necessarily refer the Court for their interpretation to the English cases defining what is to be considered as a civil wrong.

We are, therefore, of opinion that the privilege defined by the exceptions to S. 499 of the Indian Penal Code must be regarded as exhaustive as to the cases which they purported to cover and that recourse cannot be had to the English Common Law to add new grounds of exception to those contained in the statute. At the same time we desire to guard ourselves against laying down any principle wider than that necessitated by this reference. The reference relates to the position of a complainant and the 8th exception and the illustration to it show clearly that the exception was meant to apply to complainants. The question of privilege that may attach to an advocate or a witness is not before us and we express no opinion as to whether it might or might not be possible to distinguish their positions. In the next place the question referred relates solely to criminal proceedings against a complainant and we say nothing as to how far he may be protected from civil proceedings. It no doubt seems anomalous that it should be a possible view that a man should be protected against civil proceedings but still exposed to a criminal prosecution; but we do not exclude the possibility, should the question arise hereafter, of that being the necessary conclusion from the fact that the criminal law of India is codified and the law of civil wrongs is not. We refer this case back to the Divisional Bench with the expression of opinion that no absolute privilege attaches to the statement made in this case. It will be open to that Bench, before whom the matter comes on revision, to consider whether the Sub-divisional Magistrate was right, on the footing of qualified privilege alone attaching to the statement made in this complaint.

Finally we desire to say this, that the divergence of judicial opinion on the subject referred to us and the allied subjects discussed in the argument is so great that we venture to suggest that further legislation defining for this country the limits of privilege, whether absolute or qualified, is eminently desirable.

Reference answered in the negative.

A. I. R. 1926 Madras 909

ODGERS AND MADHAVAN NAIR, JJ.

Sultan Abdul Kadir and *others*—Plaintiffs—Appellants.

v.

Mohammad Esuf Rowther and *another*—Defendants—Respondents.

Letters Patent Appeal No. 4 of 1924, Decided on 27th July 1925, from the judgment of Spencer, O. C. J., in Second Appeal No. 940 of 1921.

Civil P. C., O. 6, R. 17—Plaint based on claim to exclusive ownership was allowed to be amended so as to be based on claim of co-ownership.

Where plaintiff's suit for partition based on exclusive ownership was bound to fail, he was allowed to amend the plaint so as to base his claim on co-ownership. [P 911 C 1]

A. Krishnaswami Iyer—for Appellants.

K. V. Krishnaswami Iyer—for Respondents.

Odgers, J.—This is an appeal from the judgment of the learned Officiating Chief Justice in S. A. No. 940 of 1921 which was in turn an appeal from the Second Additional Judge's Court of Tanjore.

The matter came before us sometime before the vacation when we heard arguments at considerable length. We, however, deferred giving judgment in view of representations that were made to us that there was a strong probability of the parties coming to terms. We were informed just before the beginning of the vacation that these negotiations had broken down and we, therefore, posted the case for fresh argument after the vacation.

The litigants are Muhammadans, the Plaintiffs Nos. 1 and 2 being the children and the 3rd plaintiff the wife of one Sheik Muhammad Rowther. The defendant is the brother of Sheik Muhammad Rowther uncle of the present male plaintiff. The subject of the litigation is certain property and this has been a fruitful subject of controversy between the parties or their ancestors in the past. In O. S. No. 15 of 1905 Sheik Muhammad Rowther through whom the plaintiffs claimed filed a suit against the present defendant his brother for disturbance of his possession of the suit property. The defendant pleaded that the property was not the exclusive property of the plaintiff but belonged to the whole family, the plaintiff being entitled only to a quarter share. The plaintiff put the defendant on his oath which defendant took and the suit was thereupon dismissed without trial. Ten years afterwards in O. S. No. 38 of 1915 one of the daughters of a sister of the family sued her uncles and aunt for a partition of her share. The present plaintiff was the 5th defendant in that suit and the present defendant was the 6th defendant. The plaintiff contended that he was the owner of the property as did also the 6th defendant, but the Court finding that the property belonged to the 5th defendant who is the present plaintiff, the suit was dismissed.

Now the present suit is O. S. No. 502 of 1918 and this is a suit, to use a neutral term for the present, for recovering the three-quarters share belonging to the plaintiffs. The plaint recognizes that owing to the litigation in O. S. No. 15 of 1905 the plaintiff cannot now say that he is entitled to the whole property and the question before us has been first, whether the plaint is in fact one for partition of property aud whether the suit is barred by reason of O. S. No. 15 of 1905. There is no doubt that the suit of 1905 was based on ownership and Mr. K. V. Krishnaswami Iyer's argument for the respondent in this case is that the suit is also based on ownership. The plaintiff failed in the suit of 1905 because he failed to prove that the whole of the property was his or that the property was entirely his. The learned Officiating Chief Justice in his judgment observes that the suit does not purport to be a suit for partition of the property between co-owners. I think what the learned Chief Justice means is that the plaint is practically a plaint for the recovery of the property (minus a certain proportion) on the score of ownership residing in the plaintiff. On a consideration of the matter which speaking for myself has caused some difficulty, I am not prepared to say that the learned Officiating Chief Justice was wrong. If that is so, i. e., if the suit of 1905 in which the plaintiff claimed the whole and if the present suit of 1918 in which without claiming the whole he still bases his claim on his ownership are so regarded, there can be no doubt that the suit of 1905 bars the plaintiff's claim in the present suit. This seems to have been the opinion of the learned Officiating Chief Justice basing his judgment on *Muhammad Rowther* v. *Abdul Rahman Rowther* (1). He thought however, that on the plain admission, by the appellants that a suit for partition, if properly constituted, would lie, the proper course to take was to allow an amendment of the plaint and for the plaintiffs to be allowed to rectify the mistaken course on which they have, I think plainly, embarked. I do not disguise that my first feeling was that a proper decision had been come to by the learned District Munsif and Subordinate Judge. The judgment of the District Munsif particularly strikes me as luminous and exhaustive. But I see the difficulty and inconvenience which even if the state of the pleadings allowed it this course would have entailed. It seems no doubt that there are ladies in this family who are entitled to shares and who are now at present on the record and if we divided this property now among the plaintiff and the defendant in whatever proportions, it is extremely likely that we should be embarrassing these ladies

(1) A. I. R. 1923 Mad. 257=46 Mad. 135.

in the recovery of their proper shares. I think, therefore, if I may say so with respect, that the proper course was followed by the Officiating Chief Justice and that this Letters Patent appeal must be dismissed with costs.

Madhavan Nair, J.—I agree. The facts of the case are somewhat complicated but for the purpose of this Letters Patent appeal the real question requiring consideration is whether the plaint in the case is one for partition of the suit property between the plaintiff and the defendant as co-owners thereof. The parties are Muhammadans. The plaintiff's case is that the property is absolutely his own and that, since the defendant asked for two-eighths of that property in O.S. No. 15 of 1905, he is willing to let him have that portion, with the result that according to him he is now entitled to claim six-eighths, i. e., the remainder of the suit property. A perusal of the plaint clearly shows that the plaintiff has based his title on his exclusive ownership, then the allegations in the plaint would certainly be different; the plaintiff will not allege that the property is exclusively his own. A suit for partition based upon plaintiff's exclusive ownership of the property is admittedly barred in view of the decision in O. S, No. 15 of 1905. However, it is conceded that the plaintiff has a cause of action for asking for partition on the ground of co-ownership. The learned Officiating Chief Justice has, therefore, allowed an amendment of the plaint. In this view, it becomes necessary that the sisters of the plaintiff who are alive and their children, if any, will have to be made parties to the suit. The learned Officiating Chief Justice has given specific directions that this should be done and that the defendant should be allowed to alter his written statement in whichever way he pleases. In my opinion, the course adopted by the learned Officiating Chief Justice, if I may say so respectfully, is certainly right. The Letters Patent appeal must, therefore, be dismissed with costs.

Appeal dismissed.

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* * A. I. R. 1926 Madras 911

Full Bench

KRISHNAN, RAMESAM AND BEASLEY, JJ.

C. S. Govindaraja Mudaliar—Plaintiff—Appellant.

v.

Alagappa Thambiran and *others*—Defendants—Respondents.

Original Side Appeal No. 5 of 1924, Decided on 24th March 1926, from the order of Devadoss, J., D/- 27th September 1923, in C. S. No. 539 of 1921.

* * *Civil P. C., O. 1, R. 3 — Several leases granted by trustee—One suit to set aside all leases by receiver; against all lessees is not bad: for multifariousness.*

A suit brought by a receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple, of various portions of one block of property, to different tenants separately on different dates and to recover the portions so demised from them respectively, is not bad for misjoinder of parties and causes of action: 11 *Mad.* 106 and 45 *Cal.* 111, *Rel. on*; 40 *All.* 7, *Dist.* (*Case law discussed.*) [P 912, C 2]

Krishnan, J.—Though R. 3 in terms applies only to joinder of defendants it impliedly refers to joinder of causes of action also: 45 *Cal.* 111, *Foll.*

It is desirable where there are common questions of law or fact to decide, that they should be decided in one suit rather than in many to avoid possible conflict of decisions. In the case of several alienations by a single individual which are all alleged to be improper it is better that they should all be before the Court at once to secure a proper decision as to all of them: 7 *Mad. H. C. R.* 200, *Foll.* [P 912 C 1, 2]

Ramesam, J.—Although a mere unity of title is not enough to save a suit from the mischief of multifariousness, but where the unity of the title in the plaintiff is coupled with the fact that his predecessor was a limited owner or a person under a disability, such as a minor or the idol of a temple and the alienations were made by a guardian or the trustee of the temple such a fact makes the plaintiff's suit one in respect of the same matter. [P 913 C 1]

K. S. Krishnaswami Aiyangar and *A. Kandaswami Mudaliar*—for Appellant.

K. Krishnamachariar and *V. Narasimha Aiyangar*—for Respondents.

Krishnan, J.—The question referred to the Full Bench is whether

a suit brought by a receiver of temple properties to set aside a number of leases granted by a previous trustee of the temple, of various portions of one block of property, to different tenants separately on different dates and to recover the portions so demised from them respectively, is bad for misjoinder of parties and causes of action.

In a suit brought under S. 92 of the Code of Civil Procedure to remove the trustee and to frame a scheme etc.,

plaintiff was appointed receiver and was directed to recover the temple properties. The suit properties are held by the various defendants under several leases all for 99 years granted by the trustee. Plaintiff claims that it was beyond the powers of the trustee to grant leases for such a long period and seeks to invalidate them on that ground and to recover the properties ejecting the defendants. Defendants urge, among other pleas, that the alienations are valid in the circumstances alleged by them in their written statements and that in any case plaintiff cannot recover possession but only get the term reduced to 21 years or such other period as the trustee was competent to grant. These are two of the questions that arise in the case which are common to all the defendants. The question referred for our opinion has obviously to be decided on the allegations in the plaint and on the provisions of the Code of Civil Procedure as it now stands. The principle rule we are concerned with is O. 1, R. 3 which allows the joinder in one suit of a number of defendants

> against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise.

There is a considerable difference between the language of this rule and that of S. 28 of the Code of 1882 which was the previous law on the point. The rule is now in accordance with the English Rule R. S. C. O. 16, R. 4. The older authorities are, therefore, not of much force now, though they are still useful guides as Justice Davar observes in *Umabai* v. *Bhaw Balwant* (1). Though R. 3 in terms applies only to joinder of defendants it impliedly refers to joinder of causes of action also as held by the learned Judges of the Calcutta High Court in *Ramendra Nath Roy* v. *Brajendra Nath Das* (2). They have referred to the English authorities on the point and as I entirely agree with them, it is unnecessary to refer to such authorities, again.

Two conditions are necessary to be fulfilled for the application of O. 1, R. 3, namely, that the relief claimed should arise from a series of acts or transactions, the word "series" implying that there must be some common question of law or fact arising in the suit. There is nothing in the rule that confines it to a single cause of action. Now it seems to me that both the conditions above stated are fulfilled in the present case. I have already mentioned above the two common questions that arise for decision. There is unity of title in the plaintiff as he claims as the proper present representative of the temple estate to set aside the alleged improper alienations of the previous trustee. The series of transactions impugned are the various 99 year leases granted by the previous trustee. They are all similar and depend for their validity on the powers of that trustee. They form, in my opinion, a series of transactions within the meaning of R. 3. I think the rule applies to this case and that the suit is not bad for multifariousness. While on the one hand we should not allow the Court to be embarrassed by the joinder of a number of totally unconnected controversies in one suit, we should not unduly restrict the scope of the rules regarding the joinder of parties and causes of action, so as to lead to unnecessary multiplicity of suits. If any inconvenience is felt by the joinder of a number of causes of action, it is always open to the Court to take action under O. 2, R. 6. It may be that the plaintiff can bring a separate suit against each lessee but that is no reason why he should be driven to do so. O. 1, R. 3 itself contemplates the possibility of separate suits. It is desirable where there are common questions of law or fact to decide, that they should be decided in one suit rather than in many to avoid possible conflict of decisions. In the case of several alienations by a single individual which are all alleged to be improper it is better that they should all be before the Court at once to secure a proper decision as to all of them. These are the observations made by the Full Bench in *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (3) and they are still of value as guiding principles.

The next Madras case referred to is the case *Mahomed* v. *Krishnan* (4). In that case the learned Judges pointed out that in the suit by the junior members of

(1) [1910] 34 Bom. 358=3 I.C. 165=11 Bom. L.R. 499.
(2) [1920] 45 Cal. 111=27 C.L.J. 158=41 I. C. 944=21 C.W.N. 794.
(3) 7 M.H.C.R. 290.
(4) [1888] 11 Mad. 106.

a tarwad to recover a number of tarwad properties improperly alienated by the Karnavan, the primary ground of action was the interest vested in the plaintiffs to the whole of the property in suit and that there was unity of title and the claim arose from the same cause of action though there were numerous alienees unconnected with one another holding the various items in suit. This principle has consistently been followed in this Court and in suits by reversioners, by adopted sons, and by co-parceners for partition, the joinder of any number of alienees is permitted without any objection on the ground of misjoinder. The same view is taken in Calcutta. In *Nundo Kumar Nasker* v. *Banomali Gayan* (5) following the ruling in *Ishan Chunder Hazra* v. *Rameswar Mondol* (6) it was held that a lessee could bring a single action against his lessor and a number of subsequent lessees from him for ejectment and that it was not bad for misjoinder. The point was again elaborately considered in *Ramendra Nath Roy* v. *Brajendra Nath Dass* (7) where the corresponding rules of the Supreme Court and the English authorities on them are referred to at length. I entirely agree with the view expressed by the learned Judges in that case regarding the principle of the applicability of O. 1, R. 3. The case in *Afzal Shah* v. *Lachmi Narain* (8) was cited on the other side. But it seems to me that the scope and effect of O. 1, R. 3 has not been properly considered in it. If the case was one of an owner of property suing to eject a number of wholly unconnected trespassers on different portions of his property, as their Lordships say it is on p. 11, it would be bad for misjoinder, for it is difficult to bring it under O. 1, R. 3. It is in that view quite different from the present case as the defendants here are all lessees holding under similar leases given by the trustee and the plaintiff is seeking to set aside all of them on the same ground.

For the reasons stated above, I would hold that the suit is not bad for misjoinder of parties and causes of action and answer the question referred in the negative. As no other point has been decided by the trial Judge and as, I think, he is wrong in the view he has taken, and as the parties agree to such a course, I would set aside his order and direct him to proceed with the further trial of the case. The costs of this appeal will be disposed of by the trial Judge in his final decree.

Ramesam, J.—This is an appeal from the order of our brother Devadoss, J., sitting on the Original Side. The appellant before us is the plaintiff. He is the receiver of Sri Komaleswaram Temple properties appointed by order of Court dated the 27th July 1920, passed in C. S. No. 429 of 1916, on the file of the High Court. In that capacity he sues for recovery of certain properties belonging to the temple on the ground that the various leases under which the respective defendants are in possession and which were executed by or in favour of the former trustee are voidable at the instance of the present plaintiff. Defendants 1 and 2 are interested in Plot 18. Five other defendants are interested in 5 other distinct plots. Defendants 6 and 7 are interested in 2 plots and Defendants 8 and 9 in another plot. A preliminary issue was framed : "Is the suit bad for misjoinder of parties and causes of action?" This was first argued. The learned Judge held that the frame of the suit was bad for multifariousness and he passed an order giving leave to the plaintiff to proceed with the suit against such one of the defendants as he may choose and withdraw it against the others. The plaintiff appeals.

In *Vasudeva Shanbhaga* v. *Kuleadi Narnapai* (3), it was held that a suit brought against a number of alienees of a deceased member of an undivided family for the recovery of family property illegally alienated by him is not bad for multifariousness. In *Mahomed* v. *Krishnan* (4) the suit was brought by the junior member of a tarwad against the karnavan and his alienees ; the plaintiff prayed for the removal of the karnavan ; for a declaration that his alienations are invalid against the tarwad and for possession of the property alienated among other reliefs. It was held that the suit was not bad for multifariousness and the earlier case was followed. There were 48 alienations. Muthuswami Aiyar, J., observed :

(5) [1902] 29 Cal. 871.
(6) [1897] 24 Cal. 831.
(7) [1920] 45 Cal. 111=21 C.W.N. 794=41 I. C. 944=27 C.L.J. 158.
(8) [1918] 40 All. 7=42 I.C. 856=15 A. L. J. 809.

In our judgment, it makes no difference whether the right enforced is that of a co-parcener or a reversioner, for the object in both is to reduce to possession a vested interest as well in property illegally alienated as in the property held by the managing member or by the tenant for life. In the view that the primary ground of action is the interest vested in possession as regards the whole of the property in suit, there is a unity of title, and the claim made is one in respect of the same cause of action.

In *Abdul* v. *Ayaga* (9), the same view was again taken, the suit being for a declaration that alienations by the karnavan were not binding on the tarwad. It was said there is no reason why a declaratory suit should be treated differently from a suit for possession inasmuch as the title to be adjudicated upon was the same in both. In *Byathamma* v. *Avulla* (10) it was held that the suit by a karnavan to recover properties given away by a former karnavan was not bad for multifariousness. So much is this doctrine established in this Court that in A. S. No. 132 of 1896 (unreported), it was held that a reversioner was bound to include all the alienations made by a widow and questioned by him, in one suit so that a second suit would be barred under S. 43 of the Code of Civil Precedure. This case was considered in *Dampanaboyina Gangi* v. *Addala Ramaswami* (11) Bhashyam Aiyangar, J., observed:

It purports to be based upon a course of decisions in this presidency in which it was held that a suit relating to various properties in the possession of different defendants who claimed under different alienations made by a widow or by a karnavan or the managing member of a tarwad or a joint Hindu family, is not open to the objection of misjoinder of defendants and of causes of action, when the plaintiff's ground of title to all the properties included in the suit is the same ..... A person suing for partition of an estate or for an estate which has devolved upon him by inheritance may so shape his plaint as to base it upon a single cause of action, the various defendants being joined as parties in possession of the estate. Further, under S. 28 Civil P. C. relating to the joinder of different persons as defendants, it is open to a plaintiff to join as defendants various persons against whom the right to relief is alleged to exist, whether jointly, severally, or in the alternative in respect of the same matter. .....

It would be noted that the phrase "in respect of the same matter" occurring in this section, is wider than the phrase "in respect of the same cause of action" occurring in S. 26, Civil P. C., relating to the joinder of different persons as plaintiffs in the same suit. In *Ishan Chunder Hazra* v. *Rameswar Mondol* (6) it was held, following the decision of this Court *Vasudeva Shanbhaga* v. *Kuleadi Narna-Pai* (3) and *Mahomed* v. *Krishnan* (4) that

In a suit for ejectment against several defendants who set up different titles to various parts of the land claimed, there was only one cause of action.

and it was observed that in England in an action in ejectment all the parties in possession are joined. Under the English Law, the persons to be made defendants in an action in ejectment, i. e., to be named in the writ, are all the persons in possession of the land sought to be recovered, and the persons who have a right to defend an action of ejectment are not only the persons named in the writ, but also any person who is in possession by himself or his tenant (Rr. 112 and 113; pp. 494-98 Dicey's "Parties to an action" Edn of 1870). As to cases in which different persons are in possession of different portions of the property, the rule laid down in Cole on 'Ejectment' (p. 76) is as follows.

When the tenements claimed and the tenants thereof are numerous, it is frequently advisable to bring two or more distinct ejectments rather than one action against all of them for the whole of the property. The exercise of a sound discretion and judgment on this point may sometimes save much trouble ..... Whether the action is based only upon one cause of action or not will depend upon the frame of the plaint in a suit for ejectment and not upon the answers to the suit, which may be set up by the defendants. Even if the plaint is not based upon one and the same cause of action, yet if the relief that is claimed severally against the different defendants be in respect of the same matter, S. 28 Civil P. C., will save it from the objection of multifariousness.

In my opinion, the above sentences qouted from *Dampanaboyina Gangi* v. *Addala Ramaswami* (11) though strictly obiter dicta, as the point in that case is as to applicability of S.43 (now O.2, R. 2), lay down the correct principle on the question of multifariousness. *Indar Kuar* v. *Gur Prasad* (2), *Mazhar Ali Khan* v. *Sajjad Husain Khan* (13); *Ishan Chunder Hazra* v. *Rameswar Mondal* (6) and *Nundo Kumar Nasker* v. *Banomali Gayon* (5) are other decisions laying down the same principle. In *Ishan Chunder Hazra* v. *Rameswar Mondal* (6) the Court observed.

(9) [1889] 12 Mad. 234.
(10) [1892] 15 Mad. 19.
(11) [1902] 25 Mad. 736=12 M. L. J. 103.
(12) [1889] 11. All. 33=(1889) A.W.N. 283.
(13) [1902] 24 All. 358=(1902) A. W. N. 85.

The cause of action, namely, what the plaintiffs were bound to prove in order to succeed was that they were the reversioners of Brahmamayi in regard to this property and that the claim was not barred by limitation. The defendants then could raise any answer they thought fit to get rid of the claim; but the cause of action was one.

Whatever difficulty one may feel as to whether the cause of action in such cases is the same, certainly it ought to be held that they relate to the same matter as pointed out in *Dampanaboyina Gangi* v. *Addala Ramaswami* (11). The same remarks apply to *Nundo Kumar Nasker* v. *Banomali Gayan* (5). All these cases were followed in *Parbati Kunwar* v. *Mahmud Fatima* (14). Now it may be said and there is some force in the contention that a mere unity of title is not enough to save a suit from the mischief of multifariousness. For instance, if several properties belonging to A the owner of a land have been trespassed upon by different persons at different times, can it be said that A may bring one suit in ejectment against all the trespassers? I find some difficulty in saying that a single suit will lie: (vide *Afzal Shah* v. *Lachmi Narain* (8) cited by Devadoss, J.). But where the unity of the title in the plaintiff is coupled with the fact that his predecessor was a limited owner or a person under a disability, such as a minor or the idol of a temple and the alienations were made by a guardian or the trustee of the temple such a fact makes the plaintiff's suit one in respect of the same matter. It may be that in the trial of such a suit the total income of the property vested in the widow, the minor, the idol or the manager of a joint family or tarwad has to be considered and all the circumstances of the owner or the institution have to be taken into account in judging the question of the justifying necessity in considering the various alienations sought to be impeached. The possibitity of the necessity of such an enquiry is probably the unifying element which makes the suit relate to the same matter. The case of the trustee of a temple was always regarded in several respects similar to that of a guardian of an infant, heir or manager of a joint family. (See for instance *Konwar Doorganath Roy* v. *Ram Chunder Sen* (15). Mr. Krishnamachariar appearing for the the respondents contended though this principle is correct in a suit for possession by a reversioner, it will not apply in a suit for declaration. I do not see any reason why there should be a distinction made between a suit for declaration and a suit for possession. The case in *Abdul* v. *Ayaga* (9) already cited is a case where the plaintiff sued for declaration only. The present Civil P. C. though it does not use the words "the same matter" as in the Code of 1882, refers to a transaction or a series of transactions the object being to widen the scope of the cases permitting joinder. In A. S. No. 78 of 1911 (unreported) a suit by the trustee of a temple to set aside two alienations of the former trustee was held not to be bad for multifariousness and the decree was reversed and the suit remanded by Sankaran Nair and Spencer, JJ.

None of the above authorities have been cited before the learned Judge. He relied upon a passage in *Seturatnam Aiyar* v. *Venkatachela Goundan* (16). No question of multifariousness was raised in the case. Before the Privy Council the plaintiff himself complained that evidence relating to one item should not not have been used against him for other items. The Privy Council observed that he himself was responsible for the joinder and ought not to complain. I, therefore, hold that the suit is not bad for multifariousness. The order will, therefore, be reversed and the suit sent back for disposal according to law; and I agree with my learned brother Krishnan, J.'s order as to costs.

Beasley, J.—I have read the judgments of my learned brothers and I am in entire agreement with them, and have nothing further to add.

Answered in the negative.

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(14) [1907] 29 All. 267=(1907) A. W. N. 36=4. A. L. J. 121.

(15) [1876] 2 Cal. 341=4 I. A. 52=3 Sar. 681. (P. C.)

(16) [1920] 43 Mad. 56 0=1. C. 374=47 I. A. 76 (P. C.)

* * A. I. R. 1926 Madras 916

ODGERS AND VISWANATHA SASTRI, JJ.

Chavakula Ammanna—Plaintiff—Appellant.

v.

Chavakula Satyanarayana and *others*—Defendants 1 and 3 to 6—Respondents.

Second Appeal No. 186 of 1923, Decided on 6th October 1925, from the decree of the Sub-J., Kistna, in A. S. No. 460 of 1921.

* * (a) *Hindu Law—Adoption—Consent by father-in-law to widowed daughter-in-law—Death of father-in-law before adoption—Nearer Sapindas not in existence at the time of adoption—Other Sapindas not objecting—Adoption is valid.*

Where the consent is given to the widowed daughter-in-law by her father-in-law who happens to be the nearest sapinda then living, his death, before the adoption is made, would not ipso facto revoke the consent. Such a consent will come to an end only if circumstances had materially changed after his death.

Where in such a case there had been no change in the circumstances on the date the adoption was made, either by the coming into existence of other nearer spaindas, or by the death of sapindas then alive, or by reason of the estate having vested in third persons; and five sapindas were alive on the date of the adoption and the boy adopted was the son of one of them and his natural father was present at the adoption; another sapinda assisted the widow during the ceremony and a third was present; but the 4th and 5th sapindas were on that date in their houses in the village and did not in any way indicate to the widow that they objected to the adoption.

Held, that the adoption by the daughter-in-law was valid. In the circumstances of the case the authority of the father-in-law was not at an end on the date of the adoption; 41 *Mad.* 604, *Foll.* 36 *Mad.* 145, *Dist.* [P. 920, C. 2]

* * (b) *Hindu Law—Widow—Adoption—The rule that an estate once vested can not be divested does not apply where the adopted son succeeds not by inheritance but under settlement.*

The rule that the adoption will be invalid unless made to the last male holder applies only to cases where the adopted son would take by inheritance. The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, where the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder.

Where the adopted son does not succeed by inheritance but only under the settlement by the father-in-law, the rule does not apply [P. 920, C. 2]

K. Venkatrama Raju—for Appellant.

P. Bapiraju—for Respondent.

Odgers, J.—This was a suit by a reversioner during the life-time of a widow for a declaration that an adoption alleged to have been made by the latter is not valid and binding on the reversioners. The District Munsif held that the objection raised by the plaintiff to the validity of the adoption failed, which view was upheld by the Subordinate Judge. A certain person called Somanna executed on the 26th April, 1894, Ex. 1 which is a document in favour of one Dhanalakshmi his daughter-in-law, whereby he gave her certain property—the effect of which will be discussed later—and a power or consent to her to adopt. The words are:

> As you asked me for my consent in order to adopt a boy for the prospering of our family, I have given my consent, so that you may adopt at your pleasure, whomsoever you may like whenever it is necessary, from among the sons of your brother, or the sons of my brothers or their daughter's son or their son's sons.

Somanna died on the 28th August 1891, without having revoked this authority and, on the 10th June, 1910 or nearly 19 years after, the adoption in question was made by Dhanalakshmi. The first point taken by Mr. P. R. Ganapathi Aiyar is that, as the father-in-law is merely a sapinda, his consent must come to an end with his death. It is only, says the learned vakil, in the case of the husband's authority that it extends beyond his death. Somanna had 3 brothers, Subbanna, Lingappa and Thirappayappa. The son of Lingappa called Ammanna is the plaintiff and another of his sons called Suriah is the 2nd defendant. One of the sons of Thirapayyappa is Moolaya alias Moolaswami of whom we shall hear more and the other son is Chinna Venkataramiah. Somanna had a son Ramayya who had predeceased him and who married Dhanalakshmi, the adoptive mother in the present case.

It is of course well settled in this Presidency since its recognition in the *Ramnad case, Collector of Madura* v. *Moottoo Ramalinga Sethupathy* (1) (see also the case in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (2) which approved it) that a widow may adopt if duly authorised by her husband's kindred. This has been amplified and explained in various later

(1) [1868] 12 M. I. A. 397=1 B. L. R. 1=10 W. R. 17=2 Suther 135=2 Sar. 361 (P.C.).

(2) [1876] 1 Mad. 69=3 I. A. 154=25 W. R. 291=3 Sar. 583 (P.C.).

cases. See *Kristnayya* v. *Lakshmipathi* (3) where it is said that the adoption must be made not from capricious or corrupt motives but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband. This case has been referred to a Bench by a learned Judge of this Court on account of the opinions expressed in *Mani* v. *Subbarayar* (4) and *Suryanarayana* v. *Ramadoss* (5). Referring to *Subrahmanyam* v. *Venkamma* (6) which held that the principle of the decisions of the Privy Council would be satisfied if the consent of the nearest sapinda was obtained, the learned Judges in *Mani* v. *Subbarayar* (4) proceed :

It cannot be said to have been in the contemplation of the learned Judge who held so, that the consent of the nearest sapinda would be sufficient, even if at the time of adoption that sapinda is no longer living and the person who is the nearest sapinda at the time does not consent to the adoption. It must, we think, be conceded that, if a sapinda who has given his consent withdraws it, afterwards the widow would not be entitled to act upon such consent and it seems to us to be unreasonable to hold that a consent once given should become irrevocable by the death of the sapinda who subsequently became entitled to be heard. But it is contended that, if the authority is acted upon within a reasonable time that ought to be sufficient to obivate the necessity of obtaining the consent of the sapindas living at the date of adoption. No doubt it may not be necessary that the consent should be given actually at the time the adoption is made, but it seems to us that at any rate a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.

Whereas in *Suryanarayana* v. *Ramadoss* (5), a judgment of Seshagiri Aiyar, J. the learned Judge says :

This train of thought i.e., (that the assent of the sapindas is presumptive evidence of the goodness of the act) precludes me from acceding to the proposition that mere lapse of time without more or the death of the consenting sapinda would put an end to the authorisation freely and bona fide granted. It is settled that the fact that a consent to an alienation was given by a reversioner who is dead would not by itself be sufficient to enable the reversioner entitled to succeed to the property to impeach that consent. In my opinion the same reasoning should govern the assent to an adoption.

(3) [1920] 43 Mad. 650=56 I. C. 391=46 I. A. 99 (P.C.).
(4) [1913] 36 Mad. 145=19 I. C. 663=24 M. L. J. 484.
(5) [1918] 41 Mad. 604=34 M. L. J. 87=7 L. W. 72=43 I. C. 526=(1918) M. W. N. 208.
(6) [1903] 26 Mad. 627=13 M. L. J. 239.

Mr. Ganpathi Aiyar insists that an adoption must be invalid if made without the consent of the nearest or near sapinda at the time whereas, on the other hand, Mr. S. Varadachari maintains that, in the case of a consent once obtained by the widow it is sufficient if the sapindas have the right of veto when the adoption is made a long time after the consent was originally given and if the circumstances have materially changed. On this we have no evidence here. In *Anne Brahmayya* v. *Chelasmi Rattayya* (7) Ramesam, J. says :

In my opinion, there is an essential difference between the authority of the husband and the assent of a sapinda. The former is intended to be exercised only after the death of the husband. The latter is intended to be used at a reasonable time after the consent is given. When the interval is short, the death of the sapinda may not matter ; but a sapinda's assent is not to be pocketted by the widow and used long after it was given when entirely different considerations as to the expediency of the adoption may apply.

Mr. Varadachari, on the other hand, lays stress on the word quoted above from *Mani* v. *Subbarayar* (4).

which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.

He says that these words import that, once a widow has the consent of a near or the nearest sapinda and does not adopt within a reasonable time, the sapindas who are the nearest at the time when the adoption is actually made and when the circumstances which originally prevailed when the consent was given may no longer exist must be deemed to have the power of veto. The case in *Suryanarayana* v. *Venkataramana* (8). which was a general power given to the widow to adopt any boy at any time and was not acted upon for 9 years was construed and explained in *Nagarampalli Kamesam* v. *Nagarampalli Batchama* (9), as meaning that an authority given in such general terms cannot be relied on as validating an adoption made several years afterwards when several of the sapindas who gave the authority had died and when other sapindas interested in the estate and affairs of the widow had come into existence and when other similar circumstances had intervened before the adoption took place. They

(7) A. I. R. 1925 Mad. 67.
(8) [1903] 26 Mad. 681.
(9) [1914] 1 L. W. 511=24 I. C. 257=(1914 M. W. N. 620.

also refer to *Mani* v. *Subbarayar* (4). In the present case the facts are somewhat important because it is found that the reversioners of equal degree with the plaintiff Ammanna, namely Suriah and Mooliya, actively participated in the adoption and the other two, Venkataramiah and Ammanna, the plaintiff, were in their houses at the time of the adoption and did not object. In this connexion reliance is placed on the case reported in *Venkammal* v. *Namasivaya Chettiar* (10) where it was held that there must be a conscious exercise of discretion on the part of the sapinda as to whether assent shall or shall not be given. There was no evidence or allegation that the widow asked for the boy in consequence of any authority given by her husband. But the sapinda had allowed his boy to be brought up by the widow, had been frequently urged to give the boy in formal adoption and allowed him to be so adopted. The learned Judges held that the natural father's conduct showed that he gave a deliberate assent to the action of the widow in making the adoption. That case is possibly stronger than the present. But I think the facts must be taken strongly against the plaintiff on this point.

The second point taken by Mr. P. R. Ganapathi Aiyar is that, even if this adoption had taken place and even if it must be held to have taken place with the consent of the nearest sapinda the person to whom the adoption was made namely, the son of Somanna, never had any estate and that the adoption was therefore not made to the last male holder which is Somanna but to Dhanalakshmi's husband, Ramayya. It is further said that it is a principle of the Hindu Law that, where an estate has vested in the heirs of the deceased person, it cannot be afterwards divested by any adoption made by the widow in pursuance of a power, the only exception being that if a widow has succeeded by inheritance to the estate of her husband and makes an adoption, she obviously divests herself ipso facto of her estate in favour of the adopted son. Many cases were quoted for this proposition. It is probably not necessary to go through all of them. Reference may be had to *Annammah* v. *Mabbu Bali Reddy* (11) where it was held that the estate of the deceased son having become vested in his heir cannot be defeated and divested by an adoption. and to *Rathna Mudaliar* v. *Ragunadaha Bhattar* (12) where it is clearly laid down that an adoption not made to the last male holder which would have the effect of divesting the estate taken on inheritance by the deceased brothers would be invalid. The answer to this is said to be, to begin with, that the rule as to the last male holder does not apply to joint families and further that there is no scope for the rule as to divesting where there is, as in this case, a document, there being no question of inheritance and the adopted son clearly takes as devisee under the document Ex. I. The rule as to divesting has been quite lately explained by Kumaraswami Sastri, J., in the *Tanjore Palace* case, *Maharaja of Kolhapur* v. *Sundaram Ayyar* (13) where he says:

> The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder.

In *Jagannatha Bheema Rao* v. *Behari Deo* (14), which was referred to by the learned vakil for the respondents, a case of an impartible zamindari, it was held the power to adopt was not limited in point of time by the fact that a line of husband's heirs had in succession come into possession of the estate. The limit to such power is when the husband's adopted son attains full age and so full capacity to continue the line by natural born sons or adoption. All the cases speak as to the divesting of an estate which has devolved by inheritance. In this case by this settlement or whatever it may be called, Ex. I, the father-in-law of Dhanalakshmi purported to give her for some estate or other all his property with the exception of certain property given to his daughter under these words:

> You are therefore hereby authorized to keep the whole of the property mentioned herein under your management throughout your lifetime and to pass the said property to the adopted son either after your death or at any time at your pleasure, meanwhile maintaining the adopted son at your own cost.

There can, therefore, in this case, it seems to me, be no question of inheritance where the mode of natural devolution

(10) [1896] 6 M. L. J. 35.
(11) 8 M. H. C. R. 108.
(12) [1898] 8 M. L. J. 173.
(13) A. I. R. 1925 Mad. 497=48 Mad. 1.
(14) A. I. R. 1922 P. C. 162,

has been artificially controlled by a document of this character and it is not contended that the settlor had no power to make such a disposition of his property. It has been argued at length on one side or the other that the donee took either a woman's estate or a mere life estate. If she took a woman's estate she would have the power of course to pass the corpus of the estate in accordance with the terms of the document. If it is a life estate solely as known to the English Law she either has a power of appointment within a certain class to the whole property after her death or the adopted son is a persona designata although he is to be selected from a certain class of persons. Whichever view is taken of this document, I do not think it makes any difference to the decision of the present point. If the rule of Hindu Law as to adoption to the last male holder is a corollary to the rule as to the divesting of already vested estates it seems to me that these doctrines have no application to a case like the present, where the settlor after the transfer can clearly not be regarded as the last male holder.

I, therefore, think the appeal fails on both grounds and I would dismiss it with costs.

Viswanatha Sastri, J.—Plaintiff is the appellant. He sued for a declaration that the adoption of the 1st defendant by the 3rd defendant was not valid and binding on the reversioners. The adoption was made on June 10, 1910, as recited in the adoption deed Ex. II, and the deed recites that it was made in pursuance of an authority to adopt given to 3rd defendant by her deceased father-in-law on April 26, 1891, under a deed Ex. I. It was alleged in the plaint that the authority could not have been acted upon after the father-in-law's death; that no adoption in fact took place and that even if it took place, it was not done "with the consent of the then surviving heirs." Both the lower Courts found that the 1st defendant was adopted by the 3rd defendant; and that the authority given in Ex. I was sufficient. It was contended before us that the adoption was not valid because: (1) the authority given by the father-in-law was useless after his death; and (2) the adoption was made to 3rd defendant's husband and not to the last male holder, and at a time when the reversion has vested in others. The second appeal first came before me sitting as a single Judge, and as there was an apparent conflict between *Mani* v. *Subbarayar* (4) and *Suryanarayana* v. *Ramadoss* (5), I ordered that it be posted before a Bench.

In *Mani* v. *Subbarayar* (4) the adoption was made by the adoptive mother on the authority given to her by her deceased adopted son in a Will left by him. The sapindas living on the date of adoption did not give their consent; and it will appear from the judgment (at page 146) that the adoption was made in disregard of the opinion of the nearest sapindas then living. The learned Judges observe at page 148:

> It seems to us that a consent previously obtained from a deceased sapinda cannot be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made.

This case was examined in *Suryanarayana* v. *Ramadoss* (5), and it was held that mere lapse of time without more, or the death of the consenting sapinda, will not put an end to a consent freely and bona fide granted. I may here state that although the adoption in the present case was made 19 years after the date of authority it was admitted in the plaint (paragraph 6) and conceded before us that had the donor of the authority been alive on the date of adoption, the adoption would have been perfectly valid. The question, therefore, is whether his death ipso facto put an end to his authority. In *Suryanarayana* v. *Ramadoss* (5) it was held that such would not be the case and in *Anne Brahmayya* v. *Chelasami Rattayya* (7) Ramesam, J. observes at page 517 that:

> When the interval is short the death of the sapinda may not matter; but a sapinda's assent is not to be pocketted by the widow and used long after it was given, when entirely different considerations as to the expediency of the adoption may apply.

In *Suryanarayana* v. *Venkataramana* (8) the question arose whether the assent of sapindas to adopt "any boy at any time" would entitle a widow to adopt nine years after the date the consent was given; and it was held that the assent was not valid: (1) because it was too general in its nature; and (2) because during the nine years circumstances had materially changed, one of them being that two out of the 3 assenting sapindas and two dissenting

sapindas had died. This dictum has been explained in *Nagarampalli Kamesam* v. *Nagarampalli Batchama* (9). I may here state that the authority in the present case was not to adopt any boy, but to adopt a boy "from among the sons of your brother, or the sons of my brothers, or their daughter's son or their sons," and that the boy adopted satisfied this description. There was no doubt the liberty to adopt "whenever it was necessary." In my opinion the third of these decisions is that when the consent is given by the father-in-law who happens to be the nearest sapinda then living, his death before the adoption is made would not ipso facto revoke the consent, and that such a consent will come to an end only if circumstances had materially changed after his death. In the present case it was not alleged that there has been any change in the circumstances on the date the adoption was made, caused either by the coming into existence of other nearer sapindas, or by the death of sapindas then alive; or by reason of the estate having vested in third persons. The evidence shows that five sapindas were alive on the date of the adoption. The boy adopted is the son of one of them and his natural father was present at the adoption. Another sapinda assisted the widow during the ceremony, and a third was present. Plaintiff and the 5th sapinda were on that date in their houses in the village, and did not in any way indicate to the widow that they objected to the adoption. Soon after the adoption steps were taken to transfer the patta in the name of the adopted boy and notices were sent to plaintiff. From what the District Munsif says in paragraph 49, the plaintiff made no serious attempt to oppose the transfer and Venkataramiah alleged that his son had been adopted and not the 1st defendant. And, what is more, the suit was instituted on the last day of limitation although plaintiff was aware of the adoption at any rate when he got the notices from the Tahsildar.

It was said that the 3rd defendant had to seek out plaintiff and Venkataramiah and obtain their consent and that she did not do so. She was not adopting under any consent given by sapindas then alive; and she preferred to adopt under an authority given to her by her deceased father-in-law. This authority had the approval of three out of five sapindas alive on the date of the adoption; and in the case in *Mani* v. *Subbarayar* (4), the consent was held not to be efficacious to validate an adoption which is not approved by the persons who are the nearest sapindas at the time the adoption is actually made: see at p. 148.

That presence at an adoption ceremony would imply acquiescence, though such acquiescence may not be equivalent to consent, is the view taken in *Ramachandra* v. *Mulji Nanabhai* (15). In the present case all that was needed was acquiescence in a consent already given, and not fresh consent.

I, therefore, come to the conclusion that in the circumstances of the present case, the authority under which the 3rd defendant acted was not at an end on the date the adoption was made.

It was next contended by appellant's vakil that the adoption was invalid because it was not made to the last male holder, who in this case was said to be the father-in-law. The father-in-law had given the properties to the 3rd defendant under Ex. I and possession was delivered over to her on the date of the deed (26th April 1891). The deed goes on to say:

> You are therefore hereby authorized to keep the whole of the property mentioned herein under your management through your lifetime, and to pass the said property to the adopted son either after your death or at any time at your pleasure.

And it concludes by saying:

> You shall enjoy the said lands at your pleasure, yourself paying the Government taxes thereon.

I fail to see how after this transfer the father-in-law could be deemed to be the last male holder. The terms of Ex. I above stated appear to me to be similar to the terms of the will which was construed in *Srinivasa* v. *Dandayudapani* (16). The adopted son (1st defendant) would not succeed by inheritance but only as devisee under Ex. I; and the rule that the adoption will be invalid unless made to the last male holder applies only to cases where the adopted son would take by inheritance: See *Venkataramier* v. *Gopalan* (17). As observed by Kumaraswami Sastri, J., in *Maharaja of Kolhapur* v. *Sundaram Ayyar* (13).

(15) [1898] 22 Bom. 558 (F. B.).
(16) [1889] 12 Mad. 411.
(17) [1918] 9 L. W. 43=35 M. L. J. 698=49 I. C. 48=(1918) M. W. N. 779.

The whole principle underlying the rule as to divesting estates is that a superior title as heir cannot be created by a widow, while the property has already vested in a person who in law has taken the estate from the deceased heir of the last male holder.

In this view it is not necessary to consider the cases relied upon by the appellant's vakil, *Chandra* v. *Gojarabai* (18); *Shri Dharnidhar* v. *Chinto* (19), *Lakshmibai* v. *Vishnu Vasudev* (20) *Dattatraya Bhimrao* v. *Gangabai* (21) as in all of them the adoption was after the estate had vested by inheritance in a third person. I would, therefore, dismiss the second appeal with costs.

Appeal dismissed.

(18) [1890] 14 Bom. 463.
(19) [1896] 20 Bom. 250.
(20) [1905] 29 Bom. 140=7 Bom. L. R. 436.
(21) A. I. R. 1922 Bom. 321=46 Bom. 541.

A. I. R. 1926 Madras 921

PHILLIPS AND RAMESAM, JJ.

Secretary of State—Plaintiff—Appellant.

v.

Dugappa Bhandary and *others* — Defendant—Respondents.

Appeal No. 259 of 1921, Decided on 23rd September 1925, from a decree of the Sub-J., South Kanara, in O. S. No. 2 of 1919.

(a) *Crown—Escheat—Government must first prima facie prove that last holder died without heirs.*

Where Government claims certain property by escheat, it is for the Government to prove, at least prima facie, that the last holder died without heirs and then it is open to the claimant to prove his own title or to set up the title of a third party: 12 *M. I. A.* 448 (*P. C.*), *Rel. on.* [P. 922, C. 1]

(b) *Malabar Law—Aliyasantana Law—Succession—Community of pollution is necessary to constitute heirship.*

Under Aliyasantana Law it cannot be held that a divided family, however long it may be since the division took place, necessarily succeeds. There must at least be community of pollution in order to constitute heirship. [P. 922, C. 2]

(c) *Transfer of Property Act. S. 51—Trespasser's possession cannot be a possession in good faith.*

Negligence may in certain circumstances be consistent with honesty: 1 *L. W.* 369, *Rel. on.* But where the title is obviously founded on possession which is knowingly obtained by trespass, it is impossible to hold that the trespasser honestly believed that he was the absolute owner so as to entitle him to claim improvements made by him. [P. 924, C. 2]

(d) *Crown — Escheat — Delay in establishing Government's right does not necessarily amount to laches.*

The fact that the Government has taken a very long time in establishing their right to an escheat cannot make them guilty of laches. It is impossible for Government officers to become aware at once of every case of escheat, and unless there was a neglect of duty in ascertaining the facts, it cannot be held that the Government or its officers have been guilty of any dereliction of duty. 2 *I. A.* 48 (*P. C.*), *Dist.* [P. 925, C. 1]

(e) *Malabar Law—Aliyasantana Law — Succession—Reversioner gets the same right to challenge an alienation as the person succeeded to.*

When a reversionary heir succeeds to the right of a person entitled to question an alienation, the reversioner himself would prima facie have that right: 44 *Mad.* 140, *Dist.* [P. 923, C. 2]

The Govt. Pleader—for Appellant.

B. Sitaram Rao and *K. Y. Adiga*—for Respondents.

Phillips, J—This is a case of an alleged escheat of the properties of an Aliyasantana family of South Kanara. The undisputed facts are as follows: About 1850 the Haladi family consisted of two members, Puttu Shettithi and her son, Daraya Shetti. One Venkamma Shettithi was then adopted from another family and she had a daughter, Kollu Shettithi, who married Daraya Shetti's son Nandiappa Shetti and died in 1872. They had a daughter Durgi Shettithi, who died while still a minor in 1876. In 1864, Daraya Shetti executed what is called a Tahanaman, Ex. DD, in which he stated that there were no other heirs in his family except himself and Kollu Shettithi. He then entrusted the management of the family and the family property to his son Nandiappa Shetti and he also made a provision that if Kollu Shettithi had no issue, Nandiappa Shetti should enjoy the property mentioned therein. Daraya Shetti died in 1866, and from that time Nandiappa Shetti appears to have been in possession and management of the family property. Kollu Shettithi died at about the age of 20 in 1872, and her daughter Durgi Shettithi died in 1876.

In 1878 four persons belonging to the Kavanjur family brought a suit against Nandiappa Shetti and others on the ground that they were members of Daraya Shetti's family entitled to succeed to his estate. In the appellate Court, the suit was dismissed and from that date Nandiappa Shetti appears to have remained in possession of the property. In 1886 he

sold the property to his wife Venkamma Shettithi and his son Koraga Shetti. In 1898, in pursuance of a compromise of some litigation Venkamma Shettithi and her son re-sold the property to Veeranna Shetti, an elder brother of Nandiappa Shetti. After Veeranna Shetti's death, Defendants Nos. 1 and 2 came into possession. In 1903 one Koraga Shetti, P. W. No. 12, sent in petitions to the revenue authorities stating that the property of Daraya's family had become escheated to Government, and an enquiry was held, but in 1905 the proceedings were dropped. They were revived in 1910 on the petition of one Ganapa Shetti, and in 1911 the Government ordered the property to be escheated.

The main question for determination is whether this property has escheated to Government. The Subordinate Judge has found that there were reversionary heirs alive at the time of Durgi's death. In coming to this conclusion he seems to have thrown the burden of definitely proving the absence of heirs upon the Government and, inasmuch as the Government dropped the escheat proceedings in 1905, he holds that there was an admission by the Government that there was an heir to the property in existence when Durgi died. In cases of this sort, as pointed out in *Gridhari Lall Roy* v. *Bengal Government* (1) it is for the Government to prove at least prima facie, that the last holder died without heirs and then it is open to the claimant to prove either his own title, or to set up the title of a third party. The first question then for determination is : Has Government proved at least prima facie that Durgi Shettithi died without heirs ? (His Lordship then discussed whether the evidence adduced by Government established a prima facie case that Durgi Shettithi died without heirs.) It has been definitely laid down in the case of Marumakathayam families in Malabar, which are governed by rules very similar to those applicable to Aliyasantana families, that when a tarwad, or family, becomes extinct, the other tarwads who had become divided from that branch are entitled to succeed but in this Presidency it has never been definitely decided which branch has the preferential claim, whether the branch which is most nearly related in blood or the branch which became divided at the latest point of time. In any case it cannot be held that a divided family, however long it may be since the division took place, necessarily succeeds, and I think there is considerable force in the observation in Mr. Justice Sundara Iyer's Book (Professional Ethics) at page 191 that :

> there must at least be community of pollution in order to constitute heirship.

Under Hindu Law heirs must come within 14 degrees of the deceased and similarly there must be some limit to the remoteness of relationship in Aliyasantana families, and it is unlikely that heirship would extend to a remote relation who did not observe pollution. In the present case it is in evidence that Anthaya Shetti of Choradi family was divided off from the Kavanjur family, and it is alleged that they both originally formed one family jointly with the Haladi family. Inasmuch as the claim of the Kavanjur family has been negatived by the decision of the District Court, prima facie the Choradi family which was a branch of the Kavanjur family would be disentitled to succeed. In these circumstances Government must be held to have adduced sufficient evidence to make out a prima facie case that Durgi Shettithi died without heirs. If the defendants wish to negative this contention, it lies upon them to prove that this Anthaya Shetti, or any other person whom they may choose to set up was actually an heir to Durgi Shettithi. For proving this they merely rely on the fact that the Government dropped the escheat proceedings in 1905 and on the evidence of P.Ws. Nos. 3 and 12, that the Haladi family and Anthaya Shetti's family divided long ago, but both these witnesses couple this admission with a statement that Durgi Shettithi had not any heirs, thus showing that in their opinion, the relationship was too remote to constitute heirship. It is, therefore, unnecessary in this case to decide a point which has been urged at some length, viz., the exact nature of kinship which would constitute a person an heir under the Aliyasantana Law. On this point, therefore, I find that Durgi Shettithi died without heirs and that the property escheated to Government.

(1) [1867-69] 12 M. I. A. 448=1 B. L. R. 44=10 W. R. 31=2 Suther. 160=2 Sar. 382 (P. C.).

The next point for consideration relates to the alleged mulgeni rights created by Daraya Shetti in the plaint property. In 1836 he granted a mulgeni lease to the Kolkebail family. This was transferred (excepting one small portion bearing a rental of annas 4) to Nandiappa Shetti, Daraya's son: vide Ex. III. Again in 1862 Daraya Shetti executed another mulgeni lease in favour of his wife Krishnama Shettithi. It is contended for the respondents that these two mulgeni leases are binding on the property. So far as the first lease in favour of Nandiappa Shetti is concerned, we find that after the judgment of 1856 there is no record of its existence; on the contrary we see that in Ex. DD, which definitely refers to the mulgeni lease in favour of Krishna Shettithi. there is no reference to the lease in favour of Nandiappa Shetti. Inasmuch as Nandiappa Shetti was very intimately concerned in Ex. DD, the omission, I think, is very important. Both the above mulgeni leases are in respect of plaint Item No. 2 in Sch. A, and it would appear from the fact that the second mulgeni lease is said to be in respect of property with a beriz of Rs. 72 that it included the whole of Item No. 2. The mulgeni lease in favour of Nandiappa Shetti was for land bearing a beriz only of Rs. 24, It is, therefore, very probable that the prior mulgeni in favour of Dorayya's son was merged in the later geni chit in favour of his wife whose heir the son would be. It is certainly quite clear from Nandiappa Shetti's dealings with the property after 1876 that he never specifically put forward a claim to his mulgeni right. It may, therefore, be inferred in the absence of evidence to the contrary that this mulgeni right ceased to exist, at any rate before 1864 when Ex. DD was executed. As regards the second mulgeni in favour of Krishna Shettithi it is argued by the learned Government Pleader that it was an invalid grant and is not binding on Government. That it is not a valid grant may be conceded for the preceedings evidenced by the judgment Ex. VII go to show that the transaction was a collusive one entered into by the manager of the family in order to benefit his wife. As there was at least one other member of the family living on the date of the grant it would not be binding on her unless it were for family necessity, and of this latter there is no evidence. It is then contended for the respondents that the Government has no right to object to the geni chit, firstly, on the ground that no reversionary heir can question an alienation made by a member of the family, and secondly, that the right to question it is barred by limitation. In support of the first contention the respondents rely on *Thayyil Mammad* v. *Purayil Mammad* (2) in which it was held that under Marumakathayam Law, the Attala dakkam heir, i. e., the reversionary heir, succeeds only to such of the properties of the tavazhi as have not been disposed of by its last members. This decision appears to be opposed to an unreported decision in Second Appeal No. 857 of 1884. and accordingly it would seem only natural that when a reversionary heir succeeds to the right of a person entitled to question the alienation, the reversioner himself would prima facie have that right. It is, therefore, possible that the decision in *Thayyil Mammad* v. *Purayil Mammad* (2) may require re-consideration, but for the purpose of this suit, I think the question can be decided on the second contention raised by the respondents, viz., the bar of limitation.

The mulgeni chit was granted in 1862 when Kolly Shettithi was alive. She was then aged about 10. She attained majority whether we fix the age of majority at 15 or 18 years, at least two or three years before her death in 1872. The period of limitation thus began to run before her death and would not be interrupted by the minority of Durgi Shettithi. The right of the family to set aside the alienation was, therefore barred in 1874, i. e., before the death of Durgi Shettithi. The right of Government, therefore, to question this alienation is barred by limitation and the property can only be recovered subject to the mulgeni right created in 1862.

The third and last question for consideration relates to the right of the defendants to compensation for improvements made upon the land and the right of Government to mesne profits in the past. When Government demanded possession from the defendants, an offer was made to pay Rs. 1,396-4-0 to Defendants Nos. 1 and 2

(2) [1920] 44 Mad. 140=39 M. L. J. 702=12 L. W. 634=60 I. C. 118=(1920) M. W. N. 768.

as compensation for the improvements effected since 1905, the Government thus recognizing that owing to their conduct in granting a patta to Defendants Nos. 1 and 2 in 1905, they ought in equity to recognize the right of defendants to make improvements after that date.

It is suggested for the respondents that the defendants are entitled under the customary law of South Kanara to compensation for all the improvements effected on the land. They rely on cases reported as *Daramma* v. *Mariamma* (3) and *Ramappa* v. *Abdulla Beari* (4). In the first place the right there considered was the right of tenants to improvements and the right was limited to improvements which would be beneficial to the holding. In the present case, however, it cannot be said that the defendants are tenants of the land under Government within the ordinary meaning of the law of landlord and tenant, and I do not think they can base their claim on this ground. The ground on which they must rely is the right given under S. 51 of the Transfer of Property Act which says that 'when the transferee of immovable property makes any improvement on the property believing in good faith that he is absolutely entitled thereto, the transferee has the right to require the persons causing eviction to have the value of the improvement estimated and paid. The question then arises whether the defendants believed in good faith that they were absolutely entitled to the land. They are the heirs of Veeranna Shetty, the elder brother of Nandiappa Shetti. Nandiappa Shetti obtained possession of the land after Durgi Shettithi's death, knowing full well that he had no title thereto and that he was a mere trespasser. Subsequent dealings with the land, as the result of which Defendants Nos. 1 and 2 are in possession, did not affect the original title in any way. The original possession was gained by trespass and it can hardly be said that a person who enters upon land knowingly as a trespasser can bona fide believe that he is absolutely entitled thereto. It has been held in *Narayana Aiyar* v. *Sankaranarayana Aiyar* (5) that it does not follow from mere negligence that the purchaser did not believe in good faith that he was the full owner. This ruling is in accordance with the definition of 'good faith' in the General Clauses Act; but under that definition it is essential to prove that the transferee was in fact honest in his conduct. Negligence may in certain circumstances be consistent with honesty, but where the title is obviously founded on possession which is knowingly obtained by trespass, it is impossible to hold that the trespasser honestly believed that he was the absolute owner. These remarks apply directly to Nandiappa Shetti only; but as the predecessor-in-interest of Defendants Nos. 1 and 2 was elder brother of Nandiappa, they are all members of one family. This would apply equally to Defendants Nos. 1 and 2 unless they prove positively that they acted in ignorance of Nandiappa's conduct. This they have not done. I would, therefore, hold that the defendants are not legally entitled to the value of the improvements under S. 51 of the Transfer of Property Act. Inasmuch as the Government did recognize their possession of the land by issuing a fresh patta in 1905 and also made an offer to compensate them for improvement since that date, I think that they are now equitably precluded from denying the defendant's right to improvements made since 1905. The improvements have been valued by a Commissioner, a Supervisor and a Tahsildar, and the Subordinate Judge has come to a finding as to the value of the improvements. That valuation is not now disputed and consequently the Defendants Nos. 1 and 2 will be entitled to the value of improvements effected since 1905 on the lands in their possession. A great portion of the value will be payable to tenants and consequently the defendants will only be allowed to draw the amount relating to lands in their actual possession.

The rate of mesne profits has been determined by the Subordinate Judge, and although his finding has been questioned, the learned Government Pleader does not seriously press this point, and the only question for determination is the date from which such mesne profits are payable. Inasmuch as the property really vested in Government from the date of escheat, viz., 1876, the Government would be legally enti-

(3) [1914] 24 M. L. J. 397=19 I. C. 371.
(4) [1921] 41 M. L. J. 127=69 I. C. 282.
(5) [1914] 1 L. W. 369=24 I. C. 940.

tled to mesne profits from that date and this view was held in S. A. No. 221 of 1915. The claim in the plaint is, however, limited to the period since 1898 when the predecessor of Defendants Nos. 1 and 2 came into possession, and there is no reason why the profits from that date should not be awarded. The Government has a legal title to the mesne profits and although it is contended that they have by their laches disentitled themselves, the respondents' vakil is unable to point out in what their laches consist. It is suggested that inasmuch as the Government has taken a very long time in establishing their right to an escheat they have been guilty of laches. It is impossible for Government officers to become aware at once of every case of escheat, and unless there was a neglect of duty in ascertaining the fact, it cannot be held that the Government or its officers have been guilty of any dereliction of duty. The case relied on by defendants [*Juggernath Sahoo* v. *Syud Shah Mahomed Hossein* (6)] has, therefore, no appplication to the present case. The Government is entitled to the mesne profits at the rate found by the Subordinate Judge from 1898 till date of possession with interest at 6 per cent. per annum.

The appeal is accordingly allowed and there will be a decree for the plaintiff as indicated above with proportionate costs throughout. Respondent will pay costs on Items 1 and 3 and on Item 2 respondent will receive 2/3 costs and pay 1/3 to Government.

Ramesam, J.—(His Lordship after statingthe facts as given in the judgment of Phillips, J., and discussing the evidence adduced by Government to prove their case : continued) I am inclined to think that the plaintiff has discharged the burden that rests upon him of making out a prima facie case that there are no heirs see *Gridhari Lall Roy* v. *Bengal Government* (1). So far as any definite evidence can be given the plaintiff has shown that there are no heirs. As to distant branches what we have is very vague and it is for the defendant to prove any pedigree showing the existence of a heir. I, therefore, think that the Government have established that the properties have escheated.

I agree with my learned brother that the plaintiff is now precluded from questioning the mulgeni lease of 1862. As this mulgeni lease covered the whole of Item 2 (vide para. 3 (3) of the plaint) it is unnecessary to consider the first mulgeni lease of 1838 as it is admitted that it covered only a portion of Item 2. Probably it ceased to exist as my learned brother has found.

As to improvements, the question arises only as to Items 1 and 3 as we have found that Item 2 is subject to a mulgeni lease and the defendants are not liable to be evicted, the plaintiff being only entitled to the rents. I agree with my learned brother that the defendants are not entitled to improvements under the Customary Law of South Kanara, but if at all, only under S. 51 of the Transfer of Property Act and that they are entitled to improvements effected after 1905 ; it seems to me that the defendants are entitled to such of them as were effected after 1898 and before 1902. As Durgi Shettithi died in 1876 and as no claimant came forward and established his claim successfully by 1888 the wife and son of Nandiappa Shetti, who obtained the sale-deed Ex. GG from Nandiappa Shetti, completed in 1888 a title by prescription against all possible claimants other than Government. Between 1888 and 1902 there is nothing to show that it was very clear that there were no possible heirs who might have claimed the property or that Veeranna Shetti, the vendee under Ex. HH, knew definitely that there were no heirs other than Government who might have claimed the property. Thus, though prior to 1888 Nandiappa Shetti and his wife and son might be regarded as trespassers of the property, Veeranna Shetti, after his purchase in 1898, might have thought that his vendors had an absolute title of the property and that he himself purchased an absolute title. It is true he being a brother of Nandiappa Shetti knew the immediate prior history of the family. But there is nothing in such prior history or otherwise to show that there might not be heirs who could claim this property between 1876 and 1882. It seems to me that it is more likely that Veeranna Shetti might have bona-fide thought

(6) [1874] 2 I. A. 48=23 W. R. 99=14 B. L. R. 386=3 Suther. 61=3 Sar. 419 (P. C.).

that there might have been heirs who could have claimed the property, but by their failure to claim it he obtained an absolute title in 1898, than that he definitely knew that there are no other heirs entitled to the property and the Government are, therefore, entitled to it by escheat and he has therefore obtained an absolute title to the properties. Any how, the Tahsildar issued the patta or kudtledar in Veeranna Shetti's name (see Ex. Q) and, therefore, he was justified in thinking that even the Government has no title. I, therefore, think that the defendants are also entitled to all improvements made on Items 1 and 3 between 7th September 1898, the date of Ex. HH, to May 1902, when the case about escheat was started. I may also observe that a patta was issued to Veeranna Shetti; for it is observed in para 6 of Ex. W:

It is on this purchase right that Veeranna Shetti happened to be kudtledar in Fasli 1312:

vide *Narayana Aiyar* v. *Sankaranarayana Aiyar* (5) and *Durgozi Row* v. *Fakeer Sahib* (8). Where the improvements are effected by tenants their position is even better on the question as to whether they were effected bona fide. But, as the period is small and the question is of importance as to Item 1 only, I do not think it necessary to differ from the order proposed by my learned brother.

The next point relates to mesne profits. The Government claim them from 1898. The respondants' vakil relied on *Ramaswami Iyer* v. *Venkatarama Iyer* (9) and *Subbe Goundan* v. *Krishamachari* (10). But these cases relate to claims by members of joint families seeking to repudiate alienations by a father or by a manager of the family. In this case, repudiation by the plaintiffs involved a consideration of various equities and in such cases it might well be said that the right to mesne profits arises only from the date of the repudiation. No such equity arises in the present case. The respondent also relies on *Juggernath Sahoo* v. *Syud Shah Mahomed Hossein* (6), but it cannot be said that the Government are guilty of any laches in this case. Therefore, the Government are entitled to mesne profits from the 7th September 1898, the date from which they claim, such profits being the actual profits of Items 1 and 3 as found by the Sub-Judge minus the assessment and land-cess, and the rent of Rs. 76 for Item 2 minus assessment.

I agree with my brother's order about costs.

Appeal allowed.

(8) [1907] 30 Mad. 197=17 M. L. J. 9.
(9) A. I. R. 1924 Mad. 81=46 Mad. 815.
(10) A. I. R. 1922 Mad. 112=45 Mad. 449.

A. I. R. 1926 Madras 926

BEASLEY, J.

S. A. Muthayan Chettiar—Plaintiff—Petitioner.

v.

P. Panchavarna Nadar—Defendant—Respondent.

Civil Revision Petition No. 602 of 1923, Decided on 16th July 1925, from the decree of the Sub-J., Madura, in S. C. S. No. 1006 of 1923.

Chit fund—Default by stakeholder in paying prize money does not juslify non-payment by subscriber of further subscriptions.

Apart from special agreement default in the payment of the prize-money does not relieve the subscriber from liability to pay future subscriptions. Such a termination of liability can only be on the ground that the whole contract is put an end to. (1911) 1 *M. W. N.* 79, *Foll.*

[P. 926, C. 2.]

K. V. Srinivasan—for Petitioner.

Judgment.—The facts of this case are sufficiently and fully set out in the judgment of the Subordinate Judge and it is not necessary for me to re-state them now. This case is governed by the authority of the decision in *Kunjunni Nair* v. *Kunjunni Nair* (1) and the material passage in the reported case appears at page 80. It is as follows:—

It is impossible to argue as a matter of law apart from special agrement that default in the payment of the prize-money does not relieve the subscriber from liability to pay future subscriptions. Such a termination of liability can ony be on the ground that the whole contract is put an end to.

This decision seems to me to be a decision directly in point and, therefore, I must allow this petition with costs and reverse the finding of the Subordinate Judge. The decree will, therefore, be for the plaintiff for the amount claimed with costs in the lower Court.

Petition allowed.

(1) [1911] 1 M. W. N. 79=8 I. C. 513.

*** * A. I. R. 1926 Madras 927**

SRINIVASA AIYANGAR, J.

Sri Mahant Prayaga Doss Jee Varu—Plaintiff.

v.

Board of Commissioners for Hindu Religious Endowments, Madras—Defendant.

Secretary of State—Applicant.

Civil Suits Nos. 560, 574 and 624 of 1925, Decided on 8th March 1926.

* * *Civil P. C., O. 1, R. 10 (2)—Declaration that an Act is ultra vires—Secretary of State is not necessary party.*

Different considerations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. If a third party's application to be added as party defendant were opposed by both parties it should be rejected unless the Court is satisfied that the party sought to be added was not only a proper party but a necessary party. Where plaintiff opposes such an application it should be rejected as he being generally dominus litus there is no principle of justice by which he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law. [P. 928, C. 1, 2]

The expression "all questions involved in the suit" in Civil P. C., O. 1, R. 10 (2) should be regarded as absolute and not merely relative to the parties before the Court. But there is neither principle nor authority for regarding the expression "all the questions involved in a suit" in R. 10 (2) relating to joinder of parties as absolute and not relative: *Moser* v. *Marsden* (1892) 1 *Ch.* 487 and *Norris* v. *Beasley*, (1877) 2 *C. P. D.* 80, *Foll.* [P. 930, C. 1, 2]

In a suit for declaration that a certain Act is ultra vires, the Secretary of State is neither necessary nor proper party: *Duke of Bedford* v. *Ellis* (1901) *A. C.* 1, *Ref.* [P. 933, C. 1]

Advocate-General—for Applicant.

S. Srinivasa Aiyangar & *T. Kumaraswamiah*, *T. Rangachariar*, *V. Radhakrishnayya*, *S. Muthia Mudaliar*, *V. N. Venkatavaradachariar* & *R. Gopalachariar*, and *T. R. Ramchandra Aiyar* & *K. Narasimha Aiyangar*—for Plaintiff.

P. Venkatramana Rao—for Defendant.

Judgment.—This and the other applications in the connected suits are on the name and on behalf of the Secretary of State for India in Council for the purpose of his being added as a party to the suit presumably as party defendant.

The main object of each of the suits is to obtain a declaration that the Madras Hindu Religious Endowments Act 1 of 1925 is invalid and ultra vires, and on the basis of such declaration the plaintiff has asked for a relief by way of injunction which is merely a relief consequent on the declaration.

The plaintiff in each of the cases is the head of a mutt or religious endowment and the only defendant to each of the actions is the Board of Commissioners for the Madras Religious Endowments, a body, it may be observed in passing, created and constituted by the said Act.

The question for determination, therefore, is whether on the application I should direct the Secretary of State being added as party defendant in these suits. The question is of considerable importance and of great difficulty though I did not realize the full extent of either till I was more than half way through the hearing. It has been argued with much learning and light and also some little warmth on both sides, and I took time to consider my judgment not only having regard to the importance of the question to the parties, but also to the general principle on which alone it seemed to me that a satisfactory solution can be arrived at. If it had been an ordinary case, I should probably have had very little difficulty in presuading the parties to agree to the addition of the party on conditions which may be regarded as equitable in the circumstances.

It was with this view that almost at the very commencement of the discussion I asked the learned Advocate-General who appeared for the applicant whether he had any instructions to agree as to any conditions as to costs. He said he had none. Some days thereafter he again appeared before me and intimated that, so far as the applicant was concerned, he had definite instructions not to consent to any conditions. He, however, at the same time intimated that he had received a communication from the President of the Board of Commissioners to the effect that if in the action the plaintiff should fail, the Board of Commissioners would consent to only one set of costs being allowed to the defendants and that they would be willing to allow the Secretary of State

to take such one set. It is obvious that the two things are not and cannot be the same and that in these cases a set of costs to the Board of Commissioners must mean something very different to a set of costs to the Secretary of State at any rate as at present represented in the action. Further I felt that such orders should, if at all, be passed only by consent of all parties. The plaintiff, however, refused to agree to any such arrangement and has asked me to decide the question raised ; and having regard to the great importance of the matter and the likelihood of its being taken up elsewhere, sooner or later, I have deemed it fit to deal with the application directly and dispose of it on its merits.

The first observation that falls to be made with regard to the present application is that it is one for joinder of a third party as party defendant and made by the third party himself and not by the plaintiff or the defendant in the action. I have felt it necessary to state this because it seems to me that, different consi erations should apply to applications for joinder of additional parties when the party sought to be added is party plaintiff or party defendant and also when the application for such joinder is made by the party sought to be added or by either of the parties already on the record and if so, which of them. I will not pause to refer to all such considerations. In such a case as the present one, however, it is obvious that if a third party's application to be added as party defendant were opposed by both parties, I should have had very little hesitation in rejecting the application unless I were satisfied that the party sought to be added was not only a proper party, but a necessary party. Having regard, however, in this case to the learned and strenuous argument in support of the application by Mr. Venkatramana Rao on behalf of the Board of Commissioners I have felt bound to regard it virtually as an application by both. The question thus resolves itself into this : Should the plaintiff in this case be compelled to litigate against not only the defendant of his choice against whom he has prayed for the reliefs consequent on the declaration, but also against the Secretary of State ?

I did not understand either the learned Advocate-General who argued the application on behalf of the applicant the Secretary of State or even Mr. Venkatramana Rao for the Board of Commissioners to argue that the applicant was a necessary party to the suit in the sense in which that expression is understood in the law relating to parties to actions, that is to say in other words, as a party without whom there can be no properly constituted suit, having regard to the cause of action alleged and the relief claimed. If it is to be only a question of a permissible party, then on principle it follows that such cannot generally be ordered when it is opposed by the person to fight whom he is so brought on the record. Thus, when *A* institutes a suit on title to recover certain property from *B*, *C* should not be made additional plaintiff if *B* should object to it, except perhaps in the case of one possible exception of the title to the property between *A* and *C* being alternative in its proper sense. The principle is even stronger in the case of a plaintiff as against whom another defendant is sought to be added. It is the plaintiff that comes to Court alleging a cause of action as against a particular defendant and asking for reliefs against him. The very basic principle of judgment inter partes is that the judgments are not judgments in rem, but declaratory and operative only as between them. The plaintiff being generally dominus litus, I fail to see on what principle of justice he can be compelled to fight against some other litigant not of his own choice unless such a process is required by a positive rule of law.

The question thus further resolves itself into this whether in such an action the Secretary of State is a proper party having regard to the rules relating to the joinder of defendants. It was on this basis that the question was really argued by all the parties. It is O. 1 of the First Schedule to the Civil P. C. that lays down the rules regulating the joinder of parties. R. 3 no doubt relates to joinder of defendants, but both in form and substance it is merely permissive and relates only to what the plaintiff may do if he were so minded. It is Cl. (2) of R. 10 that applies to the present case. It provides that the Court may, at any stage of the proceedings either upon or without the

application of either party and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined as defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

It has not been suggested in this case that the applicant, the Secretary of State, is a person who ought to have been added as party defendant in the suit. The contention was that the presence before the Court of the Secretary of State in this case would be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. If the expression in this clause had not been the word "necessary" but merely "desirable" a great deal might have been said for the argument adduced in support of the application. But at no stage of the discussion was I able to understand the learned gentleman that argued in support of the application to make out that the presence before the Court of the Secretary of State was necessary. The necessity referred to in the clause is for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in a suit. It is obvious that this clause cannot be read as requiring that all persons who have or claim to have or are likely to have any sort of right, title or interest in respect of any portion of the subject-matter of a suit should all be made parties. If it be borne in mind that the suit is by a plaintiff for certain reliefs against certain persons as defendants and that the judgments of civil Courts are not judgments in rem, then it follows that the questions involved in the suit are only questions with regard to the right set up and the relief claimed on the one side and denied or withheld on the other. The expression therefore "all the questions involved in the suit" can only be questions as between the parties to the litigation. The phrase "to enable the Court effectually and completely to adjudicate upon and settle" would seem really to indicate that the addition of the party should be ordered only if in the opinion of the Court in the absence of the party it cannot effectually and completely adjudicate and settle all the questions.

In these cases there is no question of the Court not being able effectually to adjudicate and settle any question. So far as I was able to see, the entire argument in support of the application was based on the position that in the absence of the Secretary of State, the Court could not completely adjudicate upon and settle all the questions involved in the suit. In other words, the contention was that the Secretary of State was a proper party to every suit in which any question was raised with regard to the legality of any statute and that in the absence of the Secretary of State as a party in any such suit there can be no completeness of adjudication within the meaning of the rule. I confess that at first I was a little impressed with this argument. But, as against this, there are found heaps of cases in the reports both in this country and elsewhere in which the question of whether a particular legislative enactment was intra or ultra vires was decided merely as between the parties to the litigation without any representation in the suit either of the Crown or of the public. But it may, no doubt, be remarked that in none of these cases the question has been raised or decided. The only case that has been cited before me in which there can be said to be any indication with regard to this matter is the case of *Cunnigham* v. *Tomey Homma* (1).

The question in that case was whether a particular provision was ultra vires of a Provincial Legislature and the Attorney-General of the province was allowed to intervene at some stage. There is no decision in the case as to whether he was either a necessary or proper party and their Lordships of the Judicial Committee do not even refer to it. I am unable, therefore, to regard it as a decision at all bearing on the point.

The case of *Esquimalt and Nanaimo Ry. Co.* v. *Wilson* (2) was also cited for the applicant and relied upon. The property which was the subject-matter of that action had been the subject of a grant by the Crown and the question that arose was whether in such an action

(1) [1903] A. C. 151.
(2) [1920] A. C. 358=89 L. J. P. C. 27=122 L. T. 563=36 T. L. R. 49.

the Attorney-General of the province was a necessary party. At page 364 Lord Buckmaster, who delivered the judgment of their Lordships of the Judicial Committee, observes as follows:

> The learned Judges of the Court of appeal from whose judgment their Lordships feel compelled to differ upon this point, do not refer to the rights of the Crown which may be affected but base their opinion solely on the ground that the Crown is not affected by the result and that consequently a mere declaratory order against the Crown would be of no value. But for the reservation of the rights already referred to, their Lordships would have agreed with this conclusion.

At page 368 occurs the following sentence:

> It is true that in these circumstances certain rights which the Crown possesses, if the grant be good, will be interfered with.

and at page 369 their Lordships concluded by saying that they

> Therefore think that the Crown is affected in this matter, so that the presence of the Attorney General is proper and necessary for the determination of justice.

It is not contended in this case that by reason of any adjudication as between the original parties to the action, the rights of the Secretary of State would in any manner or measure be affected. It is therefore not a case falling under the rule that the officer representing the Crown is a necessary party to every action as the result of which the rights of the Crown may be affected.

The question would, therefore, have to be determined merely on a consideration of, whether in the absence of the Secretary of State as a party to the action it is impossible to have a complete adjudication upon and settlement of all the questions involved in the suit. All the learned gentlemen that appeared at the Bar and argued the point on behalf of the various parties state that they were unable to find any decision bearing directly on the point.

I have therefore to arrive at a conclusion on first impression, and on what I conceive to be the general principles applicable. The conclusion I have thus arrived at is this: If the expression "all questions involved in the suit" should be regarded as absolute and not merely relative to the parties before the Court, then the Secretary of State may in this case be regarded as a proper party and not otherwise. But it seems to me that there is neither principle nor authority that can be discovered for regarding such an expression as "all the questions involved in a suit" appearing in a rule relating to joinder of parties as absolute and not relative.

The whole scheme of the Civil Procedure seems to me to point to a suit being refered as a suit for relief as against definite defendants, as a trial being one only as between the parties and an adjudication as one only binding them. If a plaintiff should claim certain property and it should be regarded that the question involved in the suit is generally whether he is the owner of the property and not whether as against any other particular person he is entitled to certain rights over property very serious consequences are sure to ensue and procedure in our Courts of law is certain to become exceedingly complicated and much more disastrously prolonged than it is at present.

At this stage I may with advantage refer to two decisions that have been cited at the Bar. Mr. S. Srinivasa Aiyangar for the plaintiff, referred to the case of *Moser* v. *Marsden* (3). In that case the plaintiff, the patentee of a machine, brought the action against the defendant for using a machine which he alleged was an infringement of his patent One Montforts, the maker and patentee of the defendant's machine, applied to be added as defendant alleging that the judgment in the action would injure him and that the present defendant would not efficiently defend the action. The Court of appeal consisting of Lord Justice Lindley and Lord Justice Kay reversing the decision of the Court below, held that Montforts not being directly interested in the issues between the plaintiff and the defendant but only indirectly and commercially affected, the Court had no jurisdiction to add him as a defendant. Lord Justice Lindley at pages 489 and 490 observes as follows:

> But reliance is placed on the following words of the rule, which provide for adding the names of parties 'whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the cause or matter.' But what is the question involved in this action? The question, and the only ques-

(3) [1892] 1 Ch. 487=61 L. J Ch. 319=66 L. T. 570=40 W. R. 520.

tion is whether what Marsden is doing is an infringement of the plaintiff's patent.

And again later on that eminent Judge says :

Can it be said that the rule prevents the plaintiff from proceeding against a defendant without having to litigate with everybody who may be in any way affected, however indirectly, by the action ? It appears to me that it does not. The counsel for the applicant grounded his argument on the allegation that Montforts' interest would be affected by the decision in this action. It is true that his interest may be affected commercially by a judgment against the defendant, but can it be said that it would be legally affected ? Can we stretch the rule so far as to say that whenever a person would be incidentally affected by a judgment he may be added as a defendant ?

And Lord Justice Kay at pages 491 and 492 observes as follows :

No doubt the judgment in the present case may indirectly affect Montforts' patent ; but the answer to that is, that whether it would affect it or not, this rule does not apply to such a case. Montforts says that the defendant will not contest the case properly, and will not conduct the defence so energetically as he would. But we cannot help that.

It seems to me that if ever a case can be conceived which would fall directly within the words of the rule already referred to this was such a case. There was a defendant, who when sued by the plaintiff for infringement of a patent right sought to justify his action on the patent right of a third party and if the terms of Cl. (2) of R. 10 should be taken absolutely as contended for, it would have seemed to be a clear case in which for the purpose of effectually and completely adjudicating upon and settling all questions involved with regard to the patent right of the plaintiff it was not only proper but necessary that this other patentee should have been added as a party defendant. But the Court of appeal said "No" and decided that he was not a proper party on the ground, I take it, that the words of the rule should be construed not absolutely but relatively. It is a very strong case and I confess almost repugnant to commonsense. But the words of the statute that their Lordships of the Court of appeal were considering were identical with the words which I have to consider and it has not been shown that this decision of the learned Judges has ever been overruled or even questioned. It must also be observed that their Lordships refused to make the other patentee a party to the action though they came to the conclusion that by reason of the decision the commercial interest of the other party would be seriously affected. Mr. Radhakrishnayya referred to *Norris* v. *Beazley* (4). It was an action on a bill of exchange against the acceptor originally and the defendant sought to add the name of a company which he alleged was the party really liable and which had also in the same matter a counterclaim against the plaintiff. Chief Justice Coleridge makes in that case an observation which I may here reproduce. At page 83 that learned Judge observes :

Now, this, although it is not a case of making a person a plaintiff in respect of a defendant as to whom he does not desire to be plaintiff without and against his will, is certainly the case of making a person a plaintiff consent.

Again that learned Judge at page 84 lays down that :

the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any.

He proceeds thus :

It seems to me that this application is answered, and that it was not intended that persons in the position of this company should be added as defendants, merely for the convenience of another defendant...It seems to me that it is the more important to construe this rule strictly because it is obvious that, in many cases, if the defendant's contention is right, its provisions might be made use of in a manner exceedingly harassing to plaintiffs, by forcing them to include in their actions persons against whom they do not seek to proceed, and to mix up their rights as against one person, with questions of a highly complicated nature arising between themselves and the others.

At page 85 Justice Denman says :

I am quite clear, however, that the Court ought not to bring in any person as defendant against whom the plaintiff does not desire to proceed unless a very strong case is made out, showing that in the particular case justice cannot be done without his being brought in.

The foregoing observations seem to me to lay down in very clear and unmistakable terms the principle applicable to such a case as the present. On these principles I cannot possibly see my way to add the applicant as a party defendant to the action. I am further unable to understand why the Secretary of State is sought to be made a party to the action at all. The only suggestion on which such a joinder can be supported is that it is necessary that the declara-

(4) [1877] 2 C. P. D. 80=46 L. J. C. P. 169=35 L. T. 845=25 W. R. 390.

tion that the Act is ultra vires should be obtained in the presence of the Secretary of State. But the Secretary of State so far as the Civil Procedure Code is concerned represents merely the Government or the sovereign and can under the present system be regarded if at all only as part of the legislative machinery. There is no principle for even suggesting that any declaration as against him will be effectual and binding as against all other possible persons such as committees and other bodies and officers that may be constituted or created under the Act now in question.

There is no cause of action alleged against the applicant, and no relief whatever claimed against him. On a proper construction of the rule I feel constrained to hold that the applicant is not a proper party to the suit. The plaintiffs have complained of certain actions by the Board of Commissioners which would undoubtedly be unlawful but for the Endowments Act. They therefore ask for an injunction on the ground that the Act which is held up as a shield by the defence is really not available to them because it is illegal and ultra vires.

The declaration therefore a against the defendants must be regarded as merely ancillary to the relief claimed. On principle and authority I have therefore come to the conclusion that the Secretary of State is neither a necessary nor a proper party and that as the plaintiffs oppose his being joined as additional defendant I would not be justified in adding him as a party defendant even as a person brought in merely to look on and see fair play to use the words of Lord Macnaghten in the case of *Duke of Bedford* v. *Ellis* (5). Even as a sort of harmless and permissible party I am satisfied he could not be added when such addition is opposed by the plaintiff and more so when on behalf of the applicant there has been an express refusal to submit to any condition as to costs.

Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of ultra vires are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them.

In the result the application must be dismissed with taxed costs for the plaintiffs in each of the cases and it is ordered accordingly.

Application dismissed.

(5) [1901] A. C. 1=70 L. J. Ch. 102=83 L.T 686=17 T. L. R. 139.

A. I. R. 1926 Madras 932

ODGERS, J.

Abdul Khadar Sheriff Sahib—Defendant—Appellant.

v.

Lalu Bi—Plaintiff—Respondent.

Second Appeal No. 1137 of 1923, Decided on 3rd March 1926, against the decree of the Dist. J., Guntur, in Appeal Suit No. 140 of 1922.

(a) *Provincial Small Cause Courts Act* (1887) *Sch. 2, Art.* 38—*To exclude small cause Court's jurisdiction—Person bound to maintain need not be a party.*

It is not necessary in order to take the case out of the cognizance of the Small Cause Court that the person bound in law to maintain should be one of the parties: 40 *All.* 52, *Foll.* [P 933, C 1]

(b) *Deed—Construction—Contract—To get away from plain terms of a contract there must be evidence and circumstances showing that parties intended to base their contract on something which was not incorporated in the contract—Evidence Act, S.* 92.

If you are to get away from the plain terms of the contract you have to read into it something which is not there, and in order to entitle you to read into it something, there must be a state of things which appears from the evidence, from the circumstances, from the extrinsic surroundings, to have been assumed by the parties to have been the foundation or basis of the contract, so that if that basis fails the contract becomes unenforceable, you have to ascertain from the surrounding circumstances recognised by both the contracting parties what is the substance of the contract and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of particular state of things, (1863) 3 *B.* and *S.* 826, *Rel. on.*

A Muhammadan not being on good terms with his wife, who lived separate claiming maintenance, an agreement was entered into between her and her brother-in-law whereby the brother-in-law promised to pay her certain amount per year for maintenance for her lifetime. Shortly after, the husband divorced her. In a suit for maintenance as per the terms of the agreement against the brother-in-law.

Held: that the divorce by husband did not put an end to the agreement and the lady was entitled to the maintenance. [P. 934, C. 1, 2]

Ch. Raghava Rao—for Appellant.

K. Ramamurthi and *K. Kameswara Rao*—for Respondent.

Judgment.—A preliminary objection has been taken in this case on which I have heard a long argument as to whether this is a suit relating to maintenance under Art. 38, 2nd Schedule, Provincial Small Cause Courts Act. I much regret that on a careful consideration of the case I must find against the preliminary objection.

The suit is brought for a sum of Rs. 76 and is brought by a sister-in-law against a brother-in-law who is not in law bound to maintain her but who entered into an agreement evidenced by the document Ex. C with her. About this document I can say nothing at present as I shall have to hear the argument on the merits, but it calls itself a deed of maintenance and the suit is apparently brought on what the plaintiff calls a registered maintenance deed. In this case I was prima facie impressed with the fact that a suit for maintenance would in the ordinary acceptance of the term be a suit by a wife or in exceptional cases a daughter against husband or father for maintenance. I should have thought prima facie the expression was inapplicable as between a brother-in-law and a sister-in-law and I was very much inclined to hold at first that this was a mere suit on the contract Ex. C between one stranger and another as far as any obligation in law is concerned dehors the document.

Various cases have been quoted on either side of the line, but I think I must follow the case in *Munir-ud-din* v. *Samir-un-nissa Bibi* (1) which seems to show that it is not necessary in order to take the case out of the cognizance of the Small Couse Court that the person bound in law to maintain should be one of the parties: *Muhammad Husain* v. *Nuryahan* (2) another Allahabad case is to the same effect. In *Munir-ud-din* v. *Samir-un-nissa Bibi* (1) the cases quoted by the learned vakil for the respondent from the *Allahabad Weekly Notes* are distinguished and I think the main point of distinction is that the maintenance holder was not a party in either of them. The same remark applies to *Annasami Sastrial* v. *Ramasami Sastrial* (3). The decision in *Mohidin Vava Ravuthan* v. *Moosa Naina Ravuthan* (4) went on the consideration that the maintenance holder, if the expression can be allowed in this case, was himself a co-sharer with the defendant, and, therefore, not entitled in law to call upon the latter to provide maintenance.

To come to the merits: this appeal which is all about Rs. 76 has taken all day in this Court. Plaintiff was the wife of Syed Ismail Sahib and his sister's husband is the defendant. It appears that Syed Ismail Sahib and his wife did not live happily together. She accused him of beating her and driving her from his house, robbing her of her jewels and purchasing one acre of land which is charged with her maintenance under Ex. C which is the document in dispute in this case. It appears that the lady had applied to a Magistrate for an order under S. 488 of the Criminal Procedure Code for maintenance. She was then living apart from her husband and in settlement of the disputes between the parties Ex. C was entered into, It should be mentioned that since the execution of Ex. C in August 1918, Syed Ismail Saib has divorced his wife and the allegation for the defendant is that the deed has ceased to have effect for this this reason. Mr. Raghava Rao for the appellant relies on three circumstance with regard to Ex. C. The deed is described as one of maintenance, as I have already pointed out in the judgment on the preliminary objection. It recites misunderstandings between the brother-in-law, i. e., husband and the lady that she desired some maintenance allowance, he agreed to provide it for the whole 'of your lifetime' i. e., Rs. 40 payable every year on the 30th of Bahula of Pushya month. It proceeds:

During the whole of your lifetime I shall not mortgage etc., this security land in favour of etc.....You shall stay in the house of your father-in-law Syed Lathif Sahib or at any other place and be receiving the maintenance allowance.

It has been argued and it is conceded that the Magistrate's order should not

(1) [1918] 40 All. 53=42 I. C. 908=15 A. L. J. 857.

(2) [1912] 10 A. L. J. 185=16 I. C. 13.

(3) [1915] 38 Mad. 553=22 I. C. 5[illegible]=1 L. W. 19.

(4) [1896] 6 M. L. J. 137.

be executed after a divorce has taken place. It is contended that that principle should be applied to this document, Ex. C. Three facts are relied on as showing that Ex. C must have been intended to operate only during such time as Lalu Bi continued to be the wife of Syed Ismail Sahib. First, she is described as Lilibi, "the wife of Syed Ismail Sahib", which was a perfectly true description at the time Ex. C was executed and one fails to see in what other way the lady could have then been identified. In my opinion, no force whatever can be given to the argument based on that description. The second point is the Muhammadan Law, which is clear, namely, that after divorce a wife is not entitled to maintenance : thirdly, the Magisterial proceedings to which I have referred.

It is clear that if you are to get away from the plain terms of the contract you have to read into it something which is not there and in order to entitle you to read into it something that is not there you must in my opinion, fall within the decisions on based *Taylor* v. *Caldwell* (5) of which *Krell* v. *Henry* (6) is an example, that is to say, there must be a state of things which appears from the evidence, from the circumstances, from the extrinsic surroundings to have been assumed by the parties to have been the foundation or basis of the contract, so that if that basis fails the contract becomes unenforceable. You have in the words of Vaughan Williams, L. J., to ascertain from the surrounding circumstances recognized by both the contracting parties what is the substance of the contract and then to ask the question whether the substantial contract needs for its foundation the assumption of the existence of particular state of things. Why should we assume in this contract that it was to last so long as the woman remained the wife of another man ? What evidence is there that it was the intention of both parties to the contract, for nothing less will do, that that was the basis on which the contract was made when the contract contains words diametrically opposed to any such construction ? Twice in the contract appear words for the whole of your life-time'. It may be as the learned Subordinate Judge points out that the lady waived valuable rights of much greater value than she has obtained under this contract. If that is the case, it seems unreasonable, that, having entered into this contract with her husband's friend and relation, the husband should have had it in his power five minutes afterwards to divorce her and thus nullify the terms of the contract. I agree with both the lower Courts and see no reason whatever for implying as the basis of this contract which both the parties must have contemplated the condition that this lady was to remain the wife of Syed Ismail Sahib or rather that the contract was only to have effect during the continuance of that relationship. For these reasons, I am of opinion, that the second appeal must he dismissed with costs.

Appeal dismissed.

(5) [1863] 3 B. and S. 826=32 L. J. Q. B. 164 =8 L. D. 356=11 W. R. 726.

(6) [1903] 2 K. B. 740=72 L. J. K. B. 794=89 L. T. 328=19 T. L. R. 711.

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* A. I. R. 1926 Madras 934

COUTTS-TROTTER, C. J., AND RAMESAM, J.

N. M. Rayalu Ayyar and *others*—Appellants.

v.

S. S. Ramudu Ayyar and *another*—Respondents.

Appeals Nos. 334 of 1924 and 219 of 1922, Decided on 17th March 1926, from the decrees of the Addl. Sub-J., Madura, D/- 16th March 1924, in O. S. No. 29 of 1921.

** Civil P. C., O. 2 R. 2—"Afterwards"—Numbering of suits does not determine order in which suits are launched—Plaintiff filing two suits may elect what suit shall continue.*

Even if the numbering of suits by Court Officer be prima facie evidence of the respective dates of admission, that does not determine that the suit bearing the later number was "afterwards" launched within the meaning of R. 2, O. 2, which contemplates a later proceeding in the real sense : 16 *All.* 165, *Dissented from.*

The plaintiff may elect as to which of two suits instituted by him together on the same day shall be held to be barred by the operation of O. 2, R. 2. [P. 936, C. 1]

C. V. Anantakrishna Iyer and *P. S. Chandrasekara Iyer*—for Appellants.

A. Krishnaswamy Iyer and *P. V. Krishnaswami*—for Respondents.

Judgment.—It will be convenient first to deal with Appeal 334. The plaintiffs and appellants before us were the sellers and they had entered into a contract to deliver to the buyers 60 bales of yarn of various counts. They delivered 28 bales before 15th November 1918 when the controversy between the parties arose. The offer is to be found in a letter of the 27th July, Exhibit A, accepted by an answer of the 5th August, Exhibit II. The terms of the contract are very simple. The bales were to be delivered by the sellers as soon as they got them from the mills which manufactured them and what is called Tavanai credit extended to the buyer. This is explained in this way. The mill month runs from the 21st of one month to the 20th of the next, and the period of credit is to the end of the calendar month following that in which the mill month expired; that is to say, for goods delivered by the mill from the 21st September to the 20th October payment will be due on the 30th of the following November. On the 15th of November the sellers wrote announcing that 9 bales had arrived at the mills and were in stock there and the letter says:

> If you therefore pay us Rs. 2,660 being the balance due for tha October Tavanai and Rs. 21,120 being the balance due for the November Tavanai, Rs. 23,780 in all, we shall also pay the amount to the mills, take out the bales and deliver them to you.

We see no answer to the contention that that was a bad tender because it did not offer to deliver the goods which were due for delivery unless a condition was complied with which was not in accordance with the original contract. It is clear therefore that there never was at this date any valid tender of the 9 bales. With regard to the remaining 23 they were never tendered at all but the seller's contention is that they were entitled to cancel the balance of the contract in the events which happened and that they did so by their letter of the 22nd January 1919, Exhibit B. It is quite true that in Exhibit II we find the position that if payments were not duly made in accordance with the contract there was a provision for cancellation of all the outstanding part of the contract at the seller's option. Assuming that Exhibit B is not merely a threat to cancel but does actually purport to effect a cancellation which the sellers were entitled to bring about as matters then stood. The demand was to pay first a sum of Rs. 23,780 as to which we will assume for this purpose the money was due but it was coupled with the further demand that 9 bales should be paid for of which up to date, as we have found, there had been no valid tender. In these circumstances we agree with the learned Judge that the sellers were never in a position to claim damages for non-acceptance of any of one of these 32 bales.

The other appeal, 219 of 1922, relates to the price of the 28 bales which the buyers have had and not paid for. They seek to evade payment by invoking the provisions of O. 2, R. 2 of the Code of Civil Procedure. What happened was that the sellers brought two suits, one in respect of the 28 bales as goods sold and delivered and the other in respect of the balance of 32 for damages for non-acceptance. A Full Bench of the Calcutta High Court, *Duncan Brothers and Co.* v. *Jeetmal Greedaree Lal* (1) giving effect to a prior expression of opinion by Wilson, J., has held that, though the two causes of action may be legally different, if the goods are all deliverable under one contract you cannot validly split them into two and bring separate suits in respect of them. Assuming this to be correct, the words of O. 2, R. 2 (2) are:

> Where a plaintiff omits to use in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

It is said that the doctrine of the Calcutta High Court can be applied to this case by invoking the authority of the decision in *Murti* v. *Bhola Ram* (2). In this case the facts appear to be that the suits were presented together on the same day and an officer of the Court numbered them respectively as 72 and 73, 72 being the suit for damages for non-delivery of the 32 bales and 73 the suit for the price of the 28 bales sold and delivered. The Allahabad case is invoked as laying down the proposition that the numbering affixed by the Court shall prima facie be conclusive as to the order of time in which the suits were respectively instituted. We are not prepared to assent to that doctrine but would rather hold that the plaintiffs here can confine themselves to Suit No. 72 and have Suit No. 73 dismissed

(1) [1892] 19 Cal. 372 (F. B.).
(2) [1894] 16 All. 165=(1894) A.W.N. 65 (F.B.)

under O. 2, R. 2. It may very well happen that of two suits presented simultaneously one was held for some technical cause for a week or ten days and then would be numbered several numbers behind the one which was admitted without question. Even if it be that the numbering is prima facie evidence of the respective dates of admission, it does not seem to us that it determines that the suit bearing the later number was "afterwards" launched within the meaning of the rule which in our opinion contemplates a later proceeding in the real sense. In any case we prefer to follow the ruling in *Appasami* v. *Ramasami* (3) which clearly contemplates that in a case like the present the plaintiff may elect as to which of two suits instituted by him together on the same day shall be held to be barred by the operation of O. 2, R. 2. This being so, we think the sellers here are entitled to ask that the doctrine if applied should be applied to the suit for damages in respect of the non-acceptance of 32 bales so as to leave their remedy unaffected as to the 28 bales sold and delivered.

The result is that both appeals fail and are dismissed with costs.

Appeal dismissed.

(3) [1886] 9 Mad. 279.

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* A. I. R. 1926 Madras 936

SPENCER AND RAMESAM, JJ.

Official Assignee of Madras—Defendant—Appellant.

v.

Vedavalli Thayarammal and *others*—Plaintiffs—Respondents.

Original Suit Appeal No. 80 of 1924, Decided on 20th August 1925, from the judgment of Kumaraswami Sastri, J., in C. S. No. 34 of 1924.

* *Will—Construction — Bequest to grandson born within 10 years of the death of testator—In the absence of grandson bequest to grand-daughters—Grandson born within ten years of testator's death—Bequest cannot take effect in favour of both the grandson and grand-daughter—Heir at law will take the estate.*

A Hindu of Madras made a Will and a subsequent codicil and died in 1897 leaving a widow and one son. The Will provided: "I give and bequeath the whole of the residuary estate to my grandson or grandsons who may be born or will be born to my son K within ten years after my death; if there shall be no such grandson to be born as aforesaid the whole of my residuary estate is to be divided equally between my said granddaughters after the death of my said wife". There was a proviso that the distribution of the residuary estate among the granddauhters should take place after the death of the testator's wife, daughters-in-law and son. A grandson was born in 1899, i. e., within 10 years of the testator's death.

Held; that the bequest in favour of the grandson being a bequest to a person not in existence at the death of the testator was invalid: 9 *Beng. L. R.* 377 (*P. C.*), *Foll.* But as the grandson was in existenee, bequest in favour of the grand-daughter could not take effect under S. 117 of the Indian Succession Act, Hindu Wills Act applying to the case, and there was complete intestacy. Therefore the grandson took the whole estate as heir-at-law: (*Case law discussed.*)

[P 937, C 1; P 938, C 2]

Per Ramesam, J.—The disposition in favour of the grandson could not vest until the birth of the first grandson within ten years after the testator's death. Until then, the estate would not vest in any person. If no grandson was born within ten years, then also the estate would not vest in any person for ten years or up to his son's death if within that time. The result was in either case there would be an interval after the testator's death during which the estate would not vest in any person. On this ground also the disposition in favour of the grandson was void and that in favour of the granddaughters was likewise void. [P 941, C 2]

O. T. Govindan Nambiar and *S. Satagona Mudaliar*—for Appellant.

A. C. Sampath Aiyangar and *P. Krishnamachari*—for Respondents.

Spencer J.—The decision of this appeal depends on the construction to be placed upon the Will of K. Narayanaswami Naidu, a Hindu of Madras. He made a Will on 3rd February 1897, and a subsequent codicil on 21st May 1897, and died on 23rd May 1897 leaving a widow and one son, whose whereabouts are not known, and three granddaughters. One grandson, who is the 2nd defendant, was born in 1899 after the testator's death and, having become an insolvent, he is represented by the Official Assignee. The Will having been made in the Presidency Town, the Hindu Wills Act is applicable to it, and S. 2 of that Act makes Ss. 116 and 117 of the Indian Succession Act applicable. Among the dispositions the important passages run as follows:

Clause 9. I give and bequest the whole of the residuary estate to my grandson or grandsons who may be born or will be born to my son Kateri Sundararamanjulu Naidu within ten years after my death; if there shall be no such

grandsons to be born as aforesaid the whole of my residuary estate is to be divided equally between my said granddaughters after the death of my said wife.

The proviso to the clause provides that a sum should be placed in deposit in Messrs. Arbuthnot & Company's Bank to provide a monthly income for the maintenance of the testator's daughter-in-law, the widow of a son who died during his lifetime, and for the distribution of the amount to his granddaughters after her death. Cl. 13 provides that the testator's son, K. Sundararamanjulu Naidu, having fraudulently spent more than half of his father's earnings and having executed a release in his favour should have no claims whatever in and upon the testator's estate. Cl. 2 of the codicil revokes a provision of Rs. 5,000 in Cl. 3 of the Will in favour of charity and Cl. 3 provides that the distribution of the residuary estate among the granddaughters should take place after the death of the testator's wife, daughter-in-law and son.

The facts necessary for understanding the case are that the testator's son Sundararamanjulu Naidu disappeared and has not been heard of for 25 years; the testator's granddaughter Kothanayaki died unmarried in 1903, the 2nd defendant was born in 1899, that is within ten years of the testator's death in 1897, but the bequest in his favour being a bequest to a person not in existence at the death of the testator is invalid under the rule in the *Tagore case* [*Ganendra Mohan Tagore* v. *Jatindra Mohan Tagore* (1).]

The question we have to decide in this appeal is whether the effect of the first of the passages quoted from Cl. 9 of the Will is, in the events that happened to create a gift to the granddaughters or an intestacy. The learned Judge in the trial Court decided in favour of the former alternative. He was of opinion that S. 116 of the Succession Act applied to this case rather than S. 117. He referred to two cases *Narandas Vrijbhukhandas* v. *Bai Saraswati Bai* (2) and *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) as being cases, in point. *Narandas Vrijbhukhandas* v. *Bai Saraswati Bai* (2) is a case which dealt with a Will executed in the mofussil and consequently it contains no discussions of the sections of the Succession Act. *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) followed the English case of *Jones* v. *Westcomb* (4). The case *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) went on appeal to the Privy Council and was confirmed on different grounds from those upon which the Calcutta High Court decided it. The decisive feature of that case was that there was no adoption in law because the authority given under the Will for the widow and the executors to adopt was invalid. S. 116 of the Succession Act runs as follows:

> Where there is a bequest to one person and a bequest of the same thing to another, if the prior bequest fails the second bequest shall take effect upon the failure of the prior bequest although the failure may not have occurred in the manner contemplated by the testator.

This provides for cases of double contingencies as may be seen from the illustrations to the section, a subject which is discussed in Williams on Executors, 11th Ed., Vol. II, pp. 1014 to 1017. S. 117 is as follows:

> Where a Will shows an intention that the second bequest shall take effect only in the event of the first bequest failing in a particular manner the second bequest shall not take effect unless the prior bequest fails on that particular manner.

The illustrations to this section recall the facts of the cases of *Underwood* v. *Wing* (5) and *Wing* v. *Angrave* (6). The Will before us declares that the gift over in favour of the granddaughters shall take effect only if there are no grandsons born within ten years of the testator's death. There was a grandson born within ten years of the testator's death, namely, the second defendant. The question is whether the prior bequest in favour of the grandson has failed in the particular manner denoted by the Will. It was argued that we should read the words

> if there shall be no grandsons to be born as aforesaid.

as meaning

> if there shall be no grandsons born who can take the estate as aforesaid.

or, in other words,

(1) [1872] I. A. Sup. Vol. 47=9 B. L. R. 377=18 W. R. 359=2 Suth. 692=3 Sar. 82 (P. C.).

(2) [1914] 38 Bom. 697=28 I. C. 130=16 Bom. L. R. 577.

(3) [1906] 33 Cal. 947=3 C. L. J. 502=10 C. W. N. 695 (S. B.).

(4) [1711] 1 Eq. Abr. 245 (248)=Pre. Ch. 316.

(5) [1855] 4 De G. M. & G. 633=19 Beav. 459=3 Eq. R. 794=24 L. J. Ch. 293=1 Jur. N. S. 169=3 W. R. 228.

(6) [1860] 8 H. L. 183=30 L. J. Ch. 65.

If the bequest in favour of grandsons fails on any account.

I think that the language used is quite specific and that it cannot be given the meaning contended for by the respondent's vakil which involves a contradiction, viz., that grandsons born within ten years after the testator's death means grandsons born during his lifetime as they alone could take the estate. The testator clearly spoke of two classes of grandsons when he used the words :

Grandsons who may be born (i. e. before my death) or will be born to my son K. Sundararamanjulu Naidu within ten years after my death.

The gift in favour of the granddaughters has been made expressly dependent on condition that there shall be no grandsons born during the testator's lifetime or within ten years of the testator's death. We cannot make a new will for the testator in the light of the events which happened. The wishes of the testator have to be given effect to so far as the Court is able to do so. We must therefore consider what the testator intended. It is evident from Cl. 12 that he intended to disinherit his son and it may also be considered from the proviso to Cl. 9 that he was in favour of benefiting his granddaughters to some extent, but he evidently preferred to benefit grandsons if any should be born within ten years of his death rather than his granddaughters. He wished to restrict the bequest to grandsons born within ten years as that was the period within which his son and daughter-in-law might be expected to have children but he showed no intention of disinheriting them altogether in case of there being a legal objection to the bequest taking effect in the manner stated. The will contains no indication that the testator wished to give preference to granddaughters supposing a grandson and granddaughters were both in existence at a date within ten years after his death. In *Hall* v. *Warren* (7) Lord Kingsdown observed :

The gift over seems to have taken effect whether we regard the precise language of the particular clause or the general intention of the testator.

So here let us consider first what is the meaning of the precise language used by the testator, and secondly what were his general intentions and how may his wishes be best carried out. If the answers to both these questions lead to the same conclusion, we need have no hesitation in giving effect to the ordinary meaning of the language used. The testator did not contemplate intestacy, but he made no provision for the case of the bequest in favour of grandsons who might be born within ten years being found invalid owing to a provision of law. If he had contemplated the event, which actually happened, of a grandson being born within ten years of his death, there can be little doubt that he would have preferred that his grandson should succeed even though on intestacy, rather than that the granddaughters should take the whole estate and the grandson take nothing. The case of *Underwood* v. *Wing* (5) was a case in which the construction put upon a will by the Court of final appeal in England who gave effect to the intentions of the testator led to intestacy and the illustration (e) to S. 92 and the illustration to S. 117 of the Succession Act are also illustrations of cases of intestacy resulting. We should not therefore assume that the idea of intestacy would have been more repugnant to the mind of the testator than the preference of female to male descendants. I think that this specific language of the will and the intention of the testator lead to the same conclusion. I further think that S. 117, Succession Act, covers the case and therefore I would, as was done, in *Maddison* v. *Chapman* (8), construe strictly the condition under which the granddaughters were to take the estate and hold that as a grandson was born, the gift over failed and the granddaughters are not entitled to take the residue, and that, as the gift to the grandson is invalid and the gift over to the granddaughters failed by reason of its being subject to a contingency which actually happened, there is an intestacy and the heir-at-law, namely, the 2nd defendant, in the absence of his father, who is presumably dead, will take the whole estate.

The appeal must therefore be allowed and the suit dismissed. Costs of the plaintiff and the Official Assignee in this Court will come out of the estate. The order as to costs in the trial Court may stand.

(7) [1861] 9 H. L. 420.

(8) [1858] 4 K. & G. 709.

Ramesam, J.—I agree but would add some reason of my own. The first illustration to S. 116 of the Succession Act is based on *Meadows* v. *Parry* (9). The second illustration is taken from *Avelyn* v. *Ward* (10). Other cases illustrating the section are collected in William on Executors (11th Ed.). Vol. II, pp. 1015-1017, Theobald on Wills, 7th Ed., pp. 656-657, Jarman on Wills, 6th Ed., pp. 2195-2199. The reason for these decisions is that :

> The intention of the testator is effectively fulfilled by regarding a clause of apparent conditional limitation, so as not to require, as in the case of a gift on the condition that the very event, on which the gift is made contingent must be fulfilled with strict exactness, but paying regard, in the construction to the substantial effect of the contingency specified and as to the real intent of the testator.

(Williams, p. 104). In these cases :

> There cannot be a shadow of doubt that, if asked whether in case of a prior gift failing altogether for want of an object he meant the alternative gift to take effect, his answer would have been in the affirmative. The conclusion that such was the actual intention has been deemed to amount to what the law denominates a necessary implication.

(Jarman, p. 2195). The Indian legislature has accordingly adopted the principle as a general rule in S. 116 of the Act making the case where the testator intends the gift over to take effect only if the first gift fails in a particular manner, an exception. Accordingly, the appellant has to show an intention that the second gift in this case should take effect only if there is no grandson born within ten years. If the appellant fails to show such an intention, the respondent succeeds even if he cannot show any clear intention the other way.

In many of the cases illustrating S. 116 the intention of the testator is so obvious that it cannot bear discussion. For instance, in the first illustration [cf. *Meadows* v. *Parry* (9)] by the time of the death of the testator, from which time the will takes effect, it was definitely known that the testator had no children though it might not have been known when the will was written and the testator could not have intended the second gift to take effect only if children are born but die within eighteen. The language of the clause could not have been the actual intention of the testator at the date of death. The same remarks apply to *Murray* v. *Jones* (11) and to *Avelyn* v. *Ward* (10) though not to *Jones* v. *Westcomb* (4) or to *Hall* v. *Warren* (7) or to *Radha Prasad Mullick's* case (3) [affirmed by Privy Council in *Radha Prasad Mullick* v. *Rani Mani Dasee* (12)]. It seems to me that, if the word "contemplated" in the section refers to the testator's state of mind on the date of death and not to the language in the will, the illustrations do not illustrate the section and the section is not happily worded : for the manner contemplated by him could not be the manner apparently expressed in the condition. Even in *Jones* v. *Westcomb* (4), *Hall* v. *Warren* (7) and *Radha Prasad Mullick* v. *Rani Mani Dassee* (3) there is no doubt as to what the testator's answer would have been, if the matter was put to him. As Lord Campbell stated in *Hall* v. *Warren* (7) :

> It was gravely argued at your Lordships' Bar that the testator wished the opinion of the inhabitants of Bayswater to be taken on the expediency of establishing this Hospital, and that a resolution of the Parish in the negative was the condition on which William Hall Warren was to take the two houses. But I apprehend that the failure of the foundation of the Hospital was the contingency on which he intended his godson to take.

There can be no analogy between that case in which the Hospital never came into existence and the present case in which a grandson had come into existence.

The illustration to S. 117 is based on *Underwood* v. *Wing* (5) and *Wing* v. *Angrave* (6). That the result of these cases involved a hardship is clear from the observations of Lord Wensleydale in the latter case at pp. 214-15 :

> This case (and there are many like it) is one in which the temptation from the supposed hardship of the case to swerve from the established rules of construction is strong. No one can doubt as to the testatrix's 'intention' in the loose sense of the word.

Then his Lordship relied on the language of the instrument. In the present case, I do not wish to rely merely on the language of the condition. Nor can it be said in the present case that the testator's 'intention,' in the loose sense of the word, was to give the residue to the granddaughters even if a grandson existed. This case is therefore stronger than the cases of *Wing* v. *Angrave* (6) and *Underwood* v. *Wing* (5). Seeing that

(9) [1812] 1 V. & B. 124=12 R. R. 198.
(10) [1750] 1 Ves. Sen. 420.
(11) [1813] 2 V. & B. 313=13 R. R. 104.
(12) [1908] 35 Cal. 896=35 I. A. 118=12 C. W. N. 729=8 C. L. J. 48 (P. C.).

the English Judges decided these cases in the way they decided in spite of the principle of the other group of cases [*Jones* v. *Westcomb* (4), *Murrays* v. *Jones* (11) and etc.], and in spite of the hardship involved and seeing that the Indian Legislature adopted those decisions as their illustration to S. 117 to show what they meant by :

An intention that the second bequest shall teke effect only in the event of the first bequest falling in a particular manner.

I do not feel any hesitation in applying S. 117 to the case before us. The illustration in (e) to S. 92 also leads to the same conclusion. It seems to be based on the passage in Jarman, 6th Edition, at page 2203. This illustration might well have been an illustration to S. 117 also. It likewise relates to the intention of the testator that the second gift should not take effect unless the failure of the first happens in a particular manner.

If, in *Wing* v. *Angrave* (6) as Theobald puts it (at p. 654) that the event that happened (simultaneous death) and the event contemplated (one dying before the other) are two distinct and independent events and if in illustration (e) to S. 92 the death of the first legatee before the eighteenth year and his death after the eighteenth year in the lifetime of the testator are two distinct and independent events in the present ease the event contemplated—non-existence of the grandson and the event that happened—the birth of a grandson are not only two distinct and independent events but contrary or opposite events. The case in *Elliott* v. *Smith* (13) is a further illustration of the rule. S. 117 is therefore applicable a fortiori.

The consideration that the Court should, if possible, lean against intestacy is not sufficient in my opinion to shake the above conclusion. In *Underwood* v. *Wing* (5), *Wing* v. *Angrave* (6) and the illustration to S. 92 (e) this consideration was not strong enough to affect the result. I am not able to follow our learned brother Kumaraswami Sastri, J. when he says in his judgment in appeal:

Reference was made to *Uunderwood* v. *Wing* (5), but I do not think that the facts of the present case fall under this decision as I do not think that limitation was a condition precedent. It cannot be deduced from *Hall* v. *Warren* (7) as the learned vakil for the respondent argued that whenever the first devise is ab inito void, the second bequest must be given effect to whatever the condition may be. He also wished us to construe the words "such grandson as aforeseid" to mean "such grandson so taking." I think that the words mean "grandson born within ten years after my death." We cannot add the words "so taking" as we have been invited to do on the basis of S. 64 of the Act and *Abbott* v. *Middleton* (14). It cannot be said that any words materlal to the full expression of the meaning are omitted in this case. Nor can we construe the will as a gift to the granddaughter subject to be defeated on the birth of a grandson within ten years after the testator's death. The mere fact that the testator wished to deprive his son of all the benefits of the will beyond the sum of Rs. 500 as capital for his trade and Rs. 250 for funeral expenses is not also strong enough to displace the application of S. 117 for in case of intestacy, the son and grandsons take as members of joint Hindu family if grandsons are born with the right to enforce partition by or on behalf of grandsons. But it is unnecessary to speculate in this direction as the testator never contemplated the event that happened, viz., the device to the grandsons being void under the *Tagore* case (1).

Our brother Kumaraswami Sastri, J. thought that the decision in *Narandas* v *Saraswathi Bai* (2) is on all fours with the present case. In that case, the testator wished to give life-estate to his widow Parvathi and on her death to his daughter's sons. He expected his daughter to have sons by the death of Parvathi. Not only did he not contemplate the gift to the daughter's sons being void under the *Tagore* case (1) but also he did not provide for the case of his daughter having no sons at Parvathi's death but having sons some time after it. Either he did not contemplate it or thought a gift to them valid though it may not immediately follow the preceding life-estate. The events that happened are incompletely stated in the reports in the Indian Law Reports, a material date being omitted. The case is reported also

(13) [1882] 22 Ch.D. 236=52 L. J Ch. 222=48 L. T. 27=31 W. R. 336.

(14) [1858] 7 H. L. 68=21 Beav. 143=28 L. J. Ch. 110=5 J. W. R. N. S. 717.

in 16 Bombay Law Reporter, p. 577; from this report it appears that Saraswati's son was born in December 1907. But the son did not come into existence on the termination of the preceding life-estate, Parvathi having died in April, 1907, the gift to him was void, apart from the Tagore case. On the analogy of S. 111 of the Succession Act (of S. 23 of the Transfer of Property Act) the clause "My daughter Saraswathi's sons, if any, shall be the heirs" should be construed to relate to the termination of the preceding life-estate, i. e., to the time of Parvathi's death. It then means My daughter Saraswathi's sons if any existing at the time of Parvathi's death shall be the heirs. As Saraswathi's son was born later he could not take. The question then arises whether there is an intestacy on the death of Parvathi.

The testator proceeded to give a life-estate to Saraswathi, "In case my daughter may not have sons." This clause can mean only "In case my daughter may not have sons at the time of Parvathi's death," in which case, Saraswathi's life-estate takes effect, and there is no alternative possible at this stage so as to result in intestacy. The clause is not a condition subsequent defeating Saraswathi's life-estate on the birth of a son later than Parvathi's death. The question next arises—do the cousins take after Saraswathi's death? It may be said that the words "after the death of my daughter Saraswathi" (towards the end of paragraph quoted in the report) may be construed as if the words "without sons" are added to them, on the principle of *Abbott* v. *Middleton* (14), but if this cannot be done, the cousin's estate takes effect—which is the actual decision The decision may be perhaps correct.

But it is difficult to see where the principle of *Jones* v. *Westcomb* (4) and similar cases on which S. 116 of the Succession Act was based came in or the necessity for discussing whether S. 116 or S. 117 applied arose. In that case, there was a life-estate before the grandson's estate but no life-estate in the case before us. I do not see how that case can be on all fours with the one before us. Neither the Hindu Wills Act nor the Succession Act applied to it as the case did not arise in the City of Bombay. Nor was there any reference to Ss. 116 and 117 of the Succession Act, nor any discussion as between two opposing principles.

But there is another ground on which the bequest to the granddaughters fails. The testator intended the estate to wait for ten years after his death, and if by that time grandsons are born (through his son) they shall take but, if no grandsons are born, the three granddaughters named shall take. The disposition in favour of the grandsons does not vest until birth of the first grandson within ten years after the testator's death. Until then the estate does not vest in any person. If no grandson is born within ten years, then also the estate does not vest in any person for ten years or up to his son's death if within that time. As S. 179 of the Indian Succession Act is not made applicable to Hindus, the estate does not vest in the executors. The result is in either case, there is an interval after the testater's death during which the estate is not vested in any person, On this ground (apart from the Tagore case) the disposition in favour of the grandson is void and that in favour of the granddaughters is likewise void. The vakil for the respondent conceded this and even relied on this for inviting us to construe the will as devise to the granddaughters in the first instance subject to be defeated by the birth of a grandson competent to take. This will be re-writing the will. Thus there is an intestacy on this ground also.

I agree with the order of my learned brother,

Appeal allowed.

A. I. R. 1926 Madras 941

PHILLIPS, J.

Siva Subramania Pillai—Petitioner.

v.

Poovalingam Pillai—Respondent.

Appeal No. 48 of 1924, Decided on 15th April 1926, from the appellate order of the 2nd Addl. Sub.-J., Tinnevelly, in A. S. No. 28 of 1923.

Civil P. C., O. 34, R. 6—Mortgage sale declared to be void—Application for personal decree—Right accrues on date of declaration and not of actual dispossession

Where the sale of a certain property in execution of a mortgage decree is declared to be void

the property not being liable to sale, e. g., being trust property, right to apply for a personal decree against the mortgagor accrues on the date of the order declaring the sale void and not the actual date of dispossession; 30 *Mad.* 209 and *A. I. R.* 1925 *Mad.* 981, *Dist.*

[P. 942, C. 2]

A. C. Shunmugha Nainar—for Petitioner.

Ch. Raghava Rao—for Respondent.

Judgment.—In this case a certain property was sold in execution of a mortgage decree. In subsequent proceedings it was held that the property was trust property and therefore could not be sold in execution of the prior mortgage decree and the sale proceedings taken in execution were declared to be void. The appellant then presented an application under O. 34, R. 6, Civil P. C., for a personal decree against the mortgagor. Two questions have arisen: (1) whether this remedy is open to the appellant; and (2) whether, if so, this petition is in time.

As far as the first point is concerned, there is the authority of *Radhakishun Lal* v. *Kashi Lal* (1) in appellant's favour. That case was not one of an application under O. 34, Rule 6, but of ordinary execution proceedings, and it was held that when a sale in execution had been set aside, it was open to the decree-holder to execute the decree again. As I think the appellant must fail on the second question, namely limitation, it is not necessary to discuss this point any further. Under O. 34, R. 6, the right to apply for a personal decree accrues when the net proceeds of any sale, in execution of a mortgage decree, are found to be insufficient to pay the amount due to the plaintiff. In the present case, as soon as the decree declaring the sale to be void was passed, it must be deemed to have been found that the sale of the property was insufficient to pay the mortgage debt. On the passing of the decree, therefore, the plaintiff's right to apply for a personal decree accrued. As he has come in more than three years after that date his application is barred by limitation. The appellant has relied on *Ramianudi Venkata Appa Rao* v. *Lokkoju Chinna Ayyanna*, (2) and *Mangamma Nayakuralu* v. *Ramadasappa* (3). Neither of these cases are under O. 34, and the question that had to be considered was when the right to apply accrued. On this ground the cases may be distinguished. I may observe that even in these cases the date of the order for refund of money was held to be the date when the right to apply accrued and not the actual date of the refund of money itself. Similarly, applying that to the present case, it will be the date of the order declaring the sale void and not the actual date of dispossession.

The appeal fails and is dismissed.

Appeal dismissed.

(1) A. I. R. 1924 Patna 273=2 Pat. 829.
(2) [1907] 30 Mad. 209=17 M. L. J. 194.
(3) A. I. R. 1925 Mad. 981.

A. I. R. 1926 Madras 942

PHILLIPS AND MADHAVAN NAIR, JJ.

V. Venugopalachariar—Petitioner—Appellant.

v.

K. Chinnulal Sowcar and *others*—Respondents.

Appeal No. 201 of 1925, Decided on 10th February 1926, from the order of the Dist. J., Chingleput, D/- 1st April 1925, in M. P. No. 129 of 1924.

✲ *Provincial Insolvency Act* (1920), *S* 43 (1) —*Order of annulment cannot be set aside under Civil P. C.. O.* 9—*S.* 10 (2) *applies—Civil P. C. O*, 9.

When an order of annulment has been passed under S. 43. (1) it is not open to the insolvency Court to set aside its order by virtue of the provisions of O. 9 of the Civil P. C., but the provisions of S. 10 (2) will apply: *C. R. P. No.* 554 (*Madras*) of 1925, *Dist.*; *A. I. R.* 1924 *Mad.* 635 *Foll.*

[P. 942, C. 2]

S. 43 is mandatory.

S. V. Venugopalachariar—for Appellant.

Phillips, J.—The question for decision in this case is whether, when an order of annulment has been passed under S. 43 (1) of the Provincial Insolvency Act, it is open to the insolvency Court to set aside its order by virtue of the provisions of O. 9 of the Code of Civil Procedure. The wording of the section is:

> If the debtor does not appear on the day fixed for hearing his application for discharge the order of adjudication shall be annulled . . .

This certainly seems to be a mandatory provision, but it is contended for the appellant that the word "shall" does not necessarily make the order mandatory and that it may be treated as

merely directory. A similar question was considered in C. R. P. No. 554 of 1925, a case in which the debtor had not applied for discharge at all and on that ground his insolvency was annulled and it was there held that the Court had power to review its order of annulment. It only differs slightly from the present case and cannot really be distinguished on principle. On the other hand, in a case in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) Waller, J., was of opinion that S. 43 was absolutely peremptory in its terms and that therefore time could not be granted for applying for discharge. Krishnan, J., did not take this view, but he apparently held that if an order for annulment had been made the provisions of S. 10 (2) should be applied. I am inclined to agree that S. 10, Cl. 2 governs this case. Under S. 5 of the Act the provisions of the Civil Procedure Code are to be applied subject to the provisions of the Act. S. 10 (2) provides a definite remedy for a debtor in respect of whom an order of adjudication has been annulled, and it gives him permission to present another petition on the same facts, provided that he satisfies the Court that he was prevented from prosecuting his application by any reasonable cause. Such a remedy is certainly distinct from any remedy granted by the Civil Procedure Code and appears to prescribe definitely the procedure to be adopted. If that is so, then I think that the words "subject to the provisions of this Act" in S. 5 must have their full force; when the Act prescribes a definite method by which the debtor can obtain his remedy it is not open to him to adopt other methods which would be open under the Civil Procedure Code.

No provision similar to S. 43 was contained in the old Provincial Insolvency Act, and it is obviously one of the provisions of the new Act that the debtor shall be obliged to apply for discharge if he wishes to retain the benefits of insolvency so as to put an end to the proceedings in insolvency. Provisions have been enacted in S. 43 (1) that if he does not apply for discharge his adjudication shall be annulled, but it allows him in certain cases a further remedy of presenting another petition in insolvency which is the method of giving relief to persons who have been prevented by bona fide causes from prosecuting their applications. In this view, with all respect, I am not prepared to accept the views expressed in C. R. P. No. 554 of 1925, but would rather adopt the opinion expressed in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1). Although the insolvent has a remedy prescribed by the Act, he has chosen to apply under O. 9. His petition was rightly dismissed.

The appeal is accordingly dismissed.

Madhavan Nair, J.—I entirely agree. The question is whether by virtue of the provisions contained in S. 5 of the Provincial Insolvency Act the appellant is entitled to ask the Court to consider his application to restore and re-hear the petition for discharge dismissed on account of his default under S. 43. In my opinion, S. 43 is clearly mandatory; S. 5 states that subject to the provisions of the Insolvency Act the Insolvency Court in regard to proceedings under the Act shall have the same powers and shall follow the same procedure as it has and follows in the exercise of original civil jurisdiction. But the Provincial Insolvency Act itself has provided in S. 10 (2) a special procedure by means of which the appellant can have his remedy. According to that section, after obtaining leave of the Court he can file an application for adjudicating him an insolvent. The intention of the Legislature therefore seems to be that in the class of cases arising under S. 43, the special procedure referred to in S. 10 (2) should be followed and not the provisions of the Civil Proedure Code. It is therefore clear that the appellant cannot rely on the provisions of the Civil Procedure Code by virtue of S. 5 of the Insolvency Act.

As regards the authorities, it was decided in C. R. P. No. 554 of 1925 that it is open to apply for review in a case where the debtor failed to apply for discharge under S. 43 within the specified time; but the learned Judges do not make any reference to the provisions of S. 10 (2) of the Insolvency Act. Krishnan, J.'s view in *Arunagiri Mudaliar* v. *Kandaswami Mudaliar* (1) as regards S. 10 (2) supports our conclusion, though his decision sitting as a single Judge in C. R. P. No. 554 of 1925 is in favour of the appellant's contention. No reference

(1) A. I. R. 1924 Mad. 635.

is made in that judgment to S. 10 (2) of the Provincial Insolvency Act. I agree with my learned brother that it is not open to the appellant to rely on the provisions of the Civil Procedure Code in this case. I would also dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Madras 944 (1)

MADHAVAN NAIR AND PHILLIPS, JJ.

Berhampore Council—Defendant—Appellants.

v.

The Oriental Govt. Security Life Assurance Co. Ltd.—Plaintiffs—Respondents.

L. P.A. No. 7 of 1925, Decided on 11th March 1926 from an appeal under Cl. 15 of the Letters Patent against the judgment of Waller, J., D/- 10th August 1924.

Madras District Municipalities Act, Sch. 4 S. 16—Scope,

The assessee has the option of being assessed under the section or under the proviso.

Judgment.—The only question in this appeal is whether under S. 15 Sch. 4 of the District Municipalities Act a company has the option of being assessed under that section or under the proviso. The language of the proviso which says that the company shall pay only certain amounts clearly indicate that those amounts are less than the amounts which would be leviable under the section itself.

There is also another ground which shows that the option is left to the assessee and that is that the proviso is not to come into force unless the company shows that its gross income does not exceed a certain amount. There is no provision in the Act to compel a company to show its gross income and unless the company chooses to do so the proviso is not applicable. It is therefore quite applicable that the option is left to the assessee and not to the Municipal Council as decided by the Government. The other points taken in this appeal memo are not seriously pressed and this appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 944 (2)

DEVADOSS, J.

Sellan—Petitioner.

v.

Vettiyan Parayan—Respondent.

Civil Revision Petition No. 812 of 1924, Decided on 25th March 1926.

Civil P. C., O. 17, R. 1—Plaintiff ready with witnesses several times but Court adjourning many times for want of time—Plaintiff failing on one occasion—Adjournment should be granted.

Where on several occasions plaintiff was ready with his witnesses but the Court adjourned the suit for want of time and then once plaintiff's prayer for adjournment was refused:

Held: that the Court ought to have granted adjournment.

K. Sankara Sastry—for Petitioner.

K. G. Ramasamy Iyengar—for Respdt.

Judgment.—This is an application to revise the order of the Subordinate Judge of Salem in S. C. S. No. 247 of 1923. The learned Subordinate Judge refused to grant an adjournment at the request of the plaintiff and dismissed the suit. The plaintiff was ready with his witnesses on several occasions before 21-1-24 when the suit came on for hearing. From the decree it appears that he paid subsistence allowance to the extent of Rs. 23-4-0 and from the subpoenas now produced it is clear that he was ready on several occasions when the Court adjourned the suit for want of time. The Court could have granted some time in consideration of the fact that he was ready on previous occasions, to enable him to produce his witnesses.

The practice of posting too many cases which could not by any possibility be disposed of in a day is responsible for the impression in the minds of parties that their cases would not be taken up on the day to which they are posted. The plaintiff might have thought that the same would not be taken up on 21-1-24 to which it was adjourned seeing that on at least three or four previous occasions the Court adjourned it for want of time. I think, in the circumstances, the Subordinate Judge ought to have granted a few days time to enable the plaintiff to produce his witnesses. I therefore set aside the decree of the Subordinate Judge and direct him to restore the suit to file and dispose of it according to law. The petitioner is partly responsible for the lower Court's order and therefore he is not entitled to the costs of this application.

Case remanded

* A. I. R. 1926 Madras 945 (1)

MADHAVAN NAIR, J.

K. A. Munisami Chetti—Petitioner.

v.

Vaiyapuri Udayan and *others*—Respondent.

Civil Revision Petition No. 1025 of 1924, Decided on 1st April 1926, from the order and decree of the Principal District, Munsif, Salem D/- 18th February 1921 in O. S. 81 of 1924.

* *Civil P. C., O. 21, R. 2—Uncertified adjustment—Decree-holder acting fraudulently in suppressing it—Court can examine merits.*

Where it appears to the Court that the decree-holder in suppressing uncertified adjustment and asking for execution has been acting fraudulently, the Court can examine the merits of an uncertified adjustment when it is pleaded in bar to execution. 40 *Mad.* 233 (*F.B*), *Foll* [P 945 C 1]

V. Ganapathi—for Petitioner.

M. Bhaktavatsalu—for Respondents.

Judgment.—I do not think that this is a case in which I should interfere under S. 115 Civil P. C. The execution application of the petitions was dismissed as he and his pleader were absent. Then he filed an application for review. That also was dismissed by the District Munsif and it is that order that is the subject-matter of this revision.

The main argument of the petitioner has been directed to show that the District Munsif should not have considered the merits of an uncertified adjustment pleaded by the decree-holder in dealing with an execution application. In this case the finding of the District Munsif amounts to this, viz. : that the petitioner in suppressing the agreement and asking for execution has been acting fraudulently. I have no doubt that in such circumstances the Court can examine the merits of an uncertified adjustment when it is pleaded in bar to execution. Further the Full Bench of this High Court in *Chidambara Chettiar* v. *Krishna Vathiar* (1) has held that such adjustment can be pleaded by the judgment-debtors as an answer to execution. There is no question of jurisdiction in this case. I dismiss it with costs.

Petition dismissed.

(1) [1917] 40 Mad. 233=5 L. W. 182=32 M. L. J. 1=37 I. C. 886—(1917) M.W. N. 44. (F. B.).

A. I. R. 1926 Madras 945 (2)

SPENCER AND RAMESAM, JJ.

Shunmuga Velayuda Mudaliar and *others*—Petitioners—Appellants.

v.

Collector of Tanjore—Respondent.

Appeal No. 30 of 1924, Decided on 19th March 1925, from the decree of the Dist.J., West Tanjore in, O. P. No. 63 of 1921.

(*a*) *Land Acquisition Act* (1 *of* 1894), *S.* 23—*Land should not be valued as building site and at the same time on footing of produce of trees.*

Land acquired under the Act should not be valued as a building site and at the same time valued upon the footing of the produce of fruit of the trees remaining there. 13 *C. W. N.* 487 *Foll.* [P 945 C 2]

(*b*) *Land Acquisition Act* (1 *of* 1894)—*Cocoanut topes.*

In the case of cocoanut topes, it is reasonable basis for fixing the market value to calculate ten years purchase on the average income of the yielding trees plus the value of the timber of the non-yielding trees. [P 946 C 1]

V. Ramaswami Aiyangar—for Appellant.

C. V. Anantakrishna Aiyar—for Respondent.

Spencer, J.—The land acquired in this case was acquired for the purpose of being allotted for building houses but the use to which the land was being put at the time of acquisition was that of a cocoanut tope. The District Judge has given compensatfon under two heads, first for the income derivable from the cocoanut trees, which he capitalized at five year' purchase and, secondly, he has given compensation for the land at Rs. 1,200 an acre. It is obvious that the same land cannot simultaneously be used as a cocoanut tope and for buildings. P. W. 7, who is the gumasta of the claimant and who speaks to the leasing of the trees, says that no yield was got from the land. In *Secretary of State* v. *Duma Lal Shaw* (1) it was observed that land acquired under this Act should not be valued as a building site and at the same time valued upon the footing of the trees remaining there. The two claims, as pointed out by the learned Judges, are inconsistent. The learned District Judge took the income per tree at not less than Rs. 2, and he observed that 5 years' income was not very high in fixing the value per tree. By Ex. E.

190 13 C. W. N. 487=4 I. C. 521.

P. W. 5 let out 150 trees for Rs. 425, a year and the lessee has also to give fruits and leaves worth Rs. 50. That is equivalent to saying that 150 trees would yield a little more than Rs. 3 a year each It corroborates the statement of P. W. 1 that cocoonut trees in this village would fetch Rs. 3 per annum rent. According to P. W. 6, 145 trees in the tope out of 160, were yielding fruits, but P. W. 1, says that 15 or 20 of them wonld have a small yield. In every tope there must be trees at various stages of growth, some beginning to yield, some yielding well, some yielding less and less every year and some past bearing. One can only take an average. On the side of Government no witness, who had counted the yielding trees, was examined. On the whole it will be reasonoble to estimate that there were at the date of notification 125 trees yielding at the rate of about Rs. 3 per annum. At this rate the annual yield would be about Rs. 375. The appellants have claimed at this rate Rs. 3 per tree for ten years upon 163 trees. We think we should allow them at the rate of Rs. 3 for ten years but reduce the number of trees, as already stated, from 163 to 125. In *Rajammal* v. *Head Quarters Deputy Collector, Vellore*(2) a Bench of this Court estimated the value of a tope of trees at 20 years annual rental: but those were mango trees which as stated by the learned Judges, are long lived and yield produce for a number of years. To this sum of Rs. 3,750 we must add Rs. 37 for the timber of trees that are not yielding at all at Re 1 per tree, and Rs. 8 for 11 portia trees. The total comes to Rs. 3,795 and to this must be added 15 per cent. for the compulsory nature of the transaction.

Nothing will be allowed for the land the acquisition being that of a cocoanut tope valued as a tope, not as a field for growing wet or dry crops as a house site.

The appellants are entitled to interest from the date of taking possession and costs throughout calculated on the amount by which we have increased the District Judge's award.

Order accordingly.

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(2) [1914] 25 I. C. 393.

A. I. R. 1926 Madras 946

COUTTS-TROTTER, C. J., AND RAMESAM, J.

K. Doraiswami Chetty—Appellant.

v.

Official Assignee of Madras — Respondent.

Original Side Appeal No. 64 of 1925 Decided on 4th February 1926, from a judgment of Beasley, J., D/- 13th July 1925, in Application No. 126 of 1925.

Madras High Court Insolvency Rules, O. 3, R. 26—"*Service of order.*"

Knowledge on the part of the insolvent of the order of adjudication cannot be a substitute for "service of the order" within R. 26. [P. 946, C. 2]

P. Jagannatha Rao Naidu—for Appellant.

Judgment.—Rule 26 of O. 3 of the Insolvency Rules runs as follows:

If an order of adjudication is made without service of the petition, the debtors may, within eight days after service of the order, or such further time as they may be allowed by the Court, apply by notice of motion supported by affidavit to annul the order.

In this case no notice of the order of adjudication was given to the insolvent at all. This application was not made within eight days, nor was any question raised as to allowing him further time. The learned Judge has held that the insolvent, who knew all about the adjudication, must be taken as a person who had in effect had service of the order. We do not think that that is a construction of the rule which can be supported. Had it been so intended, words such as "or after the order had been brought to his knowledge" after "service of the order" could easily have been added, and no such words are found. We, therefore, order that the case be remanded and dealt with on the merits. The appellant will have the costs of this appeal in any event and the costs of the other proceedings will be in the discretion of the learned Judge.

Order accordingly.

A. I. R. 1926 Madras 947

JACKSON, J.

R. S. Naidu—Petitioner.

v.

J. Ramier—Respondent.

Civil Revision Petition No. 469 of 1926 Decided on 28th July 1926, from the order of the Sub-J., Madura, D/- 24th April 1926, in O. P. No. 27 of 1925.

(a) *Madras District Municipalities Act—Election rules—R. 6.*

Court dealing with election petition must confine itself to the matters raised in the petition. [P. 947, C. 2]

(b) *Madras District Municipalities Act* (1920)—*Election Rules, R. 4—Scope.*

Rule 4 also covers cases where originally there are only two candidates. [P. 948, C. 1

T. R. Ramachandra Iyer and *S. R. Dickshit*—for Petitioner.

T. M. Krishnaswami Iyer and *P. N. Appuswami*—for Respondent.

Judgment.—The petitioner seeks to revise the order of the Subordinate Judge of Madura in O. P. No. 27 of 1925. The petitioner and counter-petitioner were the two candidates for the office of Chairman in the Madura Municipal Council. Each obtained an equal number of votes, and lots were drawn to decide the successful candidate. The petitioner was declared elected, and the counter-petitioner presented an election petition before the Subordinate Judge questioning the validity of the election because, among other reasons, the lots had been drawn not by the presiding councillor himself as required by R. IV (ii) of the rules for the conduct of the election of chairman, but by a boy, an utter stranger. The learned Subordinate Judge, without considering this or other objections contained in the petition, has declared the election void on the ground that under the rules in the particular circumstance of this case there should have been no drawing of lots at all. The petitioner seeks to revise this order, firstly as being without jurisdiction, because the inquiry by the Subordinate Judge must, under the rules, be confined to the matters contained in the petition and secondly as being an incorrect interpretation of the Election Rules.

The Subordinate Judge being of opinion that the law was not clear upon the question whether he could raise pleas other than those embodied in the petition referred the matter to this Court and was directed to dispose of it himself Rule I of the decision of disputes as to the validity of an election (Fort St., George Gazette, 30th November 1920) lays down that no election . . . . shall be called in question except by an election petition presented in accordance with these rules. Such petition (Rule 2) shall contain a statement in concise form of the material facts on which the petitioner relies; and shall (Rule 6) be enquired into by the Judge as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure. If in the opinion of the Judge (Rule 11), the result of the election has been materially affected by any non-compliance with the provisions of the rules the election of the returned candidate shall be void. Under Order 7, Rule 11, the Court is obliged to reject a plaint if it does not contain a cause of action. Thus, if the present petition had merely stated that the election should be treated as void, and had left it to the Judge to discover the invalidating circumstance the Judge would have been bound to reject it in limine c. f. *Janardhanam* v. *Verghese* (1).

There it seems clear that by the statute law of this country the Judge is expected to confine his inquiry to the points raised in the election petition, in which circumstances little is to be gained by reference to British case law. It may be noted however that when new points are discovered the British practice is to amend the petition and not merely to raise the matter in argument, and such amendment must be strictly within time: Rogers on Elections, p. 275, *Maude* v. *Lawley* (2). The counter-petitioner urges contra, relying upon observations in *Northwestern Salt Co., Ltd.* v. *Electrolytic Alkali Co. Ltd.* (3), that to raise a question of illegality it is not necessary that the defence of illegality should be pleaded; when it is apparent on the face of a contract that it is unlawful, it is the duty of the Judge himself to take the objection . . . and the defendants are not bound to plead that it is illegal because that is law not fact. These observations are concerned with

(1) A. I. R. 1925 Mad. 707.
(2) 9 C. P. 165=43 L. J. C. P. 103=30 L. T. 168=22 W. R. 649.
(3) [1913] 3 K. B. 422.

the defence not with the plaint and cannot in my opinion be read as excusing the plaintiff from giving the defendant, fair notice what he intends to raise and the facts on which he relies as constituting the cause of action. Nor is there any precise analogy between a contract which in its face is unlawful, and an election procedure which perhaps is arguably irregular. I must hold that the learned Subordinate Judge by not confining himself to the matters raised in the petition has acted without jurisdiction. In these circumstances it is not really necessary to consider whether the lower Court's interpretation of the rules is or is not correct. But the point has a certain bearing upon the question whether the election upon its face was illegal.

Under Rule IV (I), if there are only two candidates, the one who secures the larger number of votes shall be considered to have been elected. This is quite simple, but if there are more candidates than two, the next rule provides that by a process of elimination the number shall be repeated until two candidates only are left, and the candidate who secures the larger number of votes shall be considered to have been elected. So it will be seen that the election with only two and the election with a multiplicity of candidates have by this system of elimination been brought into line. Then the rule proceeds: In the event of there being an equality of votes at the final stage between the two remaining candidates—and be it noted when originally there were only two candidates there can be no further stage and no more remaining candidates—the Chairman or presiding officer shall draw lots. The Chairman and both the contesting candidates took the drawing of lots to refer to an election when originally there were only two candidates, and I am not prepared to hold that the interpretation is either unreasonable or incorrect. The interpretation of the Subordinate Judge leaves the election entirely in the air if there happen to be an equality of votes when only two candidates stand. It is not therefore a question of deciding between two interpretations each of which makes sense; but of deciding between commonsense, and nonsense, and I see no sufficient ground for deliberately relenating the rule to the latter category. And the above discussion shows how very far this matter is removed from the question of a contract which on its face is illegal. I allow the petition, reverse the order of the lower Court, and direct it to dispose of the matters raised in the election petition according to law, in order to see if the result of the election has been materially affected by any non-compliance with the provision of the rules.

I observe it noted in the learned Subordinate Judge's previous reference to this Court that Government propose to amend R. IV (ii), the drafting of which cannot be said to be entirely satisfactory.

There will be no costs in this petition.

Order reversed.

A. I. R. 1926 Madras 948

SPENCER, J.

Sethu Ramaswamy Pillai—1st Defendant—Petitioner.

v.

Venkatarama Subbier—Plaintiff—Respondent.

Civil Revision Petition No. 579 of 1924, Decided on 29th March 1926, from the decree of the Sub-J., Ramnad, in S. C. S. No. 474 of 1923.

Landlord and tenant—Rent suit—Defendant not objecting that land was estate within Madras Act I of 1908—Civil Court can try.

Where the tenant defendant did not take the objection that the land was situated in an "estate" as defined in Madras Act I of 1908, nor did he adduce any evidence to prove that the plaintiff was a person owning a village which had been granted in inam to a person not owning the kudivaram and that the grant had been recognized by the British Government:

Held: that the mere existence of occupancy rights in the tenants, even if true, will not take away the jurisdiction of the civil Courts to try suits for recovery of rent

[P. 948, C. 2, P. 949, C. 1]

R. Ganapathi Aiyar—for Petitioner.

K. B. Venkatachala Aiyar—for Respondent.

Judgment.—The Subordinate Judge of the Small Cause Court found that he had jurisdiction to try this suit for rent. So far as the pleadings are set out in the judgment (the written statement not having been separately printed), it appears that the defendant did not take the objection that the land was situated in an "estate" as defined in Madras Act

I of 1908. Nor did he adduce any evidence to prove that the plaintiff was a person owning a village which had been granted in inam to a person not owning the kudivaram and that the grant had been recognized by the British Government.

The mere existence of occupancy rights in the tenants, even if true, will not take away the jurisdiction of the civil Courts to try suits for recovery of rent. This petition to revise the Small Cause Court's decree as not being according to law is dismissed with costs.

Petition dismissed.

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* A. I. R. 1926 Madras 949

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

Commissioner of Income-tax. Madras—Referring Officer.

v.

Thevara Patasala—Assessee.

Reference No. 11 of 1925, Decided on 11th January 1926, made by the Commr., Income tax, Madras in his Letter No 524 of 1925 on 22nd April 1925.

* *Income-tax Act* (1922), *S.* 4 (3) (1)—*Property set apart in trust—Income to be applied for charitable purpose—Income invested in business—Profits are liable to be assessed—English principle applies to Indian Act.*

The English principle that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition with other persons who have to pay income-tax, they like them will have to pay income-tax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object, also applies to the Indian Income-tax Act: *A. I. R.* 1925 *All.* 115. *Foll.*

Where a joint Hindu family set apart certain property out of the income of which certain charitable institution was to be conducted but the trustees instead of applying the income as directed invested it in a trade and earned profit out of it.

Held: that the profits would be assessable to income-tax. [P. 949, C. 2, P. 950, C. 1]

M. Patanjali Sastri—for Referring Officer.

V. Ramaswami Aiyar—for Assessee.

Coutts-Trotter, C. J.—The facts in the case are sufficiently set out in the case stated by the Commissioner, and they are shortly these: that a Hindu joint family entered into a partition and agreed among themselves that Rs. 15,000 of the family property should be set aside for a trust purpose which purpose was to establish a Thevara Patasala, that is, a school for teaching Hindus Tamil hymns, and that the income from the balance of the amount after erecting a building was to be used for the upkeep and carrying on of the school. The direction was that that balance was to be invested in the purchase of lands and that it was on the income arising from those lands the Patasala should be run. Now in these circumstances we entertain no doubt that there was a creation of a valid trust and one from which none of the parties or its members could possibly have resiled without committing a breach of trust.

The question now arises in consequence of what the trustees did. Instead of investing the balance after building the school in lands they in some shape or form invested them in a rice mill—apparently they purchased it—and they carried on there the business of milling rice and derived income from it. The point taken by the Crown is that on that income they are liable to be taxed as being the profits of the business. It is quite clear to our minds that if they are the profits of a business they cannot at the same time be income derived from property held under trust wholly for religious or charitable purposes. The question was at first sight a little complicated by the fact which appears on the face of the document that this was a forbidden investment and that to put the money into this rice mill was a clear breach of trust on the part of the trustees. But the answer of the Crown appears to be on reflection that even assuming it to be a breach of trust, that is a matter which raises questions no doubt as between the cesti qui trust and the trustees and it may be that the trustees will not be able to charge the institution with any part of the profits that is taken from them by the Crown in the form of taxes. On that we express no opinion. But it does not in the least affect the position. The English authorities are quite clear that if an institution which primarily exists for charitable purposes chooses to raise funds for those purposes by carrying on a business in competition

with other persons who have to pay income-tax they like them will have to pay incometax notwithstanding the fact that the ultimate surplus of the profits is all going to the charitable object. In our opinion, that is clearly laid down in the *Rotunda Hospital* case [*Common* v. *Governors of the Rotunda Hospital, Dublin* (1)] which has been followed in the subsequent cases, and only the other day in *In the matter of Lachman Das Narain Das* (2). We think that that principle applies quite clearly to the Indian Act as the Allahabad High Court hold and that the answer to this reference must be that the proceeds derived from the carrying on of this rice mill are assessable to income-tax.

The person whom we declare to be assessable and whom we make to pay the costs of this reference including a pleader's fee of Rs. 150 is the manager Arunachalam Chetty.

Reference answered,

(1) [1921] 1 A. C. 1.
(2) A. I. R. 1925 All. 115=47 All. 68.

A. I. R. 1926 Madras 950

SPENCER AND MADHAVAN NAIR, JJ.

Rajamanicka Chetty—Appellant.

v.

P. K. Venkatramana Rao and *others*—Respondents.

Appeal No. 264 of 1924, Decided on 11th September 1925, from the order of the Sub-J., Vellore, D/- 10th March 1923, in I. A. No. 743 of 1923.

Civil P. C., O, 32, R. 4 (4)—Order appointing Court guardian when there is natural guardian and requiring the minor to deposit plaintiff's all costs before applying to set aside ex parte decree is bad and must be set aside.

In a suit against a minor, plaintiff filed an affidavit stating that the minor's mother had no interest adverse to the minor, that the minor was under her protection and that she might be appointed guardian ad litem of her son. The Subordinate Judge appointed the Head Clerk of Court as the guardian of the minor, while the petition to appoint the mother of the minor was still pending, and without recording any reasons for not appointing the natural guardian of the minor to be guardian ad litem. Afterwards the Subordinate Judge dismissed the petition to appoint the mother of the minor as his guardian, for no other reason than that the Head Clerk had already been appointed guardian. When the case came on for trial, the Court guardian contented himself with putting the plaintiff to proof of his case. He was not put in funds for the purpose of defending the case, he got no instructions from the minor's mother and the plaintiff was given a decree. After this, the mother of the minor applied to set aside the decree passed against her son and to have the case disposed of on its merits. The Subordinate Judge required her to deposit all the costs of the plaintiff in the suit up to date and when the amount was not deposited, dismissed the petition.

Held: that to appoint a Court guardian without providing for funds, to represent the minor when there was a natural guardian available that the minor would not be able to defend the suit and to require the minor to deposit all the costs of the plaintiff before restoring the suit to file is to put the minor in a position which made it impossible to have his defence heard, and, therefore, the order appointing a Court officer as guardian of the minor is bad and must be set aside. [P. 950, C. 2, P. 951, C. 1]

A. C. Sampath Aiyangar—for Appellant.

A. K. Madhava Rao and *P. K. Janakiram*—for Respondent.

Spencer, J.—The manner in which the Subordinate Judge (Mr. K. Krishnamacharya) has dealt with the rights of a minor in the matter of his representation in this suit amounts practically to a denial of justice. The suit was based upon a mortgage and was brought against the 1st defendant and his minor son, the 2nd defendant. The 1st defendant evaded service of summons and an ex parte decree was passed against him. The 2nd plaintiff filed an affidavit, on 10-9-23 stating that the minor's mother had no interest adverse to the minor, that the minor was under her protection and that she might be appointed as guardian ad litem of her son. On 16-10-23 the Subordinate Judge appointed the Head Clerk of his Court as the guardian of the minor, while the petition to appoint the mother of the minor was still pending, and without recording any reasons for not appointing the natural guardian of the minor to be guardian ad litem. Afterwards on 2-11-23 the Subordinate Judge dismissed the petition to appoint the mother of the minor as his guardian, for no other reason than that the Head Clerk had already been appointed guardian. When the case came on for trial, the Court guardian contented himself with putting the plaintiff to proof of his case. He was not put in funds for the purpose of defending the case, he got no instructions from the minor's mother, and the plaintiff was given a decree. After this, the mother of the minor applied to set aside the

decree passed against her son and to have the case disposed of on its merits. The Subordinate Judge required her to deposit all the costs of the plaintiff in the suit up to date, and when the amount was not deposited, dismissed the petition.

In *Bhagvan Dayal* v. *Param Sukh Das* (1), it was observed that the appointment of an officer of the Court as guardian ad litem of minors without requiring the party who gets him appointed to make a deposit for the purpose of defending the case is generally little more than a farce. The appointment of the Head Clerk in this case was nothing but a farce. The minor's guardian had previously in 1919, brought a suit to have it declared that the minor was not bound by the mortgage —a suit which was withdrawn in 1922 with liberty to file a fresh suit—and after the decree in this suit was passed on 5-11-23 she applied on 1-12-23 for the removal of the Head Clerk from the guardianship and that she should be appointed. She was, therefore, evidently interested in supporting the minor's rights. To appoint a Court guardian without funds, to represent the minor when there was a natural guardian available meant that the minor would not be able to defend the suit, and to require the minor to deposit all the costs of the plaintiff before restoring the suit to file was to put the minor in a position which made it impossible to have his defence heard. For these reasons, I consider that the Subordinate Judge's order appointing his Head Clerk as guardian of the minor was bad and must be set aside. Further proceedings in the case from the date of that appointment on 16th Ootober including the decree must be vacated so far as the minor is concerned because he was not properly represented. The Subordinate Judge will be directed to restore O. S. No 22 of 1923, to file as against the minor and to appoint his mother as guardian ad litem and proceed with the trial of the suit. The appeal against order and the civil revision petition will be allowed with costs in this Court.

Madhavan Nair, J.—I agree with the order proposed by my learned brother.

Appeal allowed.

(1) [1915] 37 All. 179=27 I. C. 623=13 A. L. J. 179.

A. I. R. 1926 Madras 951

PHILLIPS AND MADHAVAN NAIR, JJ.

Krishnaswami Chettiar and *another*—Petitioners.

v.

Ghulam Muhammad Ghouse and *another*—Respondents.

Civil Revision Petition No. 1166 of 1925, Decided on 10th March 1926, from the order of the Sub-J., Cuddalore, in O. S. No. 44 of 1925.

Madras Local Boards Act, Rules for decision of disputes regarding election R. 1—No election petition lies against appointment of President when there has been only one candidate.

Where only one candidate for the Presidentship of a Local Board has been nominated and in accordance with the rules has been deemed to be elected, an election petition will not lie against his appointment.

The return of a solitary candidate is not strictly speaking, an election by the electors, for the electors would have no say whatever in the matter; *A.I.R.* 1925 *Mad.* 376, *Rel. on.*

[P. 951, C. 2, P. 952, C. 1]

T. R. Ramchandra Aiyar—and *S. R Dikshit*—for Petitioner.

T. M. Krishnaswami Aiyar and *S. Srinivasa Aiyar*—for Respondents.

Judgment.—The question here is whether where only one candidate for the Presidentship of a Local Board has been nominated and in accordance with the rules has been deemed to be elected, an election petition will lie against his appointment. The question has been considered by Jackson, J. in *Srinivasa Chariar* v. *Venkatarama Aiyar* (1) and he has come to the conclusion that no such petition will lie. His opinion is based on the wording of R. 1 of the rules for the decision of disputes. This decision is in a case under the Madras District Municipalities Act, whereas the question here arises under the Madras Local Boards Act; but the rules framed under each of these Acts are practically identical. The important words are in R. 1, that is:

No election ..... shall be called in question except by an election petition ..... by any candidate or elector against the candidate (hereinafter called the returned candidate who has been declared by the Psesident of a Local Board to have been duly elected.

In the present case a successful candidate who can hardly be called the "returnedcandidate" as he was the only one nominated, has not been declared by the

(1) A. I. R. 1925 Mad. 376.

President of the Local Board to have been duly elected; but under the rules he is deemed to have been elected. Similarly, it is difficult to hold that there was any other candidate who could present a petition or even any elector when no election has been held. Election means selection of one out of two or more, and therefore the return of a solitary candidate is not, strictly speaking, an election by the electors, for the electors have had no say whatever in the matter. For these reasons we agree with the view taken by Jackson, J. The authority to the contrary in *Sarvothama* v. *Chairman Municipal, Council, Sidapet* (2) is hardly in point, because this question was not argued before that Bench. The question there was whether civil Courts had jurisdiction to entertain certain suits, and there is an observation in the judgment that the remedy lay by means of an election petition, but the point now taken was not discussed there. The petition is accordingly dismissed with costs.

Petition dismissed.

(2) A. I. R. 1923 Mad. 475=47 Mad. 585.

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* A. I. R. 1926 Madras 952

MADHAVAN NAIR, J.

Vellathusseri Chakkalakumpil Raman Menon—Defendant—Appellant.

v.

Vellathusseri Chakkalakumpil Pangunni Menon—Plaintiff—Respondent.

Appeal No. 4 of 1924, Decided on 15th January 1926, from the appellate decree of the Dist. J., South Malabar, in A. S. No. 68 of 1923.

* *Civil P. C., S. 2 (12)—Decree awarding mesne profits but silent as to interest thereon—Executing Court cannot award that interest—Execution—Decree binding.*

Where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained. But if the Court which ascertains the mesne profits has omitted to allow interest, it is not open to the Court which executes the decree for mesne profits to allow interest in execution proceedings; 6 *C. L. J.* 462, *and Wallace, J., in No.* 74 *of* 1924, *Foll*; *A. I. R.* 1922, *All.* 117, *not Foll.* [P 952, C 2; P 953, C 1]

K. P. Krishna Menon—for Appellant.

K. P. Raman Menon—for Respondent.

Judgment.— The question involved in this appeal is whether the judgment-debtor, who is the appellant before me, is bound to pay interest on the mesne profits decreed against him.

The decree, so far as it relates to mesne profits, runs as follows:

That he (defendant) do pay to plaintiff Rs. 375 for kannipattom of the year 1092 and future mesne profits from 8th Dhanu 1092 at 638 paras of paddy and Rs. 338 a year ending with 7th Dhanu until surrender, or until the expiration of three years from the date.

In the light of the decision in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) the learned District Judge decided that interest on mesne profits should be allowed unless expressly excluded and allowed it at the rate of two per cent. I think that case is clearly distinguishable. There, the trial Court did not fix the amount of mesne profits but directed that it should be ascertained on enquiry at the time of the execution of the decree and it was held that a decree for mesne profits carried interest on such profits, having regard to the definition of the expression "mesne profits" in the Code. In the present case the amount of mesne profits which the decree-holder was to get under the decree has been already fixed by the Court and was not to be ascertained afterwards. It cannot be said that the amount so fixed does not include interest.

I do not, therefore, think that the ruling of the Privy Council or the definition of mesne profits relied upon can justify the award of interest. What the decision in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) lays down and what it does not, has been well pointed out by Mukerjee and Holmwood, JJ. in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2). Referring to this decision and to another decision of their own Court the learned Judges state:

They are, no doubt, authorities for the proposition that where a decree declares that the plaintiff is entitled to mesne profits and says nothing about interest, if the amount of mesne profits is left for determination by the Court of

(1) [1900] 27 Cal. 951=27 I. A. 110=10 M. L. J. 356=4 C. W. N. 631=7 Sar. 687 (P. C.).

(2) [1907] 6 C. L. J. 462.

execution, the decree-holder is entitled to interest upon the mesne profits and to have such interest added to the mesne profits when they are ascertained. But these cases do not lay down that, if the Court which ascertains the mesne profits has omitted to allow interest, it is open to the Court which executes the decree for mesne profits to allow interest in execution proceedings. It is an elementary principle that the Court which executes the decree must execute it as it stands. Besides, there is no rule which makes it obligatory upon the Court to allow interest on the mesne profits; it is a matter of judicial discretion to be exercised according to the circumstances of the case. If, therefore, the Court which assessed mesne profits improperly exercised its discretion and disallowed interest on erroneous grounds, the remedy of the decree-holders was by way of an appeal. They cannot now claim interest when the decree for mesne profits is silent as to interest.

These observations cannot be brushed aside as mere obiter dicta as suggested by the learned vakil for the respondent. I respectfully agree with them: *See* also *Narendra* v. *Byomkesh* (3).

In A. A. A. O. No. 74 of 1924, in disallowing interest on mesne profits awarded by a decree which was in similar terms like the present one, Wallace, J., states the law thus:

I read the law to be that, when the trial Court has not fixed a figure for mesne profits, but has left that to be determined in execution, the executing Court may record interest; but when it has fixed a figure for mesne profits, it is not open to the executing Court to record interest, because it cannot be said that the mesne profits figure already fixed does not include interest. Interest on the mesne profits, is, therefore, disallowed.

On behalf of the respondent my attention has been drawn to a decision in *Lalta Prasad* v. *Sri Ganeshji* (4) in which though the amount of mesne profits was fixed, the learned Judges following the Privy Council decision allowed interest; and in so doing, they also relied upon a prior decision of their own Court in *Narpat Singh* v. *Har Gayan* (5) which, like the case in *Girish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (1) related to the execution of a decree where the mesne profits had not been fixed by the trial Court. Apparently, the learned Judges do not observe the distinction pointed out in *Harmanoje Narain Singh* v. *Ramprosad Singh* (2) and also by Wallace, J., in A. A. A. O. No. 74 of 1924.

The decision in *Lalta Prasad* v. *Sri Ganeshji* (4) ignores the principle that the Court which executes a decree must execute it as it stands, and also overlooked the fact that, when the trial Court fixed the amount of mesne profits, it must have done so with due regard to the definition of mesne profits and that there was nothing to show that the amount so fixed did not include interest. I am not inclined to follow that decision. The case in *Banwari Lal* v. *Mt. Rama* (6) does not help the respondent as the facts do not show whether the trial Court had fixed the amount of mesne profits in that case. I hold that, since the amount of mesne profits was fixed by the trial Court, it was not open to the executing Court to award interest, because it cannot be said that the mesne profits already fixed do not include interest. The decree of the learned District Judge as regards interest on mesne profits is, therefore, set aside with costs here and in the Court below.

In the Memorandum of Objections filed by the respondent the question raised is as regards the price of paddy per para. It is contended that the lower Court erred in fixing the price of paddy at 12 annas a para instead of Re. 1-8-0 a para. This is purely a question of fact. There is ample evidence to support the concurrent conclusions of the lower Courts on this point. The memorandum of objections is dismissed with costs.

Decree set aside.

(3) [1919] 30 C. L. J. 205=53 I. C. 227.
(4) A. I. R. 1922 All. 117=44 All. 579.
(5) [1903] 25 All. 275=(1903) A. W. N. 42.
(6) [1912] 10 A. L. J. 533=17 I. C. 915.

A. I. R. 1926 Madras 953

DEVADOSS, J.

Chengalvala Venkata Siva Rao—Plaintiff—Appellant.

v.

Idarapalli Venkataratnam—1st Defendant—Respondent.

Second Appeal No. 1305 of 1923, Decided on 12th March 1926, from the decree of the Sub-J., Rajahmundry, D/- 22nd December 1922, in A. S. No. 145 of 1922.

Madras Proprietary Village Service Act, S. 15 (1) and (2)—Retention of one officer under S. 15 (2) is not new appointment under S. 15 (1).

Where in proceedings under the Proprietary Village Service Act, S. 15 (2), the Collector directs one of the officers to be dispensed with and the other to be retained, the officer who is retained

cannot be said to be newly appointed under S. 15 (1). [P. 954. C. 1]

G. Lakshmanna—for Appellant.

P. Somasunddram—for Respondent.

Judgment.—The only point urged in this second appeal is that the defendant was appointed to a new office and that the plaintiff who has the preferential right to it is entitled to claim it. From the proceedings it is clear that the Collector directed one of the officers to be dispensed with and the other to be retained. This proceeding of the Collector was under the Proprietary Village Service Act of 1894. In accordance with the direction of the Collector the landholder acting under S. 15 (2) dispensed with the services of one and retained the services of the other. It cannot be said that the person who was retained in office was newly appointed to that office. He having been retained in the office the plaintiff has no right to the office by virtue of any hereditary right. The point has been properly decided by the lower Courts and there is no reason to interfere with the decree of the Subordinate Judge of Rajahmundry.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 954

DEVADOSS AND WALLER, JJ.

Swaminatha Odayar—Decree-holder—Appellant.

v.

Thiagarajaswami Odayar—Defendant—Respondent.

Letters Patent Appeal No. 114 of 1924, Decided on 6th October 1925, from the order of Odgers, J., in A. A. A. O. No. 103 of 1922, D/- 1st April 1924.

Civil P. C., S. 48—Combined order for relief against property and person passed—Time runs from date of decree in absence of fresh order in execution.

Where a combined decree gives relief against the property as well as the person of mortgagor the time for execution against the person should be calculated from the date of the decree and not from the date of the mortgagee failing to get relief by sale of the properties. If an order is passed after the property had been sold that, for the balance other properties of the mortgagors should be proceeded against, an application filed within 12 years of that order would be in time. 22 *C. W. N.* 145 *P. C. Rel. on.* [P. 950, C 1]

R. Kuppauswami Aiyar—fer Appellant.

Judgment.—This is an appeal from the order of our learned brother Odgers, J. The first point urged for the appellant is that the order on Execution Application No. 386 of 1918, operated as res judicata in favour of the appellant and that the District Munsif was wrong in dismissing the execution application which was filed on the 6th August 1921. The District Munsif decided in E. P. No. 386 of 1918 that the application was not barred by limitation. The District Munsif who dealt with the present application set aside the ex-parte order on E. P. No. 386 of 1918, on the ground that the District Munsif who first disposed of the petition had not before him the decision of the Privy Council in *Khulna Loan Company Limited* v. *Jnanendra Nath Bose* (1). It is pointed out by Mr. Kuppuswami Aiyar and very rightly too, that the District Munsif was not justified in setting aside the ex-parte order [in E. P. No. 386 of 1918 as the application to set aside the ex parte order] was made more than 30 days after the judgment-debtor became aware of the ex-parte order against him. Against this order, a revision petition was filed by the appellant, and Odgers, J. has dismissed the revision petition. The order on E. P. No. 386 of 1918 passed by the former District Munsif has ceased to be in force. Therefore there is no order now upon which the appellant can rely for his contention that the plea of limitation is barred by reason of the order on E. P. No. 386 of 1918. Therefore we disallow this contention.

The next contention of Mr. Kuppuswami Aiyar is that the application is not barred by reason of S. 48 of the Civil Procedure Code. The decree in this case is a combined decree both against the property and person of the mortgagor under the old Code and it has been distinctly held by the Privy Council in *Khulna Loan Company Limited* v. *Jnanendra Nath Bose* (1) that a decree against the person becomes unexecutable after the lapse of 12 years from the date

(1) [1918] 22 C. W. N. 145=45 I. C. 436 (P. C.).

of the decree ; in other words, where a combined decree gives relief against the property as well as the person of mortgagor, the time for execution against the person should be calculated from the decree and not from the date of the mortgagee failing to get relief by sale of the properties. In this case, the properties were sold on the 26th January, 1911, and the mortgagee obtained only part satisfaction of the decree. But in view of the decision of their Lordships of the Privy Council in *Khulna Loan Company Limited* v. *Jnanendra Nath Bose* (1) we are unable to accept the contention of Mr. Kuppuswami Aiyar that the application for the execution of the decree against the person of the motgagor should be considered to be in time, for the reason that he could not have executed the decree before the sale of the property was found insufficient to satisfy his decree. If an order was passed after the property had been sold that, for the balance other properties of the mortgagors should be proceeded against, the present application would be in time, but no such order was passed and, therefore, the application is barred by S. 48 of the Civil Procedure Code.

The appeal fails and is dismissed. We make no order as to costs, as the respondent did not appear.

Appeal dismissed.

A. I. R. 1926 Madras 955

ODGERS AND MADHAVAN NAIR, JJ.

Mathilda Sice and *another* — Appellants.

v.

Fritz Gaebele and *others*—Respondents.

Appeal No. 32 of 1922, decided on 28th September 1925, from the decree of the Sub-J., Salem, in O. S. No. 79 of 1919.

(a) *Evidence Act, S. 34—Party producing accounts should prove reliability of each item.*

It is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them : 26 *Bom.* 352, *Foll.*

A mere account book without more does not prove anything : 52 *I. C.* 104, *Foll.*

The law requires proof not only of account books generally but of each item, that is, in the interest of the person producing the books but with regard to admissions, i. e., entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer. [P. 957, C. 1]

(b) *Transfer of Property Act, S. 67—Foreclosure and redemption suits—Each party can enforce his rights against other—T. P. Act, S. 60.*

It is the essence of foreclosure and redemption suits, that each party is entitled in such suits to enforce his rights against the other. If the balance is against any party he must pay it. [P. 958, C. 1]

R. N. Aiyangar for *King* and *Partridge*—for Appellants.

C. S. Venkatachariar, Moresby & Co. and *T. N. Seshachelam*—for Respondents.

Odgers, J.—This is an appeal against the final decree of the Subordinate Judge of Salem in a mortgage suit. By Ex. A, dated 24th August 1886, one Jules Sice, who was a coffee planter in the Shevaroy Hills mortgaged certain property, namely, ½ of the Tanny Pandal Estate and the whole of the St. Josephs' Estate, to one Lob Levyt. In 1892 Jules Sice, the mortgagor, died. His widow, sons and daughters are the defendants in this case. On the 31st July 1908, Madame Sice, the widow of Jules Sice, entered into a contract, Ex. B, with one Mr. Fritz Gaebele, by which the latter undertook to work the coffee estate and to furnish the necessary money for it, which latter should bear interest at 8 per cent. Mr. Fritz Gaebele was to be treated as the first mortgagee of the estate for Rs. 24,000 and was to work the plantation without any interference from the defendants. The agreement provided that an account and inventory should be taken on the 1st March every year and that after providing for certain charges the profits should be divided by allotting 60 per cent. to the hypothecation debt, 25 per cent. to Madame Sice, and her heirs and 15 per cent. for management. The contract was to last for ten years, i. e., up to 1918. In 1909 Fritz Gaebele paid off Levyt and took an assignment of the latter's mortgage rights by Ex. C, and on the 22nd June 1910, an English mortgage was entered into by Madame Sice in favour of Gaebele. This deed recited that Gaebele had advanced Rs. 15,200 making

with the sum Rs. 13,200 paid to Levyt Rs. 28,400. It is, however, conceded that the sum of Rs. 15,200 was never in fact paid. Now it is admitted by both sides that Fritz Gaebele is in the position of a mortgagee in possession and the suit was brought for a sum of Rs. 49,877 on the footing of Ex. D. The plaintiff prayed that there might be a decree for foreclosure and that the defendants be directed to put the plaintiff in possession of the properties, the defendants having, according to the plaintiff, taken possession of the properties after the agreed period which expired on 30th October 1918 the suit having been filed on 14th December 1918.

In the preliminary judgment the Subordinate Judge held that Ex. D was not supported by consideration to a larger extent than Rs. 13,200, that the plaintiff under Ex. D, was in the position of a mortgagee in possession and that he was bound to account for 'the income of the properties; further that the defendants are entitled to re-open the settlement of accounts of the plaintiff's management. There was a decree for foreclosure and an account to be taken of what was due to the plaintiff for principal and interest on the mortgage. In giving directions for the account the learned Subordinate Judge directed that the principal due on the mortgage would be taken at Rs. 13,200 and accounts taken and usual adjustments made out of the profits according to Ex. K till the date of Ex. D, i. e., 22nd June 1910, and thereafter under the terms of Ex. D with due regard to S. 76 of the Transfer of Property Act. The accounts were referred to a commissioner from whose report it is seen that the plaintiff produced certain books of account; that he summoned two witnesses who were not examined; that books, Exs. P and Q were written from subsidiary books not produced; that the entries in Exs. P. and Q could not, therefore, be verified; and the entries gradually dwindled into one or two entries a month and practically became a monthly extract. The produce-accounts, Exs. N and O, did not contain any explicable abstracts as to the disposals and balance in stock at the end of each year. It was, therefore, not possible to arrive at the balance of coffee in stock at the end of each year. Ex. M, the cash account, up to 1915 does not help in this respect and there is no cash account from 1915 to 1918. Again management is entered in the ledger at 20 per cent. instead of 15 per cent. as per Ex. K. The advances made by Fritz Gaebele and the amount of interest due to him do not agree with the ststements forwarded to Madame Sice. There is no proper stock book maintained and the result the commissioner had arrived at is with reference to the figures available in the accounts produced.

To this report the defendants took certain objections set out in pages 56 to 58 of the printed papers. The Judge on the defendants' contention, that the accounts which the commissioner has examined were not reliable and were not kept in the regular course of business, and that no vouchers have been produced in support of the items of expenditure, says that the plaintiff was a resident of Pondicherry; that the management of the estate was entrusted to one Bosen and to one Ramdhoni and was of opinion that these facts are not sufficient to condemn the whole account as unreliable though he admits that the facts seemed to be that the plaintiff being an absentee landlord had not sufficient control over the managers. In the result he says the defendants have not called evidence as to the annual average yield either prior to the plaintiff's possession or after they got possession in 1918. All he does is to disallow all interest on the advances to the plaintiff, namely, Rs. 3,155, and to find without reasons that the plaintiff had recouped himself the actual amounts advanced for expenses. He, therefore, decreed for Rs. 13,200, the principal, and Rs. 803, the balance of interest. Against this the defendants appeal and state that if accounts were properly taken a very large sum would be found due to them.

A number of letters have been exhibited which show that Fritz Gaebele knew that his managers were behaving improperly. He complains that it is very hard to get particulars from them. The allowance to Madame Sice was paid irregularly and according to the plaintiff's own admission the manager does not properly look after the estate. In fact as he says "he has become madder every day." In spite of letters and wires he gets no reply. That is in February 1918. The question is: What to do

with this account? It is perfectly clear to my mind that the plaintiff's books are of very little real value in arriving at a figure. Mr. C. S. Venkatachariar for the respondents admits the accounts are improper but wants to throw the responsibility for proving what the mortgagee ought to have received on to the mortgagors. There is no doubt that merely putting forward accounts is of no use whatever. They must be supported by some other evidence which the Court believes. All that the plaintiff says as P. W. 1 is that Ex. M is the cash account from 1908 to 1915 kept by his agent Bosen. Ex. N is the crop account from 1908 to 1917 kept by Bosen and continued by Ramdhoni. Ex. O is the continuation of Exs. M and N. Exs. P and Q are the accounts maintained in his (plaintiff's) office at Pondicherry, under the control of his accountant. That statement to my mind is totally insufficient to afford the slightest corroboration of the accounts which the plaintiff literally threw at the head of the Court.

As said in *Kundanmal* v. *Kashibai* (1) it is for the party who puts forward the accounts to explain them and support them in such a way as to convince the Judge that there is such a probability of their accuracy as to make it reasonable for a prudent man to accept them. It has been laid down over and over again that a mere account book without more does not prove anything: see *Yasuvadiyam* v. *Subba Naicker* (2) (Abdur Rahim and Oldfield, JJ). There mere proof of the existence of certain entries in books of account kept in the ordinary course of business was held not sufficient. As laid down in *Imambandi* v. *Motasuddi* (3) mere assertion that particular pages of volumes were written by this or that writer is not sufficient compliance with the provisions of law. It appears to me therefore that the books cannot be said to have been proved item by item for the purpose of charging the defendants. Their general character has no doubt been proved by plaintiff.

There are, however, certain admissions in them which all go to the debit of the plaintiff. I take it that the law requires proof not only of account books generally but of each item, that is, in the interest of the person producing the books, but with regard to admissions, i. e., entries against the producer's own pecuniary interest, the law dispenses with all proof save that the book has been kept by or under the authority of the producer. We must, then, it seems to me, set aside the evidence as far as the plaintiff seeks to fasten the liability on the defendants by the entries in these books of account. The mortgagee is, therefore, in the position of having neglected to keep proper accounts as required by S. 76 (g) of the Transfer of Property Act. The question is what ought to be done under these circumstances. The plaintiff has had an opportunity of producing his evidence. He only produced these books that are now in question. He brought two witnesses with him who, it is stated without contradiction were Bosen and Ramdhoni and they were not examined. The defendants stated that they had no evidence to put before the Court. They of course were out of possession for ten years as it will be remembered that under Ex. K they were to have nothing to do with the management of the estate during that time. But for the fact that the defendants, beyond disputing the legal value of these accounts, should have, in my opinion, shown or attempted to show that the figures (for instance with regard to the yield) were prima facie wrong, I should have sent these accounts back with a direction that the plaintiff was to be disallowed all items of expenditure in his accounts and debited with all items of receipt.

I think, however, the defendants were under the circumstances wrongly advised. It may be that having been in possession up to 1909 and since 1918, they could have afforded the Court some assistance in the taking of these accounts. Under the circumstances I do not see how I can direct a fresh account without giving both parties an opportunity of adducing fresh evidence, it being borne in mind that on the admissions of the plaintiff any entries in the books already produced will be debited against him. Mr. Aiyangar for the appellant pressed us to decide on a figure for ourselves, to take the accounts ourselves on the basis of disallowing the plaintiff everything and making every presumption against him which the learned counsel

(1) [1902] 26 Bom. 363=4 Bom. L. R. 42.
(2) [1919] 52 I. C. 704.
(3) [1912] 15 C. L. J. 621=13 I. C. 678.

said would result in a balance in his favour of about Rs. 38,000. This we cannot do for obvious reasons. But I do not see why, if on re-taking all these accounts it turns out that a balance is due to the defendants a decree should not be given in their favour on their paying the requisite Court-fee. As Ghose says at p. 598 of his book it is the essence of foreclosure and redemption suits, that each party is entitled in such suits to enforce his rights against the other. If the balance is, therefore, against any party he must pay it. The appeal therefore is allowed. The appellants must have their costs of the appeal. The cost of the final decree will abide the result of the decree, if any, after taking the accounts afresh. The final decree is set aside. The matter will go back to the lower Court for the purpose of having the accounts re-opened, each side being at liberty to adduce evidence.

Madhavan Nair, J. — I agree and have nothing to add.

Case remanded.

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* A. I. R. 1926 Madras 958 (1)

WALLER, J.

Thummalapalli Venkatakrishnayya—Petitioner.

v.

Thummalapalli Sayamma and *others*—Respondents.

Civil Revision Petition No. 31 of 1925, Decided on 30th November 1925, from an order of the Sub-J., Masulipatam, D/- 20th October 1924, in O. P. No. 6 of 1924.

* *Civil P. C., S.* 115—*Order granting leave—Revision lies—Civil P. C., O.* 33, *R.* 7.

Revision lies from an order granting leave to sue as a pauper: 32 *All.* 623, *Dissented from.*

[P 958, C 1]

Ch. Raghava Rao—for Petitioner.
K. Chakravarti—for Respondents.

Judgment.—It is argued that no revision petition lies: vide *Mohammad Ayub* v. *Mohammad Mahmud* (1). I am not prepared to follow the distinction laid down in that decision.

(1) [1910] 32 All. 623=6 I. C. 831=7 A. L. J. 741.

I am afraid that this application must be allowed. Applicant has let in no evidence of her pauperism and has not even presented herself for cross-examination. The order is set aside, and the application will be re-heard, each party to let in such evidence as it has pro and con. Costs of this petition will abide the result.

Application allowed.

A. I. R. 1926 Madras 958 (2)

WALLACE, J.

Nachiappa Chettiar—Petitioner.

v.

Kandappan Chettiar and *another*—Respondents.

Civil Revision Petition No. 70 of 1924, Decided on 22nd March 1926, from the order of the Dist. Munsif, Devakottah, D/- 22nd October 1922, in E. A. No. 372 of 1922.

Civil P. C., S. 145—*Provincial Insolvency Act* (1920), *S.* 31.

The fact that in the meantime the judgment-debtor had got a protection order does not absolve the surety of his duty to produce the judgment-debtor on the adjourned date.

[P. 959, C. 1]

E. Vinayaka Rao—for Petitioner.
T. M. Ramaswamy Iyer—for Respondent.

Judgment.—I can see no ground for disturbing the order of the lower Court. The surety by his bond undertook a liability to produce the judgment-debtor before the Court of the District Munsiff of Devakottah, until he was finally discharged of his insolvency. Petitioner pleads that this "final discharge" does not relate to the I. P. in the District Court which is still pending and in which the judgment-debtor has not yet had a final discharge, but only to another contemplated I. P. at the date of the bond, which was put in later and dismissed on 22—3—22. I am unable to accept the contention and petitioner's own conduct itself proves it is wrong. When he was ordered on 20—6—22 to produce the judgment-debtor, he did not plead that his liability had ceased on 22—3—22 with the dismissal of the second I. P. but accepted the continuance of his liability and requested and obtained one month's time to produce the judgment-

debtor. The date for the production of the judgment-debtor was adjourned to 28—7—22 and on that date neither the surety nor the judgment-debtor appeared. It is pleaded that in the meantime the judgment-debtor had got a protection order. Even so, that does not absolve the surety of his duty to produce the judgment-debtor on the adjourned date. It is clear therefore that the surety did not produce the judgment-debtor when called upon to produce him by the District Munsif's Court at a time when he had not obtained his final discharge. This is a breach of the terms of the bond and the penalty therefore falls due.

It is further pleaded that the E. P. of respondent was ultra vires, and that the result of the recovery of the whole debt of this creditor from the surety permits a practice not sanctioned by the insolvency Court. Neither of the points has been taken at all in the lower Court and I am not prepared to allow them to be raised here. The foundation of fact for them has not been clearly laid. I dismiss the petition with costs.

Petition dismissed.

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* A. I. R. 1926 Madra 959

RAMESAM, J.

Adanamoli Chetti and *others*—Petitioners.

v.

Chinnaswami Reddi and *others*—Respondents.

Civil Revision Petition No. 797 of 1924, Decided on 17th March 1926, from the order of the Dist. J., South Arcot, D/- 7th April 1924, in C. M. A. No. 33 of 1923.

* (a) *Civil P. C., O. 21, R. 90—Hindu Law—Reversioner can apply under* R. 90.

In the case of a reversioner entitled to property after the death of a Hindu female his interest is in the estate, and though it might be said to be contingent and not vested, still it is interest enough for the purpose of enabling him to file a suit for declaration under the Specific Relief Act, to file a petition under O. 21, R. 89, and to restrain waste, and it is also enough for the purpose of applying under O. 21, R. 90: 4 *Pat L. J.* 330, *Foll.* [P. 960, C. 1]

* (b) *Civil P. C. O. 21, Rr. 89 and 90—R. 90 is wider than R. 89.*

The phrase used in R. 90, namely, "whose interests are affected by the sale", is of wider scope than the description in R. 89 "holding an interest therein by virtue of a title acquired before such sale. [P. 960, C. 1, 2]

* (c) *Civil P C., O. 21, R. 90—Price so understated that injury is obvious—Other evidence of injury need not be given.*

Where ths injury is not the obvious result of the irregularity, actual evidence must be adduced to connect the one with the other and the burden of adducing such evidence is upon the person seeking to set aside the sale. But where the irregularity is an understatement of the probable price of the property, the connexion is so near that it is difficult to adduce evidence showing that the injury had resulted from the irregularity; in such a case the Court may infer without any other evidence that injury has resulted from the irregularity: 20 *All.* 412 (*P. C.*). *Foll.* [P. 960, C. 2]

R. Gopalaswami Iyengar—for Petitioners,

K. Bashyam Iyengar—for Respondents

Judgment.—This petition arises out of an application to set aside a sale in execution of a decree obtained against a Hindu widow representing the estate of a last male owner. In execution of the deceree three items of property were sold and purchased for Rs. 210, Rs. 450 and Rs. 650 respeetively. The District Judge has committed a slip in stating figures in respect of the 2nd and third items as Rs. 250 and Rs. 600 instead of Rs. 450 and Rs. 650. The petitioner before the District Munsif is a presumptive reversioner who will be entitled to the property after the death of the widow and the application was filed under O. 21, R. 90, on the ground of material irregularity in the conduct of the sale and the publishing of the proclamation causing substantial injury. The District Munsif holding that there was no irregularity, and also that the properties were sold for the proper prices, dismissed the petition.

On appeal the District Judge held on the evidence that the properties were sold for grossly inadequate prices. The prices entered in the sale proclamation are Rs. 200, Rs. 110 and Rs. 200 for the three items respectively. The District Judge is therefore justified in stating that the value of the items given in the sale proclamation was ridiculously low. He then states:

There has been therefore material irregularity in the framing of the sale proclamation, and considering the prices fetched at the sale and the prices the items are worth, there can be no doubt that there had been substantial injury by reason of the irregularity.

No doubt, in the case of Items 2 and 3, on account of a mistake in stating the figures, the actual injury is less substantial than what he supposes, assuming it not to be a slip. The auction-purchaser files this revision petition.

The first point argued before me by the learned vakil for the petitioner is that the respondent has not got such an interest as will enable him to maintain a petition under O. 21, R. 90. He argues that the case of *Brij Kishore Lal* v. *Pratab Narain* (1), relied on by the District Judge, is not correctly decided. That case itself follows a case in *Punkhlati* v. *Nani Lal* (2), where it was held that a reversioner was entitled to file a petition under O. 21, R. 89. It is true that in *Kathiresan Chettiar* v. *Ramasami Chettiar* (3), *C. Jogendra Nath* v. *Manmatha Nath* (4) and *Pragjo Kala* v. *Aesa Jalal* (5) it was held that a creditor, a mere decree-holder or even an attaching decree-holder (the decree being one other than the one in execution) cannot be said to be sufficiently interested in the property for the purpose of maintaining a petition under O. 21, R. 90. But I do not think that the last three cases can help the petitioner They were cases in which all the interest of the petitioner was in the general solvency of the judgment-debtor and not in any particular item of property, whereas in the case of a reversioner entitled to property after the death of a Hindu female his interest is in the estate ; and though it might be said to be contingent and not vested, still it is interest enough for the purpose of enabling him to file a suit for declaration under the Specific Relief Act, to file a petition under O. 21 R. 89, and to restrain waste ; and I cannot see why the interest is not interest enough for the purpose of O. 21, R. 90. If any distinction is to be made between R. 89 and R. 90 I should think that the phrase used in R. 90, namely, "whose interests are affected by the sale" is of wider scope than the description in R. 89 "holding an interest therein by virtue of title acquired before such sale." As pointed out in *Brij Kishore Lal* v. *Pratab Narain* (1) it is difficult to describe the scope of the word "interests." I am content to follow that decision. There is no doubt that such interests as the reversioner has are affected by the sale. I think therefore the first point fails.

The second point argued before me is that some positive connexion must be shown between irregularity and injury and that the inadequacy of the prices must be shown to have resulted from the injury, and a number of cases have been cited in support of the proposition. This is true. Where the injury is not the obvious result of the irregularity, actual evidence must be adduced to connect the one with the other and the burden of adducing such evidence is upon the person seeking to set aside the sale. But in a case like this, where the irregularity is an understatement of the probable price of the property, the connexion is so near that it is difficult to adduce evidence showing that the injury had resulted from the irregularity. In *Saadatmand Khan* v. *Phul Kuar* (6) at page 417, their Lordships of the Privy Council say :

> It is a misstatement of the value of the property which is so glaring in amount that it can hardly have been made in good faith and which, however, it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices, or from bidding at all.

So long as that consideration applies, I think it is open to the District Judge to infer without any other evidence that injury has resulted from the irregularity. In this case he has done so. I do not think I am justified in interfering with his finding on the ground that there must be some more materials under S. 115 Civil P. C.

The petition is dismisssed with costs.

Petition dismissed.

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(1) [1919] 4 Pat. L. J. 360=51 I. C. 359=(1919) P. H. C. C. 303.
(2) [1914] 19 C. L. J. 72=21 I. C. 207=18 C. W. N. 778.
(3) [1914] M. W. N. 871=26 I. C. 93=27 M. L. J. 302.
(4) [1912] 16 C. L. J. 566=15 I. C. 668.
(5) [1916] 10 S. L. R. 53=35 I. C. 520.
(6) [18 8] 20 All. 412=25 I. A. 146=2 C. W. N. 550=7 Sar. 380 (P.C.).

A. I. R. 1926 Madras 961

PHILLIPS AND ODGERS, JJ.

P. Arunachala Aiyar and *others*—Appellants.

v.

Collector of Tanjore—Respondent.

Appeal No. 428 of 1924, Decided on 28th October 1925, from a decree of the Dist. J., East Tanjore, D/- 23rd April 1924, in O. P. No. 71 of 1923.

Land Acquisition Act (1894), *S.* 18—*Reference to Court—Award of the Acquisition Officer is evidence—Burden is on claimant to prove that award is wrong.*

The award of the acquisition officer is evidence in proceeding under reference under S. 18. Statements in the award, such as statements as to contents of certain documents examined by the acquisition officer, are evidence and need not be proved by the production of the documents themselves.

The burden of proof is on the claimant to show that the award is wrong and the weight of that burden depends on the nature of the award: 27 *M. L. J.* 106, *Foll.*; 36 *Mad.* 395 and 32 *Cal.* 605 (*P.C.*), *Dist.* [P. 961, C, 1 & 2]

K. Bhashyam Ayyangar and *P. J. Kuppanna Rao*—for Appellants.

The Govt. Pleader—for Respondent.

Judgment.—This is an appeal against an award in land acquisition proceedings. The first objection taken is, that the judgment of the District Judge is inadequate on the ground that he has not discussed the evidence in the case, but has relied on the award of the acquisition officer. The contention here is that the statements in the award, such as statements as to contents of certain documents examined by the acquisition officer are not evidence, but must be proved by the production of the documents themselves. So far as the adequacy of the judgment is concerned, it must be observed that the Judge appears to have disposed of the reference as if he were hearing objections to an award as specified in the Act and accordingly he has dealt with the evidence adduced to support those objections and has not dealt with the evidence relied on by the acquisition officer which was not specifically impeached. Appellant's contention is supported by an observation in *Bommadevara Venkata* v. *Atmari Subbarayudu* (1) in which it was said that proceedings under part 3 of the Act are not by way of appeal but that observation must be taken in connexion with the facts of that case. It was a case relating to proceedings under S. 30 of the Act and under that section undoubtedly there is no question of an appeal. In *Marwadi Padmaji Maichand* v. *Dy. Collector of Adoni* (2) it was pointed out that the burden of proof is on the claimant to show that the award is wrong and the weight of that burden depends on the nature of the award. That the award can be looked at by the District Judge in references of this kind is clear from the provisions of the Act. S. 12 says that, such an award shall except as hereinafter provided be final and conclusive evidence as between the Collector and the person interested as to the true value of the land. If it is final and conclusive evidence in certain circumstances, it can be hardly said that it is no evidence at all in other circumstances namely, when a reference has been made to the District Court under S. 18. This is also clear from S. 18 itself which deals with these references, for it provides in Cl. 2, that the application shall state the grounds on which objection to the award is taken and under S. 21 the scope of the inquiry shall be restricted to a consideration of the interests of the persons affected by the objection.

Thus it appears that what the District Court has to consider is the objection raised by a claimant to the award, and the claimant is bound to state the grounds for such objection. In this respect the procedure is similar to an appeal in a suit where the appellant has to state in his memorandum of appeal the grounds on which he objects to the lower Court's judgment. The Privy Council decision in *Ezra* v. *Secretary of State for India* (3) can have no bearing on the present case. In that their Lordships were dealing with a suit and not with proceedings under the Land Acquisition Act. If the District Judge's judgment is looked at in that light, it appears that he has dealt with the evidence put forward by the claimant in support of the objections, namely, the sale-deeds which had already been inspected by the acquisition officer. The acquisition officer has given reasons

(1) [1913] 36 Mad. 395=25 M. L. J. 17=12 I. C. 436=(1911) 2 M. W. N. 401.

(2) [1914] 27 M. L. J. 106=24 I.C. 141.

(3) [1905] 32 Cal. 605=32 I. A. 93=9 C. W. N. 454=1 C. L. J. 227=8 Sar. 779 (P. C.)

for not accepting the sale-deeds as conclusive, chiefly on the grounds that there are other sale-deeds which give a fairer estimate of the market value of similar lands. That being so, the award of the acquisition officer has to be considered and in that he has given very good reasons for coming to his conclusions and nothing put forward by the claimants in appeal destroys the validity of his arguments. We, therefore, are unable to say that the compensation awarded is inadequate and certainly there can be no doubt that the claimants have been very extravagant in their demands. It is also noticeable that the present applicants own only one quarter of the land acquired and that other owners have all acquiesced in the compensation awarded. In those circumstances the rate of compensation must be accepted.

There remains only one question, viz., the value of the trees. The appellants state that the value has been awarded to the wrong persons. Apart from the fact these persons are not now before us, and if we had to give a decision on the point, it would be necessary to give them notice before deciding. It is conceded by the appellant's vakil that the materials before us are entirely inadequate to deal with the question. He is unable to point out to whom the compensation has actually been awarded and in respect of how many trees. In these circumstances it is impossible to consider this ground of appeal, for there are no available data on which a decision can be arrived at. This objection also fails.

Consequently the appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 962

SPENCER, J.

Arumugam Pillai and *others*—Defendants—Petitioners.

v.

A. Kadir Mohideen Rowther—Plaintiff—Respondent.

Civil Revision Petition No. 1001 of 1924, Decided on 30th March 1926, from the decree of the Sub-J., Nilgiris in Small Cause Suit No. 370 of 1924.

Civil P. C., O. 38, R. 1—Arrest on insufficient grounds—No evidence as to damages—General damages should be awarded—Civil P. C., S. 95,

Where in an action for damages for arrest before judgment on insufficient grounds, no evidence as to damages suffered is given, the Court should award general damages : 3 *L. W.* 30, *Rel. on.*

[P. 962, C. 2]

A. V. Viswanatha Sastri—for Petitioners.

S. Panchapagesa Sastri—for Respondent.

Judgment.—There has not been a proper trial in this case. The plaintiff sued defendants to recover what was due from them on accounts and what was due from others on defendants' guarantee.

The 1st defendant counter-claimed damages for arrest before judgment. He alleged that he was a partner with plaintiff and that he was not liable in this suit without taking an account of the partnership. The only issues framed by the Subordinate Judge were : (1) Is the claim true? (2) Are any of the defendants liable? Obviously there should have been issues on the questions whether the plaintiff and the 1st defendant were partners in the business, in which these debts were incurred and secondly whether the 1st defendant had personally guaranteed payments of the accounts of all customers whom he recommended to deal in plaintiff's shop ; and lastly whether the plaintiff's application to arrest 1st defenant before judgment was justified upon the grounds stated in O. 38, R. 1, Civil Procedure Code. No deed of partnership and no security bond were produced. The Judge has referred to some of the oral evidence, but not to the statement of plaintiff that the 1st defendant stood surety for four or five persons, but the accounts of about 90 persons had been debited to him. No attempt has been made to differentiate between articles shown in the accounts as taken by defendant and others taken by customers on his recommendation, or to distinguish between recommendations as to credit made without undertaking personal liability and a contract of guarantee. On this point there should be satisfactory proof that the defendant intended to make himself personally liable : Exs. 1, 1(a) and 1 (b) are consistent with either theory. The Judge observed that there was no evinceed as to damages sustained by 1st defendant's arrest. A Court may in such a case award general damages (vide)

Subraya Davay v. *Venkatarama Aiyar* (1). It is difficult to believe that defendant, an employee under Government suffered no loss in reputation by the arrest.

The decree is set aside and the suit is remanded for retrial on the evidence already recorded and such additional evidence as the parties may adduce upon the points referred to above. The costs will abide and follow the result.

Case remanded.

(1) [1911] 3 L. W. 30=32 I. C. 592=(1916) 1 M. W. N. 76.

A. I. R. 1926 Madras 963

ODGERS, J.

Ramaswami Nayakar—Plaintiff—Appellant.

v.

Raju Padayachi and *others*—Defendants—Respondents.

Second Appeal No. 275 of 1923, Decided on 11th September 1925, from the decree of the Sub-J., Cuddalore, in A. S. No. 209 of 1921.

(a) *Evidence—Appreciation.*

The fact that in one place of an account book the signature of a party may be forged cannot preclude the Court from holding that his singature in another place is genuine. [P 964, C 1]

(b) *Civil P. C., S.* 100—*Finding of fact.*

The question whether the self-acquired property of a member of a joint Hindu family has been thrown into the common stock or not is a question of fact. [P 964, C 1]

(c) *Hindu Law—Joint family—Registration Act, S.* 17.

There is no authority for the proposition that when a co-parcener throws self-acquired property into the common stock of the co-parcenary consisting of himself and others, a registered deed is necessary to effect the transaction : *A. I. R.* 1925 *Mad.* 1174 and 8. *L. W.* 400 *Expl.* ; *per Srinivasa Iyengar, J*, in 32 *I. C.* 955, *Doubted.* [P 964, C 2]

T. R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar and *S. Ramaswami Aiyar*—for Appellant.

K. S. Jayarama Aiyar—for Respondents.

Judgment.—This is an appeal involving title to a certain house which the plaintiff bought in Court auction. The question is whether the 8th Defendant, in pursuance of a decree against whom the sale was held, was competent to mortgage the entire house as he did or as he purported to do in 1911, or whether Defendants 2 to 6, who are his nephews together with his children, have also rights in the said house. It is common ground that the 8th Defendant acquired the house under the Will of one Poongavanam as his own separate property. The whole question in the second appeal is whether or not, after thus acquiring the suit house, the 8th Defendant threw it into the common stock of the joint family consisting of himself and Defendants 2 to 6 subsequent to his acquisition of it and before the family became divided in interest which event took place in 1904. Now, the District Munsif found that the 8th Defendant had not thrown it into the common stock, that is to say, that he had not given up his own exclusive rights and treated the property as joint family property. On the other hand, the Subordinate Judge held, differing from the District Munsif, that the evidence did establish that the house was thrown into the common stock.

The first point that is pressed on me is as to Ex. 6. Now Ex. 6 is a book containing a list which is headed List of particulars of house and manai, etc.," and for the purposes of this case page 13 and part of page 14 have been printed in the documents. The house in question is said to be Item No. 3 and these pages are signed at page 14 at the end of the 8th item by the 8th Defendant A. Appavu Padayachi. The District Munsif decided that Ex. 6 was not genuine and Mr. T. R. Ramachandra Aiyar, without going so far as to say that the question of the genuineness of Ex. 6 was concluded by the judgment of this Court in O. S. No. 303 of 1910, says that the Subordinate Judge has not given sufficient weight to Ex. 6 as established in that prior suit. In fact he must go the length of saying that owing to the Subordinate Judge's treatment of Ex. 6 and the evidence generally, the finding that the Subordinate Judge has come to is, in fact, a perverse finding. For, if he did not, with the exception of a point of law to be mentioned in a moment, the case simply resolves itself into a question of fact and appreciation of evidence, one Court taking one view of the evidence and the lower appellate Court another. The prior litigation referred to was between a plaintiff—a stranger to this suit—and Defendants 2, 8 and others. It concerned not the suit house but a certain tope, and the High Court sent down to

the District Judge for a finding on the question as to whether the suit land belonged to the 1st Defendant (who is the 2nd Defendant here), or whether it was the joint family property of all the defendants. Exhibit 6 here was Ex. 2 in that case, and the tope in question was entered on pages 15 and 16 with other family property, the 1st Defendant purporting to have signed the document on page 16. As found by the District Judge, the 1st Defendant denied his signature on page 16 and there was a difference between his alleged signature on page 16 and his admitted signature at the end of page 11. The finding was that there was no proof that the 1st Defendant signed Ex. 2 at page 16 and that no inference can be drawn that the 1st Defendant threw the lands into the common stock. The finding was accepted by the High Court.

Now, it seems to me that this decision can have no bearing whatever on the present case. The property in suit is different ; the pages in the book in question are different ; and it is to be noted that on page 11, according to the District Judge, the 1st defendant who is the 8th defendant here admitted his signature. It seems to me that the fact that in another place in the same book there may have have been a forged signature of the 8th defendant cannot preclude the Subordinate Judge in this case from finding that the signature is genuine at pages 13 and 14 of Ex. 6.

It was then argued that transactions and conduct subsequent to 1904, the date of the partition, are inadmissible in evidence. This argument was directed, I take it, to Exs. 1, 8 and 10 series and 7 and 9 which are relied on by the Subordinate Judge. It is said that these documents must all be held to be forgeries because from 1904 to 1906 there was ill feeling between these two defendants. The learned Subordinate Judge was quite sensible of that state of things and he regards the evidence as corroborating the other evidence that this house was thrown into the common stock in or before 1904. I think he is perfectly entitled to do so under S. 8 of the Evidence Act and if he finds on the evidence that there is no sufficient reason for regarding these documents as forgeries, I have nothing more to say to his finding in second appeal. So then treating the case purely on a question of fact and appreciation of evidence, it is clear that the second appeal is liable to be dismissed.

Now the further question arises whether the law which has been quoted to me makes any difference in this view. I will first deal with the cases cited on behalf of the appellant. The first is that in *Lala Muddum Gopal Lal* v. *Khikhinda Koer* (1). In that case there were two brothers and one of them was disqualified under the Hindu Law on account of a physical infirmity. The brother of the disqualified co-parcener nevertheless treated his brother as a member of the family entitled to equal rights until it became clear that the latter's malady was incurable. Their Lordships said that

> acts done out of kindness and affection to the disadvantage of the doer of them, should not be construed as a gift when it is plain that no gift could have been intended.

That really does not touch the present case in the slighest and it is a case from all the circumstances of which their Lordships inferred that the disqualified brother was not intended to be given a share by the other. The next case, *Krishnaji Mahadev* v. *Moro Mahadev* (2) also turns on a question of fact as to whether two brothers there had voluntarily thrown their property in the joint stock with the intention of abandoning all separate claims upon it. If they did so, the property would thereupon under the Hindu Law become joint property.

A more interesting question has been raised this morning for the first time (there is no evidence of its having been raised in either of the lower Courts), viz., that when a co-parcener throws self-acquired property into the common stock of the co-parcenary consisting of himself and others, a registered deed is necessary to effect the transaction. Three cases are relied on in this Court of which one was decided by myself sitting as a single Judge in *Made Gouda* v. *Chenne Gouda* (3). Now it is to be noticed that in both these cases, where a deed was, held to be necessary, the transaction was in the eye of the law, between strangers. In *Made Gouda* v. *Chenne Gouda* (3) I expressly said that I found it difficult to understand how the second defendant could be made

(1) [1891] 18 Cal. 341=18 I. A. 9=5 Sar. 676 (P. C.).
(2) [1891] 15 Bom. 32.
(3) A. I. R. 1925 Mad. 1174.

a co-sharer as he was admittedly not a member of the joint family and therefore not a co-parcener; and in *Venkata Reddy* v. *Kuppa Reddi* (4) Seshagiri Aiyar, J., who delivered the judgment of the Court, came to the conclusion that the first and the fourth branches of the family there became divided inter se and that they held the A Schedule properties as tenants-in-common, i. e., that they had become divided. The question there was whether joint living, failure to keep accounts, the fact that marriage expenses were incurred indiscriminately without reference to the shares belonging to the two brothers, and that acquisitions were made jointly, would constitute what was originally separate property into co-parcenary property so that if the first branch elected to throw its extra share into the hotchpot, the transaction could only be regarded as a gift of half of the extra share to the fourth branch and would require a registered document. The third case that was principally relied on in this connexion is *Thylambal* v. *Krishna Pattar* (5) decided by Coutts-Trotter and Srinivasa Aiyangar, JJ. The former said that it is possible for a member of a Hindu family who has got self-acquired properties to convert them, if he chooses, into family property in which the other members of the family will have a vested interest and that the only question in that case was whether the facts pointed to the conclusion that the first defendant did convert his own property into family property or not. Not a word is said by the former learned Judge about the necessity of a registered deed. Srinivasa Aiyangar, J., while concurring in the judgment of Coutts-Trotter, J., entertained some doubt as to whether a member of a joint Hindu family who owns immovable property as his self-acquisition can convert it into a joint family property without an instrument in writing registered at least where the Transfer of Property Act is in force. The learned Judge found difficulty in understanding the conversion of individual property into joint property except by way of a transfer and thought that such a conversion would on analysis be found to partake of the character of one or other of gift, exchange or sale. It is certainly difficult, speaking for myself and with all deference to the learned Judge to see how the conversion would ordinarily be by exchange or sale. If the transaction were one by way of gift, it being impossible for a man to make a gift to himself, I gather we should have to conceive the donor as in the position of a stranger to the co-parcenary of which he is in fact himself a member. However, this is a question that need not be gone into by me at the present moment. The question is an interesting one raised by the learned Judge as a matter of doubt in his own mind and it still awaits as far as I am aware an authoritative decision.

Beyond this there is no authority that has been produced before me for saying that, where a co-parcenary owner of self-acquired property wishes to throw the latter into the common stock of the co-parcenary, he can only do so by a registered instrument. Nothing is said about this in the later cases on the point of throwing into the common stock, as for instance, *Suraj Narain* v. *Ratan Lal* (6), a case in the Privy Council, where their Lordships say:

> In a Hindu joint family the law is that, while it is possible that a member of the joint fami should make separate acquisition, and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged from all the facts of the case.

And in *Kedar Nath* v. *Ratan Singh* (7) the question was considered as to whether a certain estate was the self-acquired property of one of the brothers or was the joint property of the three. It was said in comment on this and other cases of the kind that the transactions took place before the Transfer of Property Act, but whether that makes any difference in law, is, as I have said, a matter not yet decided. In *Sudarsanam Maistri* v. *Narasimhulu Maistri* (8), Bhashyam Aiyangar, J., says:

> Property acquired without the aid of joint family property, by one or more individuals thereof, whether they belong to different branches or to one and the same branch of the family may by act of parties be incorporated with the joint property of the main family or one of its branches;

and no question is raised there as to whether when that took place a registered instrument is required. The result is

(4) [1918] 8 L. W. 400=47 I. C. 716=(1918) M. W. N. 680.

(5) [1916] 32 I. C. 955.

(6) [1918] 40 All. 159=40 I. C. 988=44 I. A. 201 (P. C.).

(7) [1910] 32 All. 415=7 I. C. 648=37 I. A. 161 (P. C.).

(8) [1902] 25 Mad. 149=11 M. L. J. 353.

that the point of law raised to-day on behalf of the appellant does not take his ease any further.

I was then asked to convert this suit into a suit for general partition in order that the house in question might be allotted to the 8th defendant and that therefore his alienee, the Court auction-purchaser, might be decreed possession thereof. It is difficult to see how this can be done as the suit only concerned this one item of property.

The second appeal must be dismissed with costs of respondents 1 to 5.

Appeal dismissed.

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* A. I. R. 1926 Madras 966

DEVADOSS AND WALLER, JJ.

Srinivasa Aiyangar—Plaintiff—Appellant.

v.

Vellayan Ambalam—Defendant—Respondent.

Letters Patent Appeal No. 176 of 1924 Decided on 20th January 1926, from the judgment of Madhavan Nair, J., D/- 19th September 1924, in Second Appeal No. 404 of 1922, reported in *A. I. R.* 1925 *Mad.* 338.

* (a) *Civil P. C., S. 64—Property mortgaged pending attachment—Auction-purchaser must sue for possession within 12 years from date of taking symbolical possession—Limitation Act, Art. 138—Transfer of Property Act, S. 60.*

Where property is usufructuarily mortgaged during pendency of an attachment and it is subsequently sold, the purchaser must sue for possession within 12 years from the date when he took symbolical possession. Nor could he ever sue for redemption. [P 967 C 1]

(b) *Transfer of Property Act, S. 76—Usufructuary mortgage—Mortgagor is entitled to possession on the expiry of term.*

When a usufructuary mortgage is created for a period of years the mortgagor would be entitled to possession on the expiry of the period. [P 967 C 1]

K. Bhashyam Aiyangar—for Appellant.

T. V. Muthukrishna Aiyar—for Respondent.

Judgment.—The suit property belonged to one Venkataranganadha Naicker. It was sold in Court auction on the 13th of July 1891 in execution of a small cause decree obtained against him and was purchased by the predecessor-in-title of the appellant. The sale was confirmed on the 14th of September 1891. The property was attached before sale and during the pendency of the attachment it was mortgaged on the 15th of June 1891 by Venkataranganadha Naicker to the predecessor-in-title of the defendant. The plaintiff-appellant has brought this suit for redemption of the mortgage on the ground that the defendant is only a mortgagee and that he being the owner of the equity of redemption is entitled to redeem the property. The District Munsif decreed the appellant's suit, but the Subordinate Judge reversed it on the ground that the defendant had acquired a good title by prescription, On second appeal Madhavan Nair, J., held that the appellant's suit was barred under Art. 137 of the Limitation Act.

It is contended by Mr. Bhashyam Aiyangar for the appellant that the defendant is only a mortgagee and what was sold on the 13th of July 1891 was only the equity of redemption and that he is, therefore, entitled to redeem the property. The defendant got an assignment of the otti of the suit property on the 29th of August 1909. There is a recital in the deed of assignment that the land was being enjoyed as per otti and hypothecation deed and that the assignee should enjoy the lands as per deeds above referred to. On the strength of this recital it is contended that the defendant has been in possession of the property only as a mortgagee and he cannot therefore be said to have acquired any title to the property against the appellant.

When property is sold in Court auction what is sold is the right, title and interest of the judgment-debtor as it is on the date of the sale, and any private alienation or transfer pending the attachment is void against all claims enforceable under the attachment. Under S. 64 of the Code of Civil Procedure an auction purchaser gets title to the property free of any encumbrance or any title created by the judgment-debtor after the property was attached so as to preserve the title of the judgment-debtor as it was on the date of the attachment for the benefit of the attaching creditor and, therefore, any title created after the date of the attachment to the prejudice of the attaching creditor cannot avail against the judgment-creditor as well as the auction-purchaser. The auction-purchaser gets it free from any encumbrance or any

burden that might have been created by the judgment-debtor after the date of the attachment. The mortgage of the 15th of June 1891 could not have created a title against the auction-purchaser. The auction-purchaser obtained symbolical delivery of the property. He should have asked for possession of the property, and if he died the Court would have delivered the property to him, for the mortgagee claimed only under the judgment-debtor and his possession, therefore, was the possession of the judgment-debtor, and if he was unable to obtain possession he should have enforced his right by suit. The proper article applicable to a case like this is Art. 138 of the Limitation Act.

Granting for argument's sake that Art. 137 is applicable to the case, the appellant should have brought his suit within 12 years of the date when the judgment-debtor was entitled to possession. It is contended by Mr. Bashyam Aiyangar that the appellant's predecessor-in-title was not entitled to possession as the property was under mortgage. Ex. I is the mortgage-deed, dated the 15th of June 1891. The period fixed in the document is five years and in 1896, therefore, the mortgagor was entitled to possession. The contention of Mr. Bhashyam Aiyangar is that, so long as the usufructuary mortgagee is in possession, the mortgagor is not entitled to possession. It is very difficult to follow this argument, for when a usufructuary mortgage is created for a period of years the mortgagor would be entitled to possession on the expiry of the period; otherwise, if the argument is to hold good, it might be said that for 60 years the mortgagor would not be entitled to possession. In this case the suit should have been brought within 12 years from 15th June 1896, but it was brought on 4th April 1918, and it is, therefore, barred by limitation.

It has been seriously argued that inasmuch as the defendant claimed only a mortgagee's right, the appellant is entitled to redeem the property. This contention overlooks the fact that the defendant never claimed to be a mortgagee under the appellant. He no doubt claimed to be a mortgagee from the judgment-debtor. There is no privity of contract between the appellant and the defendent, and, even though the defendant claims only a mortgagee's right that would not give the appellant a right to redeem the property. If the auction-purchaser does not bring a suit for possession within 12 years, under Art. 138, his suit for possession of the property purchased by him would be barred. The fact that the judgment-debtor has created a mortgage or a leasehold right pending the attachment would not enure for the benefit of the auction-purchaser who is entitled to get possession within 12 years of the sale under Art. 138.

In this view it is unnecessary to discuss in detail all the authorities quoted for and against the contention of the appellant. In *Dinendranath Sannial* v. *Ramkumar Ghose* (1) Sir Barnes Peacock in delivering the judgment of their Lordships of the Privy Council observes:

> Under (a private sale) the purchaser derives title through the vendor and cannot acquire a better title than that of the vendor. Under (a sale in execution of a decree) the purchaser, notwithstanding he acquires merely the right, title and interest of the judgment-debtor, acquires that title by operation of law adversely to the judgment-debtor and freed from all alienations or incumbrances effected by him subsequent to the attachment of the property sold in execution.

In *Girija Nath Roy* v. *Upendra Nath Pal* (2) it was held by Mookerjee and Beachcroft, JJ., that:

> If the mortgaged property was under attachment in execution of a decree when the mortgage was executed, the mortgage would be inoperative under S. 276 of the Civil P. C., of 1882 against the execution-purchaser, although the decree-holder was not prejudicially affected by the mortgage.

In *Subba Reddi* v. *Jayaramayya* (3) my brother Odgers, J., held that a person who has purchased the property during attachment cannot apply to set aside the Court auction-sale as the conveyance to him is void against the claims enforceable under the attachment. The principle of these decisions is that any private transfer or any title created by the judgment-debtor pending the attachment cannot in any way affect the right of the attaching creditor to have the property sold and delivered free of the title created by the judgment-debtor. The provisions of S. 64, Civil P. C., are clear in in its terms and no one who gets a title from a judgment-debtor pending attachment can set up that title against the attaching creditor or the auction-purcha-

(1) [1882] 7 Cal. 107=8 I. A. 65=10 C. L. R. 281=4 Sar. 213 (P. C.).
(2) [1913] 20 I. C. 241.
(3) A. I. R. 1923 Mad. 659.

ser. The case in *Gangayya* v. *Venkataramayya* (4) does not help the appellant. In that case the attaching creditor agreed for a consideration with the purchaser pending the attachment to release an item of the attached property and not to bring it to sale in execution of the decree. The assignee of the decree with notice of the agreement was held not entitled to proceed against the item of property agreed to be exempted from sale in execution. If in this case the defendant's predecessor-in-title had agreed to hold the property under the appellant's predecessor-in-title, and executed to him an agreement, the matter would be different. No such agreement was executed and no contention is put forward that the defendant's predecessor-in-title ever agreed to hold the property as mortgagee of the appellant's predecessor-in-title.

Considerable argument was advanced to show that the word "void" in S. 64 means only "voidable." It is unnecessary to consider this contention ; for, whether it is void or voidable, it is immaterial for the present purpose. The auction-purchaser's clear right was to get possession of the property ; but not having got possession of the property within the time allowed by law, he is not entitled to possession, and it is immaterial what the title of the present defendant is. If the claim of the auction-purchaser is barred against the judgment-debtor, it is equally barred against any person who claims under him.

Another contention put forward by Mr. Bhashyam Aiyangar is that this is a suit to redeem and, therefore, neither Art. 137 nor 138 is applicable to the case. As I have already observed, the relationshjp of mortgagor and mortgagee never existed between the appellant and the defendant or their predecessor-in-title and, therefore the plaintiff cannot redeem the property when it is not subject to a mortgage in his favour. When the auction-purchaser purchased the property he purchased it free of the mortgage and not subject to the mortgage. If he had bought it subject to the mortgage, the auction-purchaser would be entitled to redeem the property as he purchased only the equity of redemption. As already observed, what was sold in 1891 was not the equity of redemption but the property itself. Therefore the decision *Tairamiya* v. *Shibeli Saheb* (5) has no application to the present case. *Gopala Dasu* v. *Rami* (6) is not applicable as the defendant or his predecessor-in-title never held out that he was a mortgagee under the appellant's predecessor-in-title.

The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

(4) A. I. R. 1923 Mad. 230.

(5) [1920] 44 Bom. 614=57 I. C. 568=22 Bom. L. R. 802.

(6) [1921] 44 Mad. 946=(1921) M. W. N. 385=41 M. L. J. 194.

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* A. I. R. 1926 Madras 968

DEVADOSS, J.

Singavarpu Rajaratnam and *another*—Appellants.

v.

Sheik Hassan Bi and *another* — Petitioners—Respondents.

Appeal No. 52 of 1924, Decided on 11th March 1926, from the appellate order of the Addl. Sub-J., Bezwada, D/- 21st November 1923, in A. S. No. 23 of 1923.

* (a) *Civil P. C., S. 47 — No order passed specifying items to be delivered to decree-holder—Decree-holder given delivery of items in possession of judgment-debtor's vendee — Vendee can object—Objection is one under S. 47 and not under Civil P. C., O. 21, R. 99 or R. 101.*

Where before determining what item fell to the share of the decree-holder, particular items of property in the possession of a vendee from judgment-debtor were delivered to decree-holder.

Held : that such a contention could have been put forward by the judgment-debtor and it is difficult to see why the transferee from the judgment-debtor pending execution could not put forward the same contention. An objection of such a nature is not one under O. 21, R. 99 or R. 101, but one under S. 47, and his objection would prevail in spite of a notice served upon him that certain items are to be delivered to decree-holder : *A. I. R.* 1925 *Mad.* 1133 and 14 *L. W.* 92, *Rel. on.* [P 969 C 1]

(b) *Jurisdiction—Venue.*

A Court should look at the substance of the petition and not merely at the heading or sections relied on. [P 969 C 1

P. Markandeyulu—for Appellants.

P. Satayanarayana Rao—for Respondents.

Judgment.—The first point raised in this appeal is that the petition for restitution of possession by the respondents is incompetent inasmuch as the appli-

cation on the ground of dispossession is barred by O. 21, R. 102, Civil Procedure Code. That rule applies to cases where a person who gets title from the judgment-debtor is prevented from objecting to the delivery of possession to the judgment-creditor of the property directed to be delivered to him. In this case the respondents obtained a sale of the judgment-debtor's property on 23rd July 1920, when an application for execution was pending and the property had been divided but lots had not been cast. The execution petition was dismissed on the ground that one of the decree-holders had attained majority and that the petition filed by the next friend was not sustainable. A subsequent application for execution was made but no lots were cast and the items that fell to the share of the decree-holders were not determined. Without determining the items that ought to go to the decree-holders, delivery was ordered and certain items of property in the possession of the respondents were delivered to the decree-holders. They applied to the Court for restitution of possession on the ground that it was not ascertained at the time of delivery which items fell to the decree-holder's share. This contention was upheld by the District Munsif and he ordered restitution of the property. On appeal the Subordinate Judge of Bezwada upheld the order of the District Munsif.

Mr. Markandeyalu's objection to the order is that it is not competent for the transferee of the judgment-debtor's right in the property to file such an application. It is conceded that the judgment-debtor himself could file an application if any item of property is wrongly delivered to the decree-holder. The complaint in this case is that before determining what item fell to the share of the decree-holder particular items of property in the possession of the respondents were delivered. Such a contention could have been put forward by the judgment-debtor and it is difficult to see why the transferee from the judgment-debtor pending execution could not put forward the same contention. This application is not one under O. 21, R. 99 or R. 101, but one under S. 47. Though wrongly Rr. 99 and 101 are mentioned in the petition we have to look at the substance of the petition and not merely at the heading. Mr. Markandeyalu relies upon *Kanakasabai Mudaliar* v. *Rajagopal Naidu* (1) and *Rev. V. C. L. Nellson* v. *Sadananda* (2) in support of his contention. These cases have no application to the present case for, there the application was made not on the ground that the property was wrongly delivered but on the ground that the property was not liable to be delivered as the applicants were in possession. Their possession was only the possession of the judgment-debtor and, therefore, they could not apply for restitution under R. 99 or R. 101. The application of the respondents, therefore, was not incompetent.

The next contention raised by Mr. Markandeyalu is that notice was served on the judgment-debtors and they did not object to the delivery of the property and, therefore, they cannot question the delivery after it has taken place. It does not appear that notice was issued to the respondents and the judgment-debtor that the items now in dispute were going to be delivered to the decree-holder. Even if such a notice was issued it would not be competent to the Court to deliver certain items of property without determining whether those items fell to the share of the decree-holder. In a case where a division of property has to be made and lots cast before the share of each decree-holder could be ascertained it would not be proper to order delivery of particular items to the decree-holder. Therefore the service of notice in this case even if it did mention particular items would not be proper notice as required by law and it would not prevent the respondents from getting the relief available to them under S. 47. In *Vallabha Valia Raja* v. *Mankata Kovilakath* (3) and *Jainulabdin Sahib* v. *Krishna Chettiar* (4) it was held that a judgment-debtor's remedy is under S. 47 when property was wrongly delivered or some item of property to which the decree holder was not entitled was wrongly taken possession from the judgment-debtor.

In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

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(1) [1917] 6 L.W. 568=42 I.C. 523.
(2) [1910] 9 M.L.T. 136=8 I.C. 805.
(3) A.I.R. 1925 Mad. 1133.
(4) [1921] 14 L.W. 92=41 M.L.J. 120=63 I.C. 200=(1921) M.W.N. 491.

* A. I. R. 1926 Madras 970

KRISHNAN AND VENKATASUBBA RAO, JJ.

Mandoori Durga Mallikharjana Vara Prasad Rao and *another*—Appellants.

v.

Gudipudi Gopalacharlu and *others*—Respondents.

Appeal No. 221 of 1922, Decided on 17th March 1926, from the decree of the Sub-J., Bezwada, D/-12th January 1922, in Original Suit No. 90 of 1919.

* (a) *Civil P. C., S. 92—Absence of sanction—Objection as to, cannot be waived.*

Objection as to absence of sanction under S. 92 is not an objection that can be properly waived. The very object of insisting upon the sanction of a Collector or of the Advocate-General being obtained as a preliminary to a suit under S. 92 is to secure that suits are not brought against trustees unless there is a prima facie case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. [P 970, C 2]

* (b) *Civil P. C., S. 92—Sanction obtained against person not a trustee, cannot avail against real trustee subsequently.*

The object of this section will be defeated if it is left open to a plaintiff to get sanction against a person who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit. [P 970, C 2]

(c) *Civil P. C., S. 92—New defendant added—New sanction is necessary if addition alters nature of suit.*

The test as to whether a new sanction is necessary when a new defendant is added, depends on whether the scope of the suit has been really enlarged or altered by the addition of the new party : 1920 *M. W. N.* 478, *Foll.* [P 970, C 2]

P. R. Ganapati Iyer—for Appellant.

P. Satyanarayana Rao and *T. Ramachandra Rao*—for Respondent.

Judgment.—This is an appeal arising from a suit filed under S. 92 of the Civil Procedure Code for the removal of Defendants 1 to 7 from trusteeship of the plaint temple, for a declaration that certain properties described in the schedule belonged to the temple and for framing a scheme. The suit has been dismissed by the lower Court on the ground inter alia that none of the Defendants 1 to 7 is a trustee of the temple but that the trustee is really the 8th defendant, the Zemindar of Mirzapur, and that against him no sanction was obtained from the Collector and that the endorsement of sanction by the Collector on the plaint before he was added as a party is not a sufficient sanction to enable the suit to be maintained against him.

We think the Subordinate Judge is right in holding that the suit is not maintainable on the present sanction. The 8th defendant is the real trustee and as against him no sanction has been obtained. 8th defendant objected to the suit going on in the lower Court on this very ground, though before us he is not pressing that objection as he has joined the plaintiffs. Nevertheless we think that the conclusion that the sanction obtained was not a proper sanction to justify the suit under S. 92 is a conclusion which that Court was entitled to come to and it is not open to us to set aside its order in appeal merely because the 8th defendant now waives his objection before us. We think it is not an objection that can be properly waived. The very object of insisting upon the sanction of a Collector or of the Advocate-General being obtained as a preliminary to a suit under S. 92 is to secure that suits are not brought against trustees unless there is a prima facie case against them of breach of trust or unless circumstances exist which necessitate the Court's interference in the administration of the trust. The object of this section will be defeated if it is left open to a plaintiff to get sanction against a person who is not the trustee and then use it afterwards against the real trustee. The personality of the trustee and the way in which he is dealing with the trust are matters of material consideration in granting sanction for a suit.

It is quite true that every addition of a defendant is not necessarily to be regarded as invalidating the sanction already obtained under S. 92. The test as to whether a new sanction is necessary when a new defendant is added has been laid down in the case of *Gopalakrishna Iyer* v. *Ganapathi Iyer* (1), as depending on whether the scope of the suit has been really enlarged or altered by the addition of the new party. We accept that statement as embodying the right principle in considering the question at issue. In the case before us the addition of the 8th defendant entirely changes the nature

(1) [1920] M. W. N. 478=58 I. C. 124=12 L. W. 772.

and scope of the suit. Against him there is no allegation of any breach of trust. As the learned Subordinate Judge has found there is no reason whatsoever for removing him from the trusteeship and nothing to justify the Court's interference in the administration of the trust. We accept that finding. The 8th defendant is the Zemindar of Mirzapur. We have no doubt that he would discharge his duties as trustee to the satisfaction of all concerned worshippers and others. In these circumstances we think that the addition of the 8th defendant subsequent to the obtaining of the Collector's sanction has rendered that sanction invalid and hold that the suit is not maintainable and dismiss the appeal, but in the circumstances we do not propose to grant costs to either of the parties.

Appeal dismissed.

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* A. I. R. 1926 Madras 971

PHILLIPS AND MADHAVAN NAIR, JJ.

T. Kaliappa Mudaliar—Petitioner.

v.

Kumarasami Mudali—Respondent.

Civil Revision Petition No. 510 of 1924, Decided on 18th March 1926, from the order of the Dist. J., North Arcot, D/- 1st April 1924, in C. M. A. No. 18 of 1924.

* (a) *Civil P. C., O. 17, R. 2—Party present—Pleader reporting no instructions—Dismissal is decree ex parte—Civil P. C., O. 3, R. 1.*

When a party's pleader reports no instructions the dismissal of the suit amounts to a decree ex parte for default of appearance under O. 17, R. 2, although the party is personally present in Court.

The appearance contemplated by the Code must be, not as a man, but as a party and with the intention of acting as such party in that suit and therefore the mere fact that the party was present in Court when his pleader reported no instructions would not amount to an appearance: 30 *Mad.* 274, *Affirmed.*

[P 971, C 2, P 973, C 2.]

K. Rajah Iyer—for Petitioner.

C. V. Anantakrishna Iyer—for Respondent.

Judgment.—This civil revision petition is against the decision of the District Court, North Arcot, in the following circumstances. The petitioner is the 1st defendant in O. S. No. 11 of 1921 in the Sub-Court of Vellore. On 24th November 1923 the suit was posted for hearing and his witnesses were absent. His pleader applied for an adjournment and was refused. Then the pleader said he had no instructions. The 1st defendant himself was present. The suit was decreed against him. He applied to the Sub-Court to vacate that decree and the Sub-Court ordered that the suit would be restored on condition that the appellant paid into Court the amount of the decree and costs. On appeal the District Court held that the Sub-Court had no jurisdiction to restore the suit as it was really decreed under O. 17, R. 3, Civil Procedure Code, and that the proper remedy of the appellant was to appeal on the merits, which he had not done. The District Court declined to interfere with the order and the appellant-petitioner now files this civil revision petition.

The point for decision is, when a party's pleader reports no instructions and the party himself is personally present, is a dismissal of the suit or a decree ex parte for default of appearance under O. 17, R. 2, or does the case come under O. 17, R. 3 of the Code? It appears to me that when a party is himself present and has not done something which he was required to do, namely, produce his witnesses, the order is under O. 17, R. 3 and not an order for default of appearance.

It is argued, however, that, since the party was represented by his pleader, the party, when his pleader withdrew from the case, cannot for that hearing be held to have been present in law, although he was present in person, the argument being that he was not prepared to go on with the case himself. I am not able to appreciate this distinction. If it were open to a party to whom time was granted and who has failed to produce his evidence, when his pleader retires from the case, because an adjournment is refused, to plead that he is not ready to conduct his case and therefore any dismissal of the suit must be one for default of appearance, it is difficult to say to what kind of default O. 17, R. 3 applies. The party when taxed with failure to perform any of the duties enumerated in O. 17, R, 3 could always put up his pleader to retire from the case, and then himself plead that he could not conduct it. My view,

therefore, is that if a party's pleader, on the party's own instuctions given in Court in person, retires from the case, the party must himself carry on the case. It cannot be within the option of the party to decide whether or not he is putting in an appearance which is an appearance in law.

In another case which I have lately heard, C. M. P. No. 3591 of 1923. Mr. Jayarama Aiyar sought to support the present argument by a reference to a foot-note to the Civil Rules of Practice, No. 276, quoting the proceedings of the High Court, dated 15th March 1821, which runs :

> A party who has retained a vakil to appear for him cannot be heard in person unless he has withdrawn the vakalatnama.

Mr. Varadachariar who appeared on the other side was able to trace this ancient rule to its source, and pointed out that it was framed under S. 22 of Regulation XIV of 1816 which is directed towards ensuring that a vakil will only undertake a case on a vakalat and that if he has signed a vakalat to one of the parties he cannot accept a brief for the other party. S. 13 of the same regulation permits a party to appear in person and plead his case if his pleader is unable to attend. This makes it evident that the rule was not meant to preclude a party from appearing and pleading his own case when his pleader was unable to do so, except on the condition that he first withdrew the vakalat. When, then, a party's pleader is merely absent, the party when present can conduct his own case in Court and mere absence of a party's pleader will not of itself constitute absence of the party when the party is in fact present in Court. As to whether a similar inference should be drawn when the pleader, with the party at his elbow, merely reports no instuctions, there are no doubt two reported cases to the contrary, namely, *Gopal Row* v. *Maria Suraya Pillai* (1) and *Damodar Das* v. *Raj Kumar Das* (2). In both of these case it was held that where a pleader appeared and was refused adjournment and then declined to proceed with the suit and it was dismissed, it was a dismissal for default, even though the plaintiff himself was personally present. The argument is that the party was appearing not in his own capacity, but by his pleader ; and therefore, when the pleader declined the party failed to appear as from that time. For my part I find it very difficult to resist the inference that when a party is present instructing his pleader to report no instructions the party is thereby taking upon himself the conduct of his own case and cannot be heard to say that he is not. The case reported in *Pichamma* v. *Sreeramulu* (3) does not help. In that case neither the party nor his pleader was present. Nor does the case in *Manickam Pillai* v. *Bathummal* (4) and the Privy Council case quoted therein, *Radha Kishan* v. *Collector of Jaunpur* (5). In the case in *Shivdayal Ramcharan* v. *Khetu Gangu* (6) both the pleader and the party were absent and the Court, after remarking that the pleader was not present by virtue of his having delegated his powers to another pleader to whom he could not delegate them, went on to remark : "As the defendant was not himself present the decree passed against him was an ex-parte one." This seems to imply that if the defendant had been present in person the decree would not have been ex parte. As at present advised I am not prepared to hold that a party, who appears in person when his pleader is absent or on the instruction of the party reports no instructions, has not put in an appearance in the case. I think, however, in view of the ruling in *Gopala Row* v. *Maria Susaya Pillai* (1) and *Mahant Damodar Das* v. *Raj Kumar Das* (2) quoted above that it is advisable that the point should be put before a Bench, which may, if it thinks fit, refer it to a Full Bench for a definite ruling, and I order accordingly.

This petition coming on for final hearing the Court delivered the following Judgment :

Judgment of the Bench

Phillips, J.—Wallace J. has referred a point for the decision of a Bench, namely, whether a party when he appeared by a pleader who after an application for adjournment has

(1) [1907] 30 Mad. 274=17 M. L. J. 225.
(2) A. I. R. 1922 Patna 485=1 Pat. 188.
(3) [1918] 41 Mad. 286=34 M. L. J. 24=43 I. C. 566=(1918) M. W. N. 92 (F. B.).
(4) A. I. R. 1925 Mad 21=47 Mad. 819 (F.B.).
(5) [1901] 23 All. 220=28 I. A. 28=5 C. W. N. 153 (P. C.).
(6) [1896] 20 Bom. 293.

been refused, reports no instructions is to be deemed ex parte or whether he if personally present in Court at the time must be deemed to have "appeared" in the case. Wallace, J.'s order by inadvertence purports to refer the above question alone for our decision, but we must take it that the civil revision petition itself has been referred for disposal.

The question at issue was decided in *Gopala Row* v. *Maria Susaya Pillai* (1) by a Bench of this Court, where it was held that a plaintiff fails to appear within the meaning of S. 102, Civil Procedure Code, when his pleader declines to proceed with the suit. It makes no difference that the party himself was present in Court. This case actually determines the point before us, and there has been no reported decision to the contrary since the date of this case i. e., 1907. That decision has also been followed in *Mahant Damodar Das* v. *Raj Kumar Das* (2), *Lalji Sahu* v. *Lachmi Narain Singh* (7), *Prabhu* v. *Dwarka Prasad* (8) and *Ramdhan Tewari* v. *Bishun Progash Narain Singh* (9). In one of those judgments a statement is made that the Calcutta High Court takes the same view, but possibly this refers to an unreported case, for no reported decision of the Calcutta Court has been cited before us. A different view is taken in *Sunderlal* v. *Goor Prasad* (10) but only as an obiter dictum. On the facts of that case the decree was held to have been passed ex parte. The other case cited, *Ismail Ebrahim* v. *Haji Jan Mahomed* (11), does not seem to be really in point. We have therefore the decision of this High Court followed by practically all the Judges of the Patna High Court, and there does not appear to be any good reason why we should not follow the same. As the correctness of the decision is questioned in Wallace, J.'s reference we think it advisable to add our own reasons.

The real question for determination at issue is whether the appearance menticned in O. 3, R. 1 is merely a physical appearance, or whether it must be an appearance with the intention of pleading in a suit. It is argued for respondents that mere physical appearance is sufficient, but if this is so it would be an appearance if a party happened to be anywhere on the Court precincts with or without the knowledge of the Court. It is therefore rather difficult to accept the argument that mere personal appearance is sufficient. It is clearly, we think, intended that the appearance must be, not as a man, but as a party and with the intention of acting as such party in that suit. If this is correct, then the mere fact that the party was present in Court when his pleader reported no instructions would not amount to an appearance, for he is merely there as the person who was represented by his pleader. The pleader acted on his behalf and when he ceased to do so, the party tock no further part in the proceedings. The mere fact that he was in Court cannot make it an appearance in the suit. We must therefore hold that in the present case there was no appearance by the defendants and that the application to set aside the order as passed ex parte was competent.

On this application the Subordinate Judge has passed the following order:

> Without any expression of opinion on the merits of the application and the provision of law under which it is sought to be put in, I propose to set aside the decree on petitioner's depositing into Court the amount of decree and costs up to this day within one month from this date.

The appellant appealed against this order to the District Judge who was inclined to hold that no appeal lay, but that, if an appeal lay, the Subordinate Judge was entirely competent to deal with the matter because he had the conduct of the suit throughout and therefore the District Judge refused to interfere with a matter which was fully within the decision of the Subordinate Judge. This would be quite right if the Subordinate Judge had exercised any judicial discretion at all, but in the present case he has entirely refused to form an opinion on the merits of the case, i. e., he omitted to determine under O. 9, R. 13 either that summons was not duly served or that the appellant was prevented by any sufficient cause from appearing when the suit was called on for hearing. Until that point was decided the Subordinate Judge had no

(7) [1918] 3 Pat. L. J. 355=47 I. C. 27.
(8) [1919] 4 Pat. L. J. 152=50 I. C. 323.
(9) [1920] 5 Pat. L. J. 17=54 I. C. 715=1 Pat. L. T. 156.
(10) [1898] 23 Bom. 414.
(11) [1909] 33 Bom. 475=3 I. C. 992=10 Bom. L. R. 1172.

power to set aside the decree on terms or otherwise. It is therefore an order passed without a finding on the point necessary to be determined before such an order could be passed against the respondent. Consequently the District Judge's order leaving the whole matter to the Subordinate Judge's discretion cannot be upheld, for, that discretion if it can be so called, was exercised in an arbitrary manner. The petition will have to be remanded to the Subordinate Judge for fresh disposal in the light of the above. Costs here will abide the result and be provided for in that Court's order.

Case remanded.

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* A. I. R. 1926 Madras 974

KRISHNAN, J.

Raghava Aiyangar and *another*—Appellants.

v.

Irula Thevan and *others*—Respondents.

Second Appeal No. 1569 of 1923, Decided on 25th March 1926, from the decree of the Sub-J., Sivaganga, in Appeal Suit No. 95 of 1921.

* *Civil P. C., S. 11—Adverse finding—Appeal —Right to — Person in whose favour a suit is dismissed may appeal if issues decided are against him.*

In a suit by a mortgagee against A for possession, mortgagor was joined for the express purpose of determining rights of all parties concerned. A denied title and possession of either Court holding that neither the mortgagors, nor the mortgagee had any title, dismissed the suit.

Held : that though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted dismissing the plaintiff's suit and therefore they had a right of appeal ; 37 *Mad.* 25 *Exp* ; *A. I. R.* 1924 *Mad.* 689, *Foll.* [P 975, C 1]

R. Srinivasa Aiyangar — for Appellants.

K. Rajah Aiyar and *V. Ramaswami Aiyar*—for Respondents.

Judgment. — This second appeal arises in a suit brought by the plaintiff claiming as mortgagee from certain mahajanams of the village to recover possession of suit properties from Defendants 1 and 2. The mahajanams were made party defendants for the express purpose of determining the rights of all parties concerned. Defendants 1 and 2 denied the right of the mahajanams as well as that of the plaintiff. They pleaded that they had neither title nor possession within 12 years before the date of suit.

The first Court found the points raised in favour of Defendants 1 and 2 and dismissed the suit. Against that decree the plaintiff did not appeal. But two of the mahajanams appealed. As a matter of fact the first Court had dismissed the suit against the mahajanams also with costs. Nevertheless as the finding of the first Court that neither mortgagors nor the mortgagees had any title or possession within the last 12 years was against the interest of the mortgagors, they appealed against that decree. In appeal the case has been disposed of in a curious manner by the Subordinate Judge. He discussed the evidence in the case and was apparently inclined to hold that both title and possession within the last 12 years of the mortgagors were established but he has come to no very definite and clear findings on these points. He goes on to say :

> But for the fact that the plaintiff whose suit was dismissed has not chosen to appeal against the decree there will be no difficulty in the appropriate decree to be passed herein.

Apparently if the plaintiff had appealed he would have been given a decree for possession against Defendants 1 and 2. But the Subordinate Judge says :

> I am unwilling to set aside the decree of dismissal so far as the plaintiff is concerned without his taking exception to it, but at the same time such conduct of the plaintiff should not be allowed to prejudice the rights of the mahajanams two of whom are the appellants.

He therefore proceeds to declare

> that the rights of the appellants amongst other mahajanams in the sites A, B, C. D. are left undetermined

and dismisses the appeal. He makes the declaration so that by reason of the default of the plaintiff the rights of the appellant may not be prejudiced. I think that this is not a proper disposal of the appeal. The learned Judge should have come to definite findings on the points raised in the case and if he was of opinion that the title of the mortgagors as well as their possession within 12 years was proved he should have given a decree giving effect to those findings. It may be that as the mortgagors are not entitled to possession they could not get a decree for possession. But a decree for

possession could have been given to the plaintiff, mortgagee under O. 41, R. 33, Civil Procedure Code, even though he had not appealed. It was contended that the rule above mentioned could not be applied because the appeal of the mortgagors in the lower appellate Court was itself not a competent one as there was nothing in the decree passed by the first Court which was against them. It is however clear to my mind that though that suit was dismissed against them by the first Court that Court had given effect to its adverse findings that the mortgagors as well as the mortgagee had no title and no possession within 12 years by dismissing the plaintiff's suit. So long as that dismissal remained, it would prejudice the mortgagors. They had therefore a right of appeal against the first Court's decree.

The learned vakil for the respondent cited *The Secretary of State* v. *Swaminatha Goundan* (1) in his favour. But that case is different from the present case. There it was held as the headuote shows :

> the fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding. The finding would not act as res judicata as regards such a point.

In the present case though the decree was formally in favour of the mortgagors there were findings against their contentions on which the Court acted dismissing the plaintiff's suit. Those findings are on points directly and substantially in issue between the parties ; in fact they were practically the only issues of importance in the case. In these circumstances the ruling in *Secretary of State* v. *Swaminatha Goundan* (1) cannot be applied. I am inclined to think that the mortgagors were entitled to appeal. This view is in accordance with the view taken by Sir Kumaraswami Sastri, J., in *Venkateswaralu* v. *Lingayya* (2).

In the lower appellate Court no objection seems to have been taken by the 1st and 2nd defendants to the maintainability of the appeal on the ground that there was no decree against the appellants. The appeal I think was a competent one in the lower appellate Court and it should have been disposed of according to law. The decree of the lower appellate Court must therefore be set aside and the case remanded to it for a fresh disposal according to law. The costs will abide and follow the result. The Court-fee paid will be refunded to the appellant.

Case remanded.

(1) [1911] 37 Mad. 25 = 21 M. L. J. 947 = 12 I. C. 167=(1911) 2 M. W. N. 303.
(2) A. I. R. 1924 Mad. 689=47 Mad. 633.

A. I. R. 1926 Madras 975

RAMESAM, J.

Madini Doraswami Naidu—Petitioner.

v.

Syed Mir Hussain and *others*—Defendants—Respondents.

Civil Revision Petition No. 52 of 1924, Decided on 17th March 1926, from the decree of the Dy. Collector, Chittoor, in Summary Suit No. 3 of 1922.

Madras Estate Land Act, S. 45—Holder of Sivoyjama patta cannot claim possession against person admitted as ryot.

The effect of issuing a sivoyjama patta is not to recognize grantee as a ryot but only to collect some amount from him for his occupation within the meaning of S. 45, and, therefore, a holder of such patta cannot claim possession against a person expressly introduced by proprietor as a ryot. Even as against the proprietor his possession is no more than that of a trespasser. [P 976, C 1]

S. Jagadisa Iyer—for Petitioner.

V. Sivaprakasa Mudliar and *A. C. Sampath Iyengar*—for Respondent.

Judgment.—The plaintiff is the petitioner before me. He filed a suit before the Deputy Collector of Chittoor under S. 46 of the Estates Land Act and he seeks to get a ryoti patta for Survey No. 67 in the Atmakur village attached to Narangatipalayam zamin. The 1st defendant is the proprietor. The history of the holding seems to be that an old tenant who cultivated it abandoned it about 15 years before suit and afterwards it was cultivated off and on by others. Apparently, it was left vacant at the end of Fasli 1330, i. e., 30th June 1921. On 4th July 1921 a cousin of the plaintiff 2nd defendant, made an application for being admitted to the land. It was favourably received by the proprietor and an order was issued in favour of the 2nd defendant that she should be admitted as a ryot to Survey No. 67 to the extent of 1 cawny 6 cents, for a rent of Rs. 6-0-3, and the 2nd defendant was authorized to enter upon the land. The plaintiff applied for the same land on 31st July

alleging that he occupied it and had begun to cultivate it. He sent two reminders. Ultimately in June 1922 a patta was issued to him and it was described as Sivojama patta (Exhibit C). The effect of describing Exhibit C. as a sivoyjama patta is not to recognize him as a ryot but only to collect some amount from him for his occupation within the meaning of S. 45 of the Act. If the landlord receives two such payments from him, no doubt he would become a ryot. see explanation to S. 6. But, meanwhile, the 2nd defendant has been admitted as a ryot to the land and the 1st defendant, the proprietor, has no right to introduce another ryot in the land in derogation of the rights of the 2nd defendant. The result is the plaintiff has no right at all to the land. The question of non-occupancy or occupancy ryot does not arise. His occupation is only that of a trespasser, and whatever the relationship between him and the 1st defendant may be in the absence of the 2nd defendant he has no right as against the 2nd defendant. Even as against the 1st defendant his possession is no more than that of a trespasser—a trespasser from whom rent has been collected for one year.

I think the suit has been rightly dismissed. The petition is dismissed with costs of the 2nd defendant.

Petition dismissed.

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* A. I. R. 1926 Madras 976

DEVADOSS AND WALLER, JJ.

Ramasankara Aiyar Sankaranarayana Aiyar—Appellant.

v.

The Firm of V. K. R. Krishna Aiyar & Sons—Respondents.

Appeal No. 215 of 1924, Decided on 24th March 1926, from the order of the Dist. J., Tinnevelly, D/- 6th December 1923 in I. P. No. 29 of 1922.

* *Provincial Insolvency Act, S. 6 (e)—Decree against partnership—Sale of separate property of one partner does not amount to act of insolvency on the part of other partners.*

Sub-S. (e) refers only to the property of the person against whom an application for adjudication is made. It cannot be said that the separate property of one partner becomes the property of the other by reason of their being partners. [P 976, C 2]

K. V. Sesha Aiayngar and *S. Venkataraman*—for Appellant.

P. S. Narayanaswami Aiyar and *P. S Ramachandra Aiyar*—for Respondents.

Judgment.—This is an appeal by the 2nd respondent in the lower Court against the order of the District Judge of Tinnevelly adjudicating him an insolvent. The learned Judge finds that the 1st respondent's property was attached and sold on the 23rd June 1922, and that amounts to an act of bankruptcy on the part of the appellant.

The appellant and the 2nd respondent herein were partners in trade. A decree was obtained against the partnership and the property of the 2nd respondent herein was attached and brought to sale. Under S. 6 (e) of the Provincial Insolvency Act a person commits an act of insolvency if any of his property has been sold in execution of a decree of any Court for payment of money. No property of the appellant was sold in execution of a decree for money. The contention on behalf of the 1st respondent is that the attachment and sale of property of a partner is sufficient to bring the appellant within the provisions of S. 6 (e). Sub-section (e) refers only to the property of the person against whom an application for adjudication is made. It cannot be said that the property of one partner becomes the property of the other by reason of their being partners. It is not contended that the property that was brought to sale on the 23rd of June was partnership property. If the partnership property had been brought to sale within three months of the presentation of the petition for adjudication all the members of the partnership could be adjudicated insolvents.

Here, only the separate property of a partner was attached and sold, and that cannot be held to mean that the property of the appellant was brought to sale. So far as the property of the partners is concerned, that is liable only in case the partnership assets are not sufficient to satisfy the creditors' claims. Even the separate property of the partners remains as such and the mere fact that it is liable for partnership debts would not make it partnership property. The appellant not having committed an act of bankruptcy within three months of the presentation of the application the order of adjudication is illegal. We therefore allow the appeal with costs.

Appeal allowed.

* A. I. R. 1926 Madras 977

PHILLIPS AND MADHAVAN NAIR, JJ.

Pathina Subbarami Reddi—Petitioner.

v.

Genesam Pattabhirama Reddi—Respondent.

Civil Revision Petition No. 400 of 1925, Decided on 2nd March 1926, from the order of the Dist.-J. Nellore, D/- 25th February 1925, in I. A. No. 402 of 1924.

* *Guardians and Wards Act, S. 41 (4)—Court is not bound to enquire about correctness of accounts.*

If the Court is satisfied on a perusal of the accounts submitted by the guardian at the time of his discharge and on hearing the parties, that the accounts are correct, it may make a declaration of his discharge, but it is not bound to do so, nor is it bound to certify that the accounts are correct. The minor may bring a separate suit for the purpose: 5 *C. W. N.* 207; 21 *C. W. N.* 688 and 29 *C. L. J.* 44, *Foll*; *A. I. R.* 1924 *All.* 593, *Dissented from* and *A. I. R.* 1926 *Mad.* 419, *not Foll.* [P. 977 C. 2]

B. Somayya—for Petitioner.

M. Patanjali Sastri—for Respondent.

Phillips, J.—This is a petition under the Guardians and Wards Act. The minor having attained majority, the guardian was discharged and filed his accounts in Court. The minor took objection to these accounts and wished the Court to hold an enquiry and ascertain what amount was really due by the guardian. The District Judge has declined to hold any enquiry and has referrred the minor to a suit if so advised. It is now contended for the petitioner, the late minor, that this order is wrong and that under S. 41 (4) the Court ought to have held an enquiry and discharged the guardian after ascertaining what was due from him. There is no specific provision in the Act for such taking of accounts and determining the amount due by the guardian, but it is contended that in view of the fact that S. 41 (4) says: "the Court may declare him to be discharged from his liabilities," etc., this can only be done after an enquiry has been held, but it must be observed that there is no mandate in this section and it is not necessary that the Court should make such a declaration. Undoubtedly, if it were incumbent on the Court to make such a declaration, the Court would not be able to do so without holding an enquiry.

It has been held by the Calcutta High Court in three cases *Nabu Bepari* v. *Sheik Mahomed* (1); *Jagannath Panja* v. *Mahesh Chandra Pal* (2); and *Abdul Hasin* v. *Maleka Khatun* (3), that under the Guardians and Wards Act no such enquiry should be held. The Allahabad High Court has taken a contrary view in *Sita Ram* v. *Mt. Govindi* (4) and there is also the opinion of a Judge of this Court in *Rama Rao* v. *Rengaswami Rao* (5) to the effect that the Court ought to take an account. To deal with this last case first, the learned Judge seems to have come to this conclusion on the ground that he was unable to concede that the Court is bound to accept without scrutiny any accounts that the guardian chooses to submit.

This will certainly be applicable if the Court were bound to make the declaration mentioned in S. 41 (4), but if the Court is not so bound, it does not seem necessary that there should be such an enquiry. If the Court is satisfied on a perusal of the accounts and on hearing the parties that the accounts are correct it may make such a declaration, but it is not bound to do so, nor is it bound to certify that the accounts are correct. The whole scheme of the Act seems to provide for matters of this kind, i. e., disputes between the minor and the guardian, by way of suit. During the minority Ss. 35 and 36 provide for suits being filed by a next friend of the minor in case of misconduct on the part of the guardian, and there can be no doubt that, when the minor attains majority, he can bring a suit against his guardian. There being no provision at all for any enquiry into accounts by the Court I think the opinion expressed by Calcutta High Court is the correct one.

This view obtains support from S. 34. (c) and (d), where it is provided that the guardian must exhibit his accounts in the Court at such times and in such form as the Court from time to time directs and that if so required by the Court the guardian must pay into Court the balance due from him on those accounts, or so much thereof as the Court directs. These provisions presume that the

(1) [1900] 5 C. W. N. 207.
(2) [1916] 21 C. W. N 688=36 I. C. 286=25 C. L. J. 149.
(3) [1916] 29 C. L. J. 44=49 I. C. 132.
(4) A. I. R. 1924 All. 593=46 All. 458.
(5) A. I. R. 1926 Mad. 419.

accounts are correctly submitted and the Court may take action on such accounts, but no provision is made for an enquiry as to whether the accounts are correct or not. Similarly, under S. 41 (3), when a guardian has been finally discharged, the Court may require him to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. This section quite clearly assumes that a guardian will put in the accounts that he has been directed to keep into Court and that these accounts will be accepted subject to the minor's rights, or those of a next friend on his behalf to question them in proper proceedings. If the Court were to hold an enquiry and come to the conclusion that the guardian owed a much larger amount than that stated in his accounts, there is no provision for enforcing any such order. Further, such order under Ss. 47 and 48 would be final; under S. 48 an order made under this Act shall be final and shall not be liable to be contested by suit or otherwise. If therefore the Court made an order that the guardian was to pay a definite sum into Court such an order could not be contested by a suit and there would be no remedy left either for the guardian or for his ward. This seems to be contrary to the intentions of the Act, which, as I have said before, appear to leave all these questions for decision by a suit outside the guardianship proceedings.

The interests of the minor are sufficiently protected: firstly by the selection of a guardian by the Court; and secondly by the control of the Court over such guardian. With all respect I am unable to agree in the conclusion of the Allahabad High Court; for I do not think the arguments are very convincing. I prefer to follow the opinion of the Calcutta High Court referred to above and hold that the Court should not hold an enquiry and pass orders in such matters. The District Judge's order is therefore correct and this petition is dismissed with costs.

Madhavan Nair, J.—I entirely agree. The conclusion which we have arrived at in this case is also supported by the reasoning in *Ramanujulu Reddy v. Rangiah Reddiar* (6) to which I was a party. In that case it was held that under S. 45 (1), Cl. (c), a guardian is not expected to deliver property or accounts which he has not actually got in his possession. In other words, it was held that the property to be delivered is the property which is actually in the possession of the guardian and not what he should have with him according to the opinion of the Court; and so also, the accounts to be delivered are those which have been actually kept by him and not those which according to the Court are the correct accounts. The phrase used in S. 41 (4) "when he has delivered the property or account" is the same as used in S. 45 (1) (c) and may be understood also in the same way.

Petition dismissed.

(6) A. I. R. 1926 Mad. 825.

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* A. I. R. 1926 Madras 978

KRISHNAN, J.

T. S. R. M. Ramaswami Chettiyar—Plaintiff—Petitioner.

v.

K. T. Abdul Kuddus Sahib—Defendant—Respondent.

Civil Revision Petition No. 984 of 1924, Decided on 24th March 1926, from the decree of the Dist. Munsif, West Tanjore, in S. C. S. No. 427 of 1924.

* (a) *Registration Act, S. 17—Right to remove bark from trees is license and not lease—Transfer of Property Act, S. 107.*

The right to go and cut and take the bark of of trees away from the land, when no further right is given to the person to whom that right has been given, will amount only to a license. It is certainly not a lease. Such a license as that does not require a registered instrument for its creation under any law: 20 *Mad.* 58 (*F.B.*), *Expl.* and *Dist.* [P. 979, C. 2]

* (b) *Transfer of Property Act, S. 6 (e)—Right to receive money for license is transferable.*

A right to receive money for license given to another to remove bark from licensor's trees is transferable. [P. 979, C. 2]

G. Krishnaswami Aiyar—for Petitioner.

S. Subramania Aiyar—for Respondent.

Judgment.—This is a suit by the plaintiff for the recovery of Rs. 127-3-0 as the amount due to him for Faslis 1330 to 1332 under a contract by which the defendant was given the right to cut and remove the bark of the Avaram plants

growing in the plaint mentioned village. The annual amount payable was Rs. 40. The contract pleaded between the parties is an oral one and there is no written document to evidence it, but the defendant has admitted the terms of the contract. The plaintiff's suit has been dismissed on the ground that without a registered lease the right to take the Avaram bark from the trees growing upon the plaintiff's land could not be transferred under S. 107 of the Transfer of Property Act. The argument is that "the lease being one for 5 years ought to be evidenced by a registered instrument." The learned Munsif accepted this contention and rejected the further argument that, if it was a lease, it was an agricultural lease. S. 117 excluded the application of S. 107 of the Transfer of Property Act. He held that there ought to have been a registered instrument and dismissed the suit. It seems to me that this is an erroneous way of looking at the case. The learned District Munsif has relied upon *Seeni Chettiar* v. *Santhanathan Chettiar* (1) for the view that the transaction in question is really in the nature of a lease. It seems to me that this is a misreading of the case altogether, for the judgment of Subrahmania Aiyar, J., in that Full Bench shows clearly that such a document could not be treated as a lease at all. What the learned Judge says on page 64 is:

> First, as to the contention that there was a lease, it is to be observed that, to constitute such a transfer, it is essential that exclusive possession of the property which is the subject of the transfer, should be intended to be vested in the transferee. . . . If the possession is, however, not of that character, the transaction, whatever else it may, is not a lease.

In this case there is no evidence of possession of the village being given to the defendant; the defendant's right is confined to the cutting and removing of the Avaram bark from the trees growing in the village. The Full Bench judgment is really against the view the District Munsif has taken. Unless it can be held that the transaction in this case amounted to a lease S. 107 of the Transfer of Property Act will not apply, and the necessity for a written and registered instrument does not arise.

In the Full Bench case in *Seeni Chettiar* v. *Santhanathan Chettiar* (1) the learned Judges had to consider the admissibility of a written; but an unregistered document under the provisions of the Registration Act. They had thus to decide whether, in spite of the fact that the instrument in that case was not a lease it was not an instrument creating an interest in immovable property and they held it was. Such a question as that does not arise in the present case for we have not got here a written instrument. In my opinion, it is, therefore, clear that the claim of the plaintiff was not properly disallowed for want of a registered instrument. The right to go and cut and take the bark away from the land, when no further right is given to the person to whom that right has been given, will amount only to a license and can hardly be treated as anything more than a license; such a license as that does not require a registered instrument for its creation under any law. The contract has been admitted and there is practically no difficulty about it.

The last point urged before me is that as the plaintiff is the assignee of the rights of the person who gave the contract to the defendant, his claim must fail as the assignment of a claim for damages and such an assignment is not valid under S. 6 (e) of the Transfer of Property Act. Here again, the District Munsif, it seems to me, is in error in upholding the contention; the claim for money due under the contract of cutting the Avaram bark cannot be treated as a claim for damages. In fact the parties had settled the amount of money payable per year for this right. This is clearly not a case of damages and I see no difficulty whatever in upholding the assignment that the plaintiff got. It is a perfectly valid assignment and the plaintiff is entitled to recover the money he has claimed.

The revision petition is allowed and the decree of the District Munsif is set aside and there will be a decree in favour of the plaintiff for the amount sued for with costs throughout.

Petition allowed.

(1) [1897] 20 Mad. 58=6 M.L.J. 281 (F.B.)

* A. I. R. 1926 Madras 980

DEVADOSS AND WALLER, JJ.

Narayana Chettiar and *another*—Appellants.

v.

P. C. Muthu Chettiar and *others*—Respondents.

Appeal No. 63 of 1924, Decided on 5th March 1926, from the order of the District J., Ramnad, D/- 10th September 1923, in Appeal Suit No. 153 of 1922.

(a) *Civil P. C., O. 9, R. 9—Execution proceedings are not covered.*

Order 9, R. 9, does not apply to execution proceedings : *A. I. R.* 1925 *Mad.* 412, *Foll.* [P. 981, C. 1]

* (b) *Civil P. C., O. 47, R. 4—Notice is imperative—Absence of notice renders an order illegal.*

Under O. 47, R. 4, notice to the other side is imperative, and an order without such notice is illegal and not merely an irregular one and a party is not bound by the illegal order : 43 *Cal.* 178 and *A. I. R.* 1925 *Cal.* 114, *Dist.*; 42 *Cal.* 433, *Rel. on.*

Where an execution petition was dismissed for non-appearance of the decree-holders' pleader and on application it was restored to file without notice to the opposite party.

Held : that the order restoring the petition could not be considered to be a final order and was open to the objection of the other side on any ground it was open to it if notice had been issued : 41 *Mad.* 412 (*P. C.*), *Rel. on.* [P. 981, C. 1, P. 982, C. 2]

(c) *Civil P. C., O. 47, R. 1—Absence of pleader is not sufficient ground.*

The grounds for review are set out in O. 47, R. 1, and no Court is justified in reviewing an order made by it for any ground other than those mentioned in O. 47 or grounds which are similar to the grounds specifically mentioned therein : *A. I. R.* 1922 *P. C.* 112, *Foll.*

The absence of a pleader is not a ground for review. [P. 983, C. 1]

* (d) *Civil P. C., S. 151—Court can correct mistakes committed by it and not by party—Execution application dismissed for default—Restoration cannot be ordered on the ground that fresh application would be barred by limitation.*

Where the Court passes an order inadvertently without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it, not owing to the negligence of a party, but owing to its not being aware of certain facts.

Section 151 enables a Court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. It would not be proper for a Court to restore an application for execution dismissed for default on the ground that limitation would bar a fresh application. When the law lays down certain procedure for parties who are affected by any order, the mere fact that the Law of Limitation steps in and prevents the party from claiming relief under the procedure is not sufficient justification for the Court to grant a relief under S. 151 : 2 *Lah.* 66, *Diss. from.* [P. 983, C. 2, P. 984, C. 1, 2]

(e) *Civil P. C., O. 21, R. 57—Failure to furnish information—Dismissal is one under R. 57 and not for default.*

Where the decree-holder is asked to furnish certain information to the Court to enable it to proceed with the execution, his failure to furnish the information to enable the Court to proceed brings him within O. 21, R. 57, and the dismissal of the application cannot be considered to be a dismissal for default of appearance, [P. 983, C. 2]

C. S. Venkatachariar—for Appellants.

M. Patanjali Sastri and *C. S. Rama Rao Sahib*—for Respondents.

Judgment.—The 1st respondent herein filed an application on 23rd February 1920 for the execution of the decree in O. S. No. 14 of 1908. The application, after several adjournments, came on for hearing on 11th October 1921, when, owing to the absence of the decree-holder's pleader, it was dismissed. The decree-holder's pleader appeared before the Court some time after and the Court restored the application to file without notice to the opposite party.

On the same day the application was made by the decree-holder for an amendment of the execution application. When the amendment application came on for hearing the judgment-debtors contended that the order restoring the petition to file was illegal and that the amendment petition should not be allowed. The Subordinate Judge of Ramnad held that O. 9, R. 9, Civil Procedure Code, was not applicable to execution proceedings and that the order restoring the petition to file, if treated as an order under O. 47, was illegal as the other party was not given notice of the application. In the result he dismissed the petition for execution as well as the application for amendment. On appeal the District Judge held relying on *Janki Nath Hore* v. *Prabhasini Dasee* (1) that the Court has power under O. 47 to restore an application dismissed for default of appearance of the applicant and that even if it was not an order under O. 47, it should be treated as one made under S. 151. He set aside the order of the Subordinate Judge and remanded the execution application for disposal according to law.

(1) [1916] 43 Cal. 178=19 C. W. N. 1077=30 I. C. 898=22 C. L.J. 99.

Defendants 5 and 7 have preferred this appeal against the order of the District Judge.

The first contention raised by Mr. C. S. Venkatachariar for the appellants is that the Court had no power to restore an application to file which was dismissed for default as O. 9, Civil Procednre Code, did not apply to execution proceedings. We have recently held in a case reported in *Kaliakkal* v. *Palani Goundan* (2) that O. 9, Civil Procedure Code, did not apply to execution proceedings. Mr. Patanjali Sastri who appears for the 1st respondent, does not challenge the correctness of this decision and concedes that O. 9 is not applicable to execution proceedings. The order of the Subordinate Judge was not, therefore, one passed under O. 9, R. 9.

It is next contended that the order restoring the execution petition to file should not be treated as an order made in review of the order dismissing the application. The Subordinate Judge, when he restored the execution application to file, did not issue notice to the other side. Under O. 47, R. 4 notice to the other side is imperative ; Cl. 2 ; (a) is as follows :

> No such application shall be granted without previous notice to the opposite party to enable him to appear and be heard in support of the decree or order, a review of which is applied for.

The question is whether an order passed without notice is a nullity or only an irregular order which the Court had jurisdiction to pass. The District Judge has relied upon *Janki Nath Hore* v. *Prabhasini Dasee* (1) as supporting his view that the order of the Subordinate Judge was an order under O. 47. In that case it was held

> where an appeal was summarily dismissed by a Division Bench of this Court, and such order was ultimately set aside on review by the said Bench on an ex-parte application without notice to the respondents, that the last order was valid even in the absence of such notice.

The learned Judges held that the respondent was not 'the opposite party' within the meaning of R. 4, Cl. (2) (a) interested to appear and support the order of dismissal when the only order sought to be substituted, therefore, was that the appeal be heard in his presence. With very great respect we are unable to follow the reasoning of the learned Judges. When an appeal is dismissed the decree of the lower Court is left un-undisturbed and the respondent is entitled to the benefit of such dismissal, and when the dismissal is sought to be set aside it is he that is interested in supporting the order of dismissal. They conceded that an order of review cannot be made without previous notice to the person interested in supporting the order sought to be reviewed, but their view was that there was no opposite party when the Court was moved to set aside the order of dismissal for default. This case was followed by another Bench of the Calcutta High Court in *The Official Trustee of Bengal* v. *Benode Behari Ghose Mal* (3). In that case though the learned Judges observe that they prefer to follow *Janaki Nath Hore* v. *Prabhasini Dasee* (1) in preference to a previous decision in *Abdul Hakim Chowdhury* v. *Hem Chandra Das* (4), they rest their decision upon the practice obtaining in the Calcutta High Court for forty years under which an appeal summarily dismissed under O. 41, R. 11, is set aside on review by the same Bench. These two cases cannot be authority for the position that no notice is necessary in the case of a review of an order under O. 47, for the practice of the Calcutta High Court was rightly or wrongly to set aside a summary order of dismissal on an application made for that purpose. In *Abdul Hakim Chowdhury* v. *Hem Chandra Das* (4) it was held that non-compliance with R. 4 of O. 47 rendered the granting of an ex-parte application for review a nullity. Holmwood, J., observes at page 439:

> It is clear that non-compliance with R. 4 of O. 47 renders the granting of this application for review, which was prejudicial to the respondent, a nullity and that such an application could not be granted without previous notice.

This judgment was concurred in by Chapman, J.

Where the law requires that a certain formality should be complied with before an order could be made, it is not open to the Court to ignore the clear provision of the law and pass an order without complying with it. The notice to the opposite party is imperative under R. 4, Cl. (2) (a). It is urged by the respondent that when the Subordinate Judge restored the petition to file, the

(2) A. I. R. 1926 Mad. 412.

(3) A. I. R. 1925 Cal. 114=51 Cal. 943.

(4) [1915] 42 Cal. 433=30 I. C. 165.

appellants should have preferred an appeal against that order and when a remedy is open to a party against an irregular order made by a Court it should not be considered to be a nullity; for the Court has power to review its own order and if it reviews it irregularly the party affected by the order should appeal against it and R. 7 (b) provides for an appeal if the Court granting the review contravenes the provisions of R. 4. The question is not whether the party to an illegal order has a remedy or not. If a Court does something which it is not authorized by law to do, that order has no legal force. Such an order is illegal and not merely an irregular one and a party is not bound by the illegal order. In *Surajpal Pandey* v. *Utim Pandey* (5) the learned Chief Justice and Coutts, J., declined to follow the case in *Janaki Nath Hore* v. *Prabhasini Dasee* (1) and held that

> Where an appeal has been dismissed for default it cannot be restored under O. 41, R. 19, which has no application to such a case; nor can it be restored under O. 47, R. 4, Cl. (2), without notice to the opposite party.

And:

> If the appeal is restored without such notice and disposed of without the opposite party becoming aware of the order of dismissal or restoration; that party is entitled, as soon as the matter is drawn to its notice even in second appeal, to a hearing.

The order of the Subordinate Judge restoring the application to file cannot be considered to be a final order and the opposite party on coming to know of the order could urge any objection which it was open to him to urge if he had notice of the petition for restoration. This was clearly laid down by the Privy Council in *Krishnaswami Panikondar* v. *Ramaswami Chettiar* (6). In that case Sankaran Nair, J., without notice to the respondent excused the delay in filing the appeal and admitted it. When it came on for hearing after notice an objection was taken before the Division Bench which heard it as being out of time. The Division Bench after an examination of the affidavits filed on both sides dismissed the appeal as provided by S. 4 of the Limitation Act. It was contended before the Privy Council that the order of Sankaran Nair, J., was final and that the Division Bench had no jurisdiction at the hearing of the appeal to reconsider the question whether the delay was excusable. Their Lordships observe at p. 416:

> This order of admission was made not only in the absence of Ramaswami Chettiar, the contesting respondent, but without notice to him. And yet in terms it purported to deprive him of a valuable right, for it put in peril the finality of the decision in his favour so that to preclude him from questioning its propriety would amount to a denial of justice. It must, therefore, in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected; and this view is sanctioned by the practice of the Courts in India.

The order of the Subordinate Judge, therefore, restoring the petition could not be considered to be a final order and is open to the objection of the other side on any ground it was open to it if notice had been issued.

There are at least two stages in a review application. When a review application is filed, the Court gives notice to the opposite party and on hearing the opposite party if it considers there are grounds for re-opening the case it grants the application and if after review it sees reason to alter the order already passed, it modifies it. Against the order granting review there is an appeal under R. 7 of O. 47 and against the final order passed after review there is also an appeal. Why should a party be deprived of the right of appeal by his not being given notice when the Court grants an application for review? The Lahore High Court in *Firm Gopal Mal-Ganda Mal* v. *Hara Chand* (7) holds the view that an order granting an application for review of an order dismissing a suit for default is not illegal merely because notice of the application was not given to the opposite party. If that party has been given every opportunity to raise any objections that he could raise and was therefore in no way prejudiced by the non-issue of notice to him. Though the party against whom an order is made without notice is entitled to object to it afterwards, it is not competent to a Court to omit to give notice to the opposite party when the law requires that notice shall be given of an application before it is granted.

The order made by the Subordinate Judge restoring the execution application

(5) A. I. R. 1922 Patna 281.
(6) [1917] 41 Mad. 412=43 I. C. 493=45 I. A. 25 (P. C.).
(7) A. I. R. 1923 Lah. 303.

to file cannot be considered on the merits as an order under O. 47, Civil P. C. Though the petition mentioned O. 47, R. 1, S. 151 and O. 9, R. 9 yet the affidavit did not set out any grounds which would justify a review of the order. The absence of a pleader is not a ground for review. The grounds for review are set out in O. 47, R. 1 and the Privy Council has ruled that no Court is justified in reviewing an order made by it for any ground other than those mentioned in O. 47 or grounds which are similar to the grounds specifically mentioned therein. In *Chhajju Ram* v. *Neki* (8) a Bench of the Lahore High Court reviewed an order made by another Bench. Viscount Haldance in delivering the judgment of their Lordships observed :

> They think that R. 1 of O. 47 must be read as in itself definitive of the limits within which review is to-day permitted, and the reference to practice under former and different statutes is misleading. So construing it they interpret the words 'any other sufficient reason' as meaning a reason sufficient on grounds at least analogous to those specified immediately and previously.

The order of the Subordinate Judge restoring the appeal to file cannot be treated as an order under O. 47, R. 1.

It is next contended for the respondent that the Court has power under S. 151 to correct its own errors or to pass an order which it thinks proper in the interests of justice. In *Bholu* v. *Ram Lal* (9) it was held that

> in the exercise of its inherent power expressly recognised by S. 151 of the Code, a Court can restore an application after it has dismissed it for default and should do so notwithstanding that the applicant has an alternative remedy by making a second application for execution if he satisfies the Court that it should exercise its inherent jurisdiction ex debito justitiae.

In that case reliance was placed upon *Debi Baksh Singh* v. *Habib Shah* (10) as supporting the view taken by it. In *Debi Baksh Singh* v. *Habib Shah* (10) the plaintiff was dead and the Court not being aware of his death dismissed the suit for the non-appearance of the plaintiff. The Privy Council held that the dismissal was an abuse of the process of the Court. Their Lordships observe at p. 337 :

> Quite apart from S. 151, any Court might have rightly considered itself to possess in inherent power to rectify the mistake which had been inadvertently made.

Where the Court passes an order inadvertently or without being aware of certain facts which should have been brought to its notice it has power to correct an error committed by it, not owing to the negligence of a party, but owing to its not being aware of certain facts. What applied to a person who makes default in appearing before the Court cannot apply to a deceased person for he cannot appear before the Court and a Court has no power to dismiss a suit for default when the plaintiff is dead, and if it does without being aware of the fact it can correct the wrong order made by it.

In this case it cannot be said that the application was dismissed for default of appearance. The decree-holder was asked to furnish certain information to the Court to enable it to proceed with the execution. He having failed to furnish the information or produce the necessary papers for proceeding with the execution, has brought himself within O. 21, R. 57 and the dismissal of the application cannot therefore be considered to be a dismissal for default of appearance. It is strongly urged by Mr. Patanjali Sastri that the respondent would lose the benefit of his decree for any subsequent application would be barred by the twelve years' rule and therefore the Court should use its inherent power to restore the application to remedy the wrong. The decree-holder can always file a fresh application for execution if the previous one is dismissed and the fact that a fresh application would be barred by limitation would not give jurisdiction to the Court which it does not otherwise possess. With very great respect we are unable to agree with the learned Judge who decided *Bholu* v. *Ram Lal* (9) that the inherent power of the Court should be invoked in cases in which the second application may be barred by limitation. In *Babui Ritu Kuer* v. *Alakhdeo Narain Singh* (11) it was held that the Court should not use its inherent power for the purpose of restoring execution cases. Suhrawardy, J., in *Saradindu Muckerjee* v. *Giresh Chandra Tewari* (12) takes the view that :

(8) A. I. R. 1922 P. C. 112=3 Lah. 127
(9) [1921] 2 Lah. 66=60 I. C. 720.
(10) [1913] 35 All. 331=19 I. C. 526=40 I. A. 150 (P. C.).
(11) [1918] 4 Pat. L. J. 330=5 Pat. L. W. 208=47 I. C. 154=(1918) P. H. C. C. 265.
(12) A. I. R. 1925 Cal. 184.

If an execution case is erroneously dismissed for default and the decree-holder applies for the restoration of the case by way of review, the application for restoration was one under S. 151 of the Civil P. C., and the mere fact that it was also described as an application for review did not give the judgment-debtor a right of appeal against the order of restoration.

The Bombay High Court in *Sonubai* v. *Shivaji Rao* (13) held that:

where an application is made to re-admit an appeal dismissed for default, it was open to the Court to exercise its inherent powers to deal with the application under S. 151 of the Civil P. C., and make an order to the effect for the ends of justice or to prevent abuse of the Court, without any reference to the period of limitation fixed for application to re-admit appeals or to restore any other proceeding dismissed for default.

When an application is granted under S. 151 of the Civil Procedure Code, the party affected by the order has no right of appeal as observed by Suhrawardy, J., in *Saradindu Muckerjee* v. *Giresh Chandra Tewari* (12), should the Court use such powers in such a way as to give an unfair advantage to one party over the other because it thinks that the ends of justice do require it. Justice should be administered according to law and procedure. It may be that in administering the law the Court may feel that one party gains an unfair advantage over the other. But it is not open to a Court to ignore the procedure laid down for its guidance and grant reliefs when it thinks such a relief should be granted without following the procedure laid down for its conduct. If the provisions of S. 151 is given the extended interpretation which some Courts are prepared to give them, the Courts may overlook the rest of the Procedure Code whenever it considers that the ends of justice do require that a certain order should be passed. S. 151 enables a Court to make such orders as may be necessary; for the ends of justice do require that a certain order should be passed. S. 151 enables a Court to make such orders as may be necessary for the ends of justice and to prevent the abuse of the process of the Court. The Law of Limitation works hardship upon persons who have legitimate claims against their opponents, but the Legislature has enacted the Law of Limitation and it would not be right for the Court to overlook the Law of Limitation on the ground that the claim is a bona fide one and the defence on the ground of limitation is immoral. When the law lays down certain procedure for parties who are affected by any order the mere fact that the Law of Limitation steps in and prevents the party from claiming relief under the procedure is not sufficient justification for the Court to grant a relief under S. 151. In this connexion reference may be made to *Neelaveni* v. *Narayana Reddi* (14). There Oldfield, J., observed at page 151:

that our Courts possess inherent power is recognized in S. 151 of the Civil P. C. But the exercise of the power in a particular form in which it is invoked must be justified in each case in the manner authorized by authority.....And generally the legitimacy of its exercise must be tested with reference to the principles which authority has prescribed.

In that case it was held:

that a Court has no power, apart from the provision of O. 9, R. 13 of the Civil P. C., to set aside an ex parte decree passed by itself.

Though a Court may feel that an ex-parte decree was improperly passed, it cannot set it aside by invoking its power under S. 151. The application to set aside an ex-parte decree can only be granted if the conditions laid down in O. 9, R. 13 are satisfied. In *Somayya* v. *Subbamma* (15) it was held that if the Court sees sufficient reason to grant the application it could do so, but that decision was overruled by the decision in *Neelaveni* v. *Narayana Reddi* (14). We hold that the order restoring the execution application to file cannot be said to be an order passed under S. 151. The first respondent could have presented a fresh application for execution, but owing to the Law of Limitation he is precluded from doing so and that would not give jurisdiction to a Court to invoke the aid of S. 151. Mr. Patanjali Sastri very strongly urged that his client would lose about Rs. 5,000. However dishonest the conduct of the appellants might have been, they are entitled to the relief which the law gives them. We therefore with much regret allow the appeal, but in the circumstances disallow the costs of the appeal.

Appeal allowed.

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(13) A. I. R. 1921 Bom. 20=45 Bom. 648.

(14) [1919] 43 Mad. 94=37 M. L. J. 599=10 L. W. 606=53 I.C. 847=(1920) M. W. N. 19 (F.B.)

(15) [1906] 26 Mad. 599.

A. I. R. 1926 Madras 985

VENKATASUBBA RAO, J.

Chakravarthi Nainar—Plaintiff—Appellant.

v.

Pushpavathi Ammal—Defendant 1—Respondent.

Second Appeal No. 770 of 1923, Decided on 18th January 1926, from the decree of the Dist. J., Chingleput, in Appeal Suit No. 351 of 1921.

Evidence Act, Ss. 35 and 32—Copy of birth register is admissible to prove age.

Where the original birth register of a particular year was found to have been lost, but a copy thereof, prepared by the public servant whose duty it was to maintain such a register, was found and it was relied upon to show that certain *A* was born in that year and it was also found that the public servant who prepared that copy had died shortly after :

Held : that the copy was admissible.[P 986 C 1]

T. R. Ramachandra Aiyar, V. C. Seshacharriar and *K. V. Sesha Aiyangar*—for Appellant.

L. A. Govindaraghava Aiyar and *K. V. Ramachandran*—for Respondent.

Judgment.—After giving this matter my very careful consideration, I am satisfied that the decision of the learned Judge is correct, that he has committed no error of law, and that I cannot interfere with his judgment in second appeal. He had a very difficult task to perform and I think he performed it well.

One Marudappa died leaving a Will in favour of his mother, and the present suit has been filed by a reversionary heir attacking the Will. The plaintiff's case is that Marudappa was a minor at the date of his death and was thus not competent to make a Will. The question to be determined is, therefore, whether Marudappa was a minor or a major at the time of his death. The learned District Judge has come to the conclusion that he was a major, and I am asked to decide, whether his decision is vitiated by any error of law. I am satisfied that it is not.

Exhibit 2 which has been relied on by the District Judge establishes that Marudappa was born in the year 1900 and was thus a major at the date of his death. As the learned Judge points out there can be no doubt that it is genuine, because Narayana Pillai, the Village Munsif of Vippedu, the place where the testator was born, in whose handwriting Ex. 2 is, died long ago, that is, in 1902, and it is impossible to suggest that the document was fabricated for purposes of the suit. Even P. W. 2 admits that Ex. 2 is in the handwriting of Narayana Pillai. This exhibit purports to be a copy of the Birth Register for 1900. The original Birth Register was not produced although the defendants took every possible step in order to cause its production. The Karnam, P. W. 2, who produced the Birth Registers for several years as well, as a Death Register, says that he is unable to produce the Birth Register for the year 1900, the year in question. The District Judge seems to suspect the bona fides of this witness. I agree with him that strong suspicion attaches to the non-production of the original Birth Register for the year 1900. It is in these circumstances that the defence had to rely upon Ex. 2 which purports to be a copy of that Birth Register.

The contention that was put forward for the plaintiffs in the lower Courts was that Marudappa in Ex. 2 is a mistake for Ammaiyappa, the elder brother of Marudappa. In paragraph 6 of his judgment the District Judge has shown the absurdity of this contention.

Now it is argued before me that Exs. 2 and 2-a were not admissible in evidence and it is said that objection was taken to these two documents going in. It is denied by the defendants that any such objection was taken. On going through the judgment of the two lower Courts I am disposed to agree that there was no objection raised to the filing of Exs. 2 and 2-a. It is no doubt true that a gentleman who conducted the case for the plaintiff has filed an affidavit to say that objection was taken, but it must be remembered that this affidavit was sworn so long after the events to which reference is made in it, and I am not in the least satisfied that it will be safe to act on the recollection of this gentleman. On a perusal of the two judgments it is impossible to resist the conclusion that no objection was taken. The learned Subordinate Judge who has refused to act upon Exs. 2 and 2 a for certain reasons has not said that there was any objection raised to their being filed. On the other hand, his mode of dealing with those documents clearly

shows that such an objection could not have been taken. Similarly the judgment of the District Judge leaves no doubt that no such objection was taken before him either. It must also be noticed that the Subordinate Judge has noted several objections raised in regard to other documents with his rulings thereon. It would be strange in these circumstances if he had failed to note this particular objection had it been really put forward. The impression that I have formed on a reading of these judgments is strengthened by the denial in the counter-affidavit filed on behalf of the defendants. I may also remark that Mr. Govindaraghava Aiyar who appeared in the District Court says that to the best of his recollection no objection was taken.

Under S. 35 of the Evidence Act, on proper proof being given, Ex. 2 might become admissible. An entry in a record made by a public servant in the discharge of his official duties is under that section admissible in evidence. If objection had been raised, it would have been open to the defendant to show that there was a duty cast on the Village Munsif to make a copy such as Ex. 2. Again the statement in Ex. 2, that it is a true copy over the signature of the Village Munsif, would be admissible in evidence under S. 32, provided it was shown that it was made in the ordinary course of business. If these documents had been allowed to go in without objection, it would not have been necessary for the defence to make out that the conditions mentioned in Ss. 32 and 35 existed. The result of accepting the plaintiff's contention would be to remand the case to allow the defendants to give evidence. I fail to see why I should now take this step at this late stage. Ex. 2-a is a list of boys to be vaccinated. P. W. 2 admits that it is necessary to prepare such a list. Some attempt has now been made to suggest that the last sheet of Ex. 2-a stands on a different footing from that of the first sheet. This may be so ; but no point seems to have been made of this in the lower Court. Speaking for myself, I am disposed to attach greater weight to Ex. 2 than to Ex. 2-a.

If the objection relating to the admissibility of these documents fails, there is nothing else that the appellant can urge. I cannot go into the reasoning of the District Judge in second appeal, but I may say that, in my opinion, his reasoning is entirely sound. The plaintiff relies upon the negative evidence furnished by Ex. G on the one hand and Exs. H, H-1, and H-2 on the other. This evidence is entitled, as the District Judge points out, to very little weight. I am satisfied that the District Judge has drawn proper conclusions, and in any event, there is absolutely no ground for interfering with his judgment in second appeal. It accordingly fails and is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 986

DEVADOSS AND WALLER, JJ.

Paramaswami Aiyangar and *another*—Petitioners.

v.

Pichammal—Respondent.

Civil Misc. Petition No. 379 of 1926, Decided on 6th May 1926, against the decree of the High Court, D/- 22nd September 1925, in Appeals against Orders Nos. 437 of 1923 and 15 of 1924.

* *Civil P. C., S. 109—Decree in testamentary matter is appealable to Privy Council—Letters Patent (Mad.), Cl. 39.*

A decree of the High Court in a testamentary matter is appealable to His Majesty in Council when the case is that if it were an ordinary civil case it would be appealable under S. 109 : *40 Cal. 21 (P. C.), Expl.* ; *10 L. B. R. 22, not Foll.* [P 987 C 1, P 988 C 2].

S. Varadachari, N. S. Rangaswami Aiyangar, P. V. Marthandan Pillai and *A. Ramamurthi*—for Petitioners.

M. Patanjali Sastri—for Respondent.

Order.—This is an application for the grant of leave to appeal to His Majesty in Council against the decree of the High Court in C. M. A. Nos. 437 of 1923 and 15 of 1924. A preliminary objection is taken by Mr. Patanjali Sastri for the respondent that no appeal lies to the Privy Council against the decree of the High Court in testamentary matters and it is incompetent for the High Court to grant leave to appeal to His Majesty in Council. The argument of Mr. Patanjali Sastri is that under the Probate and Administration Act, S. 86, only one appeal is provided from an order of District

Judge or District Delegate to the High Court, and no further appeal is allowed by the Act ; and that an appeal being a creature of statute there is no statute granting the right of appeal to the Privy Council in testamentary matters. S. 86 no doubt provides for an appeal to the High Court against an order made by a District Judge or a District Delegate. The question is : Is the decree of the High Court in a testamentary matter appealable to His Majesty in Council, if the case is one which, if it were an ordinary civil case, would be appealable under S. 109 of the Code of Civil Procedure. Reliance is placed upon the well-known case in *Botatoung Co., Ltd.* v. *Collector of Rangoon* (1), for the contention that no appeal lies to the Privy Council. In that case it was held that no appeal lay to the Privy Council in land acquisition cases. Their Lordships observed :

A special and limited appeal is given by the Land Acquisition Act from the award of 'the Court' to the High Court. No further right of appeal is given. Nor can any such right be implied.

In that case the award was considered to be an award by an arbitrator and the Land Acquisition Act having provided for only one appeal it was held that no second appeal lay to the Privy Council. Their Lordships treated the decision of the Court on reference by the Collector to be an award by arbitrators. The question is whether to a civil case wherein the rights of parties are determined the Civil P. C. does not apply. The case in *Botatoung Co., Ltd.* v. *Collector of Rangoon* (1) has been explained by their Lordships of the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (2). Lord Buckmaster, in delivering the judgment of their Lordships, observed at page 329 :

The argument which succeeded in that case emphasizes the distinction between an award and a decree, and the judgment mentions this in terms by stating that the appellants, although admitted to the High Court, could not have the right to carry an award made under an arbitration as to the value of land taken for public purposes up to this Board as if it were a decree of the High Court made in the course of its original jurisdiction ..... When once the award as to the amount has become final, all questions as to fixing of compensation are then at an end ; the duty of the Collector in case of dispute as to the relative rights of the persons together entitled to the money is to place the money under the control of the Court, and the parties then can proceed to litigate in the ordinary way to determine what their right and title to the property may be.

In *Ramachandra Rao* v. *Ramachandra Rao* (2) it was held that a decision with regard to title in arbitration proceedings was res judicata between the parties in subsequent proceedings. The explanation is this : so long as the amount of compensation is in question no right or title of the parties is involved ; but where the amount awarded as compensation is paid into Court, and two or more persons claim the right to receive the money, there is a civil contest as to the right to the money between the persons before the Court, and any determination by the Court as to the rights of the parties is a determination in a civil case, and the ordinary incidents applicable to a decree in a civil suit concerning property apply to such decision and therefore in land acquisition proceedings, if two persons contest the right to the amount deposited in Court, their title to such money is determined by the Court and that decision is a decision on the merits of the contest as to the title, and such a decision operates as res judicata in a subsequent suit where the same title is in question. In *Secretary of State* v. *Chellikani Rama Rao* (3) the objection that no appeal lay to the Privy Council in a case under the Forest Act was raised. Reliance was placed upon *Botatoung Co., Ltd.* v. *Collector of Rangoon* (1) in support of the contention. The Privy Council overruled the objection on the ground that there was no civil right in dispute in *Botatoung Co., Ltd.* v. *Collector of Rangoon* (1). Lord Shaw in delivering the judgment of the Privy Council observed :

The proceedings were, however, from beginning to end ostensibly and actually arbitration proceedings. In view of the nature of the question to be tried, and the provisions of the particular statute, it was held that there was no right 'to carry an award made in an arbitration as to the value of land' further than to the Courts specifically set up by the statute for the determination of that value.

With reference to the case before them they observed :

The merits of the present dispute are essentially different in character. The claim was the assertion of a legal right to possession of and property in land ; and if the ordinary Courts of

(1) [1912] 40 Cal. 21=16 I. C. 188=39 I. A. 197 (P. C.).

(2) A. I. R. 1922 P. C. 80=45 Mad. 320.

(3) [1916] 39 Mad. 617=35 I. C. 902=43 I. A. 192 (P. C.).

the country are seised of a dispute of that character, it would require, in the opinion of the Board, a specific limitation to exclude the ordinary incidents of litigation.

The order passed by this Court is a decree in a contested civil matter and under Cl. 39 of the Letters Patent an appeal lies to the Privy Council from any judgment, decree or order of the High Court made on appeal. Cl. 44 empowers the Indian Legislature to alter or modify the Letters Patent. By the Civil P. C. an appeal to the Privy Council against an order of the High Court is provided if it fulfils certain conditions. Ss. 109 and 110 of the Civil P. C. lay down in what cases an appeal shall lie to the Privy Council. If a decree or a final order of the High Court satisfies the provisions of Ss. 109 and 110, it is difficult to see how an appeal is not competent to His Majesty in Council. The only authority in point is a decision of the Lower Burma Chief Court reported in *Po Kin* v. *Ma Sein Tin* (4). There, the learned Judges following *Botatoung Co., Ltd.* v. *Collector of Rangoon* (1), held that no appeal lay against an order made under the Probate and Administration Act. Such an objection does not seem to have been taken in any other case, though in several cases against orders under the Probate and Administration Act appeals were presented to the Privy Council. It is urged by Mr. Patanjali Sastri that, though this objection is a novel one, yet it is one which, though not taken in other cases, he is entitled to take here.

If the contention of the respondent is to prevail, no appeal to the Privy Council could lie against the orders of the High Court in insolvency matters or orders under the Guardians and Wards Act. In the Provincial Insolvency Act an appeal is provided to the High Court, but not an appeal to the Privy Council. It cannot be said that no appeal lies to His Majesty in Council against the order of the High Court made in insolvency proceedings provided Ss. 109 and 110 are satisfied. This point was specifically raised and decided in *Chatrapat Singh Dugar* v. *Kharag Singh Lachmiram* (5). In that case Jenkins, C. J., observed :

(4) [1919] 10 L. B. R. 22=51 I. C. 596=12 Bur. L. T. 11.

(5) [1913] 40 Cal. 685=17 C. W. N. 752=19 I. C. 453=17 C. L. J. 547.

It is urged that Ss. 46 and 47 of that Act (meaning the Provincial Insolvency Act), if anything, negative this right of appeal. But I do not so read the Insolvency Act. In my opinion, by that Act there was no intention to interfere with any right of appeal to the Privy Council that might otherwise exist, and this is a case which comes clearly within the provisions of the Letters Patent and of S. 109 of the Code. The only question is whether this is a case which can properly be certified to be a fit one for appeal to His Majesty in Council.

Section 47 of the Guardians and Wards Act provides for an appeal to the High Court from an order made by the District Court. The provisions as to appeal in the Guardians and Wards Act are similar to the provisions in the Probate and Administration Act. In a well-known case an appeal was preferred with success against the order of the Madras High Court under the Guardians and Wards Act. We have therefore no hesitation in holding that the objection of the respondent as to the competency of an appeal to the Privy Council is wholly untenable.

On the merits, we hold the case satisfies the provisions of Ss. 109 and 110. We therefore certify that this is a fit case for appeal to His Majesty in Council under S. 109 (*a*), and we grant the leave prayed for.

Petition allowed.

A. I. R. 1926 Madras 988

DEVADOSS, J.

Parvathi Auchi and *another*—Plaintiffs—Appellants.

v.

Sundaram and *others*—Defendants—Respondents.

Second Appeal No. 1283 of 1923, Decided on 12th March 1926, from the decree of the Addl. Sub-J., East Tanjore, in A. S. No. 42 of 1922.

(*a*) *Civil P. C., O. 6, R. 17—Defendant objecting to maintenance of suit—Plaintiff insisting on continuing and failing—Leave to amend should not ordinarily be granted.*

No doubt, Courts should not refuse petitions for amendment without proper grounds, but where the plaintiff is negligent or where he insists upon proceeding with a suit notwithstanding the objection raised by the defendant and fails, the Court should hesitate to grant an application for amendment at the mere request of the plaintiff. [P 989 C 1]

(b) *Civil P. C., O. 6, R. 17—Leave to amend may be given even in second appeal.*

In proper cases the plaint can be amended even in second appeal, but that depends upon the circumstances of the case. [P. 989, C. 2]

M. S. Venkatarama Aiyar—for Appellants.

N. Muthuswami Aiyar—for Respondents.

Judgment,—The only point argued in this second appeal is that the lower appellate Court should have allowed the plaintiffs to amend their plaint. The lower appellate Court held that the appellants were not entitled to any indulgence as they failed to apply to the first Court notwithstanding the contention raised by the respondents that the plaintiffs were not in possssion of the property in dispute. The suit as framed was one for the issue of a permanent injunction. The defendants in their written statement pleaded that the plaintiffs were not in possession and that the suit for injunction was not maintainable and an issue was specifically raised in the first Court and was tried, and the Court found that the plaintiffs were not in possession of the property. The plaintiffs could have asked the first Court to allow them to amend the plaint by asking for possession and they failed to do so. The contention of Mr. Venkatarama Aiyar for the appellants is that another suit was filed for possession on the ground of title and that the plaint in that suit was returned and for some reason or other was not re-presented. If that was so the present plaintiffs ought to have applied for amendment of the plaint seeking that the other suit which they wanted to proceed with could not be continued on account of something which happened before the trial of this suit.

No doubt, Courts should not refuse petitions for amendment without proper grounds, but where the plaintiff is negligent or where he insists upon proceeding with a suit notwithstanding the objection raised by the defendant and fails, the Court should hesitate to grant an application of this kind at the mere request of the plaintiff. In this case the plaintiffs ought to have known that they had not possession of the suit property and inasmuch as the defendants contested the fact that they were in possession at the earliest opportunity, they should have asked for the leave of the Court to amend the plaint by adding a prayer for possession. For reasons best known to themselves they had not done so and in the lower appellate Court they asked for leave to amend the plaint. In proper cases, no doubt, the plaint could be amended even in second appeal, but that will depend upon the circumstances of the case.

In this case I am satisfied that the plaintiffs would not suffer irreparable damage by the request not being granted. If advised they could file another suit for possession of the property on the ground of title. That being so, I cannot hold that the lower appellate Court was wrong in refusing to grant the prayer of the plaintiffs to amend the plaint. This is the only point argued in second appeal and the point is not sustainable. In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 989

WALLACE, J.

K. C. Menon — Complainant—Petitioner.

v.

P. Krishna Nayar—Accused—Respondent.

Criminal Revision No. 153 and Criminal Rev. Petition No. 136 of 1926, Decided on 25th March 1926, from the order of the Sub-Divl. Mag., Calicut, D/- 19th December 1925, in Calendar Case No. 136 of 1925.

* *Criminal P. C., S. 252—Complainant producing more witnesses after the original witnesses—Magistrate should not ordinarily refuse.*

Section 252 of the Code means first that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced he must record their evidence.

Next when the complainant has done all he can without the assistance of the process of the Court it is then for the Magistrate to ascertain from the complainant or otherwise the names of other persons likely or able to give evidence, and he must summon such of those as he thinks necessary, i. e., such of those as he thinks will be of value in assisting the prosecution case. He cannot arbitrarily refuse to summon such witnesses. It is his duty to assist and not to

hamper the prosecution, and for that purpose he must issue summons to persons of whom complainant has informed him, who he considers are likely to give useful evidence. The Magistrate is not bound to or expected to exercise this duty of ascertaining more than once, and the proper time is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any and re-examination, if any, before the charge.

The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case. A useful test will be whether, if the accused were acquitted in this case, it would be open to the complainant to put in a fresh complaint on the facts put forward: *A. I. R.* 1923 *Mad.* 609, (*F.B.*) *Ref.*

[P 990, C 2, P 991, C 1]

K. S. Jayarama Aiyar--for Petitioner.

V. L. Ethiraj and *M. C. Sridharan*--for Accused.

A. S. Sivakaminathan--for the Crown.

Order.—This is a petition to revise the order of the Sub-Divisional Magistrate of Calicut refusing the petitioner's petition to summon certain witnesses for the prosecution. The petitioner is prosecuting the accused for offences under S. 477 (A) of the Indian Penal Code and S. 282 of the Indian Companies Act for concocting false balance sheets, when he was the managing Director of the Manorama Printing Works in 1921 and 1922 in particular for showing an inflated and false value of the stock in hand and including in the company's stock the full value of books only sent to them for sale on commission. The petitioner filed his complaint on 3rd November 1925, naming three witnesses. At that time the books of the company had been impounded and were in the lower Court. His witnesses were examined on 23rd and 24th November 1925, and cross-examined on 5th and 6th December 1925. The petitioner put in a further list of four witnesses styled "Experts in valuation" and the Magistrate examined these on 12th December 1925, and 19th. December 1925. On 17th December, 1925, the petitioner put in a further list of witnasses stating that he got further information about the inclusion in the stock-list of books which never belonged to the company and were not in its possession, some of which the petitioner had secured. The lower Court refused to summon these on the ground that it was new matter, and the petitioner has put in this revision petition.

His chief point is that at the stage which the case has reached the Magistrate has no option to refuse to examine witnesses cited by him, and he relies on S. 252 of the Criminal Procedure Code. That section lays down that not only shall the Magistrate take all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. In the present case the new list of witnesses is one offered by the complainant himself, just as his previous list of expert witnesses was offered, some time after the complaint was filed and after the trial had begun. What then is the proper attitude for the Court to take up regarding such a list? The section does not appear to me to be very clear on the point; but, as I read it, it means first that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall proceed to hear it. The Court is apparently not bound to issue process for such witnesses, or to grant time for the production of such witnesses, but if produced he must record their evidence. There is no section here corresponding to S. 208 (3) in the case of committal proceedings or S. 244 (2) in the case of trial in summons cases. This is a remarkable omission as otherwise the language:

shall take all such evidence as may be produced in support of the prosecution

is the same in all three sections; and S. 257 gives the accused the power of asking the Magistrate to issue compulsory process, while S. 252 itself gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case.

Next when the complainant has done all he can without the assistance of the process of the Court it is then for the Magistrate to ascertain from the complainanant or otherwise the names of other persons likely or able to give evidence, and he must summon such of those as he thinks necessary, i. e., such of those as he thinks will be of value in assisting the prosecution case. He

cannot, I take it, arbitrarily refuse to summon such witnesses. It is his duty to assist and not to hamper the prosecution, and for that purpose he must issue summons to persons of whom complainant has informed him, who, he considers, are likely to give useful evidence. I take it that the Magistrate is not bound to or expected to exercise this duty of ascertaining more than once, and the proper time is when the evidence "produced" in support of the prosecution has been taken, and that ordinarily includes the cross-examination, if any, and re-examination, if any, before the charge: see *Varisai Rowther* v. *King-Emperor* (1).

Now I find from the Magistrate's order that though he asked the complainant after the examination-in-chief of his original witnesses, whether he had any more witnesses to examine, he did not and has not yet asked him that question after the examination of the original witnesses was over nor was the question in the proper form. The question to be asked is not whether complainant has any more witnesses whom he can produce without summons but whether he can inform the Court of any witnesses who will have to be brought by process. The Magistrate has, therefore, in my view, not complied with the law. The stage of examining the original witnesses produced by the complainant is over. But still the Court has to ascertain from the complainant whether there are any other persons able to give evidence in support of the prosecution. The Court must remedy this defect and must do so now.

As to whether the petitioner has traversed new grounds the consideration of that matter seems to me not at all a matter of procedure on which I can at this stage be properly called upon to give a decision. The discretion to summon or not to summon lies with the Magistrate. But he is not to interpret that discretion in a narrow or purely technical sense. He must look at the prosecution case broadly, decide what are the broad allegations of facts on which the complaint is founded and then determine whether the evidence offered is not necessary to assist in the establishment of that case. A useful test will be whether, if the accused were acquitted in this case, it would be open to the complainant to put in a fresh complaint on the facts now put forward.

I set aside the order and direct that the petition be reheard in the light of the above remarks.

Order set aside.

(1) A. I. R. 1923 Mad. 609=46 Mad. 449 (F.B.).

A. I. R. 1926 Madras 991

WALLACE, J.

Vesu and *another*—Appellants.

v.

Thekkedath Veetil Kannamma and *others*—Respondents.

Appeal No. 93 of 1923, Decided on 26th March 1926, from the appellate order of the Sub-J., South Malabar, in A. S. No. 62 of 1921.

(a) *Civil P. C., O. 1, R. 1—Necessary parties not on record—Decree passed in ignorance of the fact is void against them and wholly void if interests are inseparable—Decree—Validity (obiter).*

No decree is binding on a party if he was a necessary party to the suit and he was not on record: and if his interest is inseparable from those of other judgment-debtors under the decree, the decree as a whole would be void: *A. I. R.* 1925 *All.* 141; 17 *All.* 478; 32 *All.* 301 and 38 *Mad.* 682, *Rel. on.* [P. 992, C. 2]

(b) *Malabar Law—Tarwad—Karnavan effectively represents tarwad and decree against him binds tarwad.*

A decree sgainst the karnavan binds the tarwad if he was sued in his representative capacity and the decision of the latter question is not so much a question whether he was specifically impleaded as representative of the tarwad, as whether he was as a matter of fact not conducting the litigation for the tarwad; and if it is found that he was, it does not matter if the other members were added or omitted to be added: 53 *I. C.* 548 and *A. I. R.* 1923 *All.* 211, *not Appr.*; 27 *Mad.* 375 and 35 *M. L. J.* 51, *Foll.* [P. 992, C. 2]

(c) *Civil P. C., O. 41, R. 4—Rule 4 applies where it is consciously applied.*

Rule 4 can only apply when the fact of the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule. [P. 994, C. 1]

L. A. Govindaraghava Aiyar, P. S. Narayanaswami Aiyar and *P. S. Ramachandra Aiyar*—for Appellants.

C. V. Anantakrishna Aiyar and *P. R. Ramakrishna Aiyar*—for Respondents.

Judgment.—This C. M. S. A. is against the decision of the lower appellate Court in a matter of restitution reversing the decision of the first Court.

The restitution was applied for by the respondents on the strength of a decree

of the High Court in second appeal reversing the decrees of both the lower Courts and dismissing the plaintiffs' (appellant's) suit. It appears that of the original appellants in the first appellate Court, the 10th defendant, though dead before the second appeal was filed, was included as one of the appellants, and his legal representatives were not brought on record, and the 13th defendant was not included at all. The present appellant's contention in this matter of restitution has been that these errors vitiate the High Court's decree and render it void for want of jurisdiction since the necessary parties were not on the record and therefore no application for restitution under it can lie.

It will be noted that the objection that the High Court's decree is a nullity comes not from those defendants who were not made parties to the appeal but from the plaintiffs who say that they are entitled to benefit thereby to the extent of having the decree dismissing this suit declared a nullity. The plaintiff's point is thus a purely technical one and there is nothing to commend it on the merits apart from the technical law, and I have to see if the technical law will justify their contention.

The original suit was by the plaintiff's tarwad against the defendants' tarwad: the plaint and the written statement show that clearly. Instead of putting the tarwads on record only by and through their karnavan or other representative all the members of the plaintiffs' tarwad were arrayed as plaintiffs and all the members of the defendant's tarwad, thirteen in all, as defendants. On each side the actual karnavan was of course one of the parties to the suit—14th defendant on the plaintiffs' side and the 4th defendant on the defendants' side—and on the defendant's side the de facto manager, a woman (1st defendant) was also a party. These karnavans and this manager remained as parties throughout the whole of the litigation and are now parties to the present proceeding. There has been throughout no flaw in the array of parties on the plaintiffs' side, but, as mentioned, on the defendants' side there was in the second appeal a mistake including the deceased 10th defendant as an appellant and not bringing on his legal representatives and in omitting the 13th defendant. It appears that the 10th defendant died after the vakalat was given to the vakil for the appeal, but before the appeal was actually filed. His legal representatives are said to include, besides the other members of the tarwad including the omitted 13th defendant, a male infant. 10th defendant was even on the date of his death a minor and the 13th defendant was an infant when the proceedings began and was about 5 or 6 years old at the date of the second appeal.

Now it goes without saying that no decree is binding on a party if he was a necessary party to the suit and he was not on record, and if the result of the judgment in second appeal had been a decree against necessary parties not on the record undoubtedly the interest of those parties would have been affected without their having had an opportunity of meeting the case against them, and in such circumstances the judgment against them would have been void, and in certain circumstances when their interests were inseparable from those of other judgment-debtors under the decree, the decree as a whole would have been void. This principle of law is laid down in several cases: see *Bikramagit Rai* v. *Darshan Das* (1); *Imdad Ali* v. *Jagan Lal* (2); *Imam-ud-din* v. *Sadarath Rai* (3); and *Subramania Aiyar* v. *Vaithinatha Aiyar* (4).

The question then is, were these minor members of the tarwad necessary parties to the defendants' second appeal when their karnawan and tarwad manager were throughout on record? It is argued that because the original suit was filed not against the tarwad as a unity represented by its head, but against the tarwad through each of its individual members, each one of these is a necessary party to all subsequent proceedings. It is contended that the second appeal in the High Court has abated so far as the 10th defendant was concerned and that as the 13th defendant also never appealed, the lower appellate Court's decree is still enforceable against both of them, and that since their shares in the tarwad cannot be partitioned and separated, the

(1) A. I. R. 1925 All. 141.
(2) [1895] 17 All. 478=(1895) A. W. N. 109.
(3) [1910] 32 All. 301=5 I. C. 897=7 A. L. J. 228.
(4) [1913] 38 Mad. 682=31 I. C. 198.

lower appellate Court's decree is thus enforceable against the whole tarwad. This argument assumes that 10th and 13th defendants were necessary parties to the second appeal. As I have already said and as the lower Court has found as a question of fact, it was the tarwads which were opposed to each other in this litigation throughout, it was therefore the tarwads who were the necessary parties to each step of the litigation and the tarwads who were the necessary parties in the second appeal. To that second appeal the plaintiffs' tarwad was a party undoubtedly because every member of it was on record. But it seems to me that the defendants' tarwad was no less on the record as a party, even though two of its minor members were not there because, as pointed out, the karnavan and the manager of the tarwad were on the record.

The plaintiffs' contention, if I understand it aright, is that the fact that they chose to make each member of the tarwad a party to the suit somehow deprived the manager and karnavan of their ordinary character as manager and representative of the tarwad, and that therefore the tarwad cannot be on the record, even though its karnavan is, unless each member is also on the record. I am unable to accept the contention which in effect is that the plaintiff has power to force on the tarwad whatever manner of representation he pleases and prevent them from using any other that is ordinarily open to them. So that in a case like the present, the plaintiff could, by choosing the manner of representation by inclusion of all individual members and by gaining over any single member to his side, effectualy burke any proceedings in opposition to his own. Obviously, such a contention is untenable. The only question I have to decide is whether, as a matter of fact, the tarwad was properly represented in that appeal. The karnavan was on record, and he is ordinarily sufficient to represent the tarwad and he does not lose his representative character merely because the plaintiff chooses, from abundant caution, to make all the members parties. I find nothing to indicate that the karnavan had lost his representative character. Clearly, the karnavan is prima facie always clothed with a representative as well as an individual character, and I am unable to appreciate how it is open to plaintiff to deprive him of that representative capacity. In that capacity he represents and defends the rights of the whole tarwad and all the members of it as well as his own individual rights. Any decree then, in favour of or against the karnavan was a decree in favour or against the tarwad as a whole.

It has been clearly laid down in *Manakat Velamma* v. *Ibrahim Lebbe* (5) and *Rayarappan Nambiar* v. *Koyotan Chalile Veetil Karnavan* (6), that a decree against the karnavan binds the tarwad if he was sued in his representative capacity and that the decision of the latter question is not so much a question whether he was specifically impleaded as representative of the tarwad, as whether he was as a matter of fact not conducting the litigation for the tarwad ; and if it is found, as in this case, that he was, it does not matter if the other members were added or omitted to be added. The decree which the plaintiffs got in the lower appellate Court was a decree against the karnavan and, therefore, against the tarwad. The karnavan and therefore the tarwad appealed and got a decree in his favour and therefore in its favour. That decree enures for the whole tarwad, whether or not all the other members were on the record. Applying the test whether the original suit could have been maintained without bringing the 10th and 13th defendants on record, it appears to me quite clearly that it could. The plaintiff's tarwad is, therefore, bound by the decree in second appeal.

The plaintiffs have relied specifically on two rulings to controvert this view : *Balaram Pal* v. *Kanysha Majhi* (7) and *Ambika Prasad* v. *Jhinak Singh* (8). The former case, I confess I do not follow, where it is stated " as the plaintiffs pleaded a joint title, the right to sue was one which did not survive to the surviving plaintiff." I do not see why it might not have survived. But if the Court meant that from the other facts it was apparent that the right to sue did not survive this ruling has no application to the present case. The

(5) [1903] 27 Mad. 375.
(6) [1918] 35 M. L. J. 51=45 I. C. 489=8 L. W. 154.
(7) [1919] 53 I. C. 548.
(8) A. I. R. 1923 All. 211=45 All. 286.

case *Ambika Prasad* v. *Jhinak Singh* (8) purports to follow this case. But, with respect, I do not see why the decree against a deceased party should be a nullity if the deceased party was properly represented in the decree and therefore all the necessary parties were on the record; and I doubt if that ruling was intended to go so far.

In this view of the case I do not think it necessary to consider the application of O. 41, R. 4 and the rulings under that rule; but I agree with the plaintiffs' learned pleader when he contends that that rule can only apply when the fact of the omission of the parties is brought to the notice of the Court and it consciously decides to apply the rule. If the rulings in *Appanna* v. *Govarappadu*. (9) and *Chintaman* v. *Gangabai* (10) imply that O. 41, R. 4 applies even if the Court is ignorant of the absence of the necessary parties, it may be that they go too far. It is not necessary to go into this question further. In the present case the High Court was not aware when it heard the appeal that the 10th defendant was dead, although it might have been aware, if it had scrutinized the array of parties that the 13th defendant who was a party in the lower appellate Court had not been added in the High Court. Nor is it a case for the application of O. 22, and the survival of any right to sue or defend a suit. The whole of the defendants' party was embodied in the karnavan and the right to appeal never abated against him. Thus, no possibility of conflict between the decisions of the lower appellate Court in the first appeal and the High Court in the second appeal arises.

On the whole, therefore, I am not prepared to interfere with the order of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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(9) A. I. R. 1925 Mad. 910.
(10) [1903] 27 Bom. 284 = 5 Bom. L. R. 90.

* * A. I. R. 1926 Madras 994

Full Bench

KRISHNAN, RAMESAM AND VENKATASUBBA RAO, JJ.

Balavenkataseetharama Chettiar and *another*—Petitioners—Appellants.

v.

Official Receiver, Tanjore and *others*—Respondents.

Appeal No. 39 of 1925, Decided on 26th April 1926, against the order of the Dist. J., West Tanjore, D/- 15-12-1924.

* * *Provincial Insolvency Act* (1920), *Ss.* 28, 2 (*d*) *and* 17—*Power of Mitakshara Hindu father to sell whole undivided property including son's share passes to Official Receiver—Passing is independent of S.* 2 (*d*) *and the power continues even after father's death*: **A. I. R. 1925 Mad. 52 Overruled.**

Official Receiver in whom the property of an insolvent Hindu governed by the Mitakshara is vested under the Provincial Insolvency Act (5 of 1920) is entitled to sell the joint family property of the insolvent and his sons for his debts where they are neither illegal nor immoral, i. e., such debts as the sons would, on account of their pious obligation, be bouud to pay from their joint property. It is the power of sale that vests in him and not the share of the son itself. *A. I. R.* 1925 *P. C.* 18, *Expl.* **A. I. R. 1925 Mad. 52, Overruled.** This power continue even after the father's death by virtue of S. 17. S. 28 by itself is enough to vest the power of disposing whole family property in the Receiver in insolvency of a Mitakshara Hindu father. It is not necessary to pray in aid the definition of "property" in S. 2 (d) for this purpose.

[P 994 C 2, P 995 C 1, 2; P 996 C 1]

Per Venkatasubba Rao, J.—The expression 'property' in S. 2 (d) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father. [P 1000 C 2]

T. Rangachariar and *K. Narasimha Aiyangar*—for Appellants.

S. Varadachariar and *T. M. Krishnaswami Aiyar*—for Respondents.

Krishnan, J.—The point for decision in this appeal is whether the Official Receiver in whom the property of an insolvent Hindu governed by the Law of Mitakshara is vested under the Provincial Insolvency Act V of 1920 is entitled to sell the joint family property of the insolvent and his sons for his debt, they being neither illegal nor immoral. The lower Court has held that he could and has upheld the sale by him. The appellants contend that he has no such power.

The rulings of this Court have been in favour of recognizing such power and holding such sales to be valid both in the Presidency Town and in the mofussil. [See *Official Assignee of Madras* v.

Ramachandra Aiyar (1); *Sellamuthu Servai, In re.* (2), *Sankaranarayana Pillai* v. *Rajamani* (3) and *Kuppuswami Goundan* v. *Marimuthu Goundan* (4)]. There was a difference of opinion as to whether the power to sell the joint property alone vested in the Official Assignee or whether the undivided share itself of the sons vested in him. In the first three cases quoted above it was ruled that the power alone vested but in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) the opinion was expressed that the share itself vested. But all the cases were agreed that the Official Assignee or Receiver was entitled to sell the whole joint property and give a good title to the purchaser provided that the debts were such as as the sons were, on account of their pious obligation, bound to pay from their joint property.

The question has again been raised now on account of the recent ruling of the Privy Council in *Sat Narain* v. *Behari Lal* (5) and it is contended that the result of that decision is to compel us to hold that neither the shares of the sons nor the power to sell such shares vests in the Official Receiver and that he can proceed against the sons' share if at all only by way of suit. The Privy Council has no doubt clearly laid down that the shares of the sons do not vest in the Official Assignee. That decision was under the Presidency Towns Insolvency Act and one of the arguments used by their Lordships to arrive at their conclusion is based on the existence and the language of S. 52 of that Act, a section which finds no counterpart in the Provincial Insolvency Act. Nevertheless as the other arguments apply equally to the latter Act it seems to me that we must hold that the same principle governs cases under it in the mofussil. As a result we must overrule the decision in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) in so far as it holds that the undivided share of the son itself vests in the Official Receiver.

That does not however carry the appellants far enough to enable them to succeed in their appeal, for, if the Official Receiver has got the father's power to sell the joint property vested in him he will be entitled to sell the whole joint property himself. It is therefore argued for the appellant that though under the Presidency Towns Insolvency Act such a power may be vested in the Assignee by virtue of S. 52 there is no provision in the Provincial Insolvency Act to so vest it. I do not think the Legislature intended to make any such distinction between the Madras andt he mofussil insolvencies as suggested by this argument. It cannot be said that their Lordships of the Privy Council laid down that such a power will not pass to the Official Assignee; it was not necessary for them to do so for the purpose of the case before them which was one of a right of pre-emption claimed by the insolvent's son as owner of his share of the family property. The vesting of a power to sell it in the Official Assignee would not interfere with that right till he actually exercises that power and sells; a thing which had not been done in that case. In fact their Lordships expressly say:

> It may be that under the provisions of S. 52 or in some other way that property i. e.. the joint property) may be in a proper case be made available for the payment of the father's just debts.

The contention, however, is that the effect of their Lordships' judgment is to prevent any vesting of such a power in mofussil cases at any rate as there is no express provision for it in the mofussil Act. It seems to me, however, that the provisions we have in the Act are sufficient to vest such a power. S. 28, which is the vesting section, vests the whole of the property of the insolvent in the Official Receiver. In the joint family property the insolvent father is not only entitled to his own share but has also got a power to sell the whole property including the son's share for payment of his just debts. It seems to to me that under S. 28 itself his share as well as the power will vest in the Receiver as the insolvent's property. It is not necessary to pray in aid the definition of "property" in S. 2 (d) for this purpose. There may be a difficulty in doing so as their Lordships seem to have been of opinion that S. 2 (e) of the Presidency Towns Insolvency Act, the wording of which is the same as that of S. 2 (d) of the Provincial Insolvency Act, contemplates only an "absolute and

(1) A. I. R. 1923 Mad. 55=46 Mad. 54.
(2) A. I. R. 1924 Mad. 411=47 Mad. 87 (S.B.).
(3) A. I. R. 1924 Mad. 550=47 Mad. 462.
(4) A. I. R. 1925 Mad. 52.
(5) A. I. R. 1925 P. C. 18=6 Lah. 1.

unconditional power of disposal" which a father's power is not as it depends upon the existence of debts liable to be satisfied out of the son's share. S. 28, however, by itself is enough, it seems to me, to vest that power in the Receiver as a species of property belonging to the father.

Now it is argued that a power can never be treated as property and reliance is placed upon the case of *Ex parte Gilchrist, In re Armstrong* (6), especially on the judgment of Fry, L. J., on page 531. In that case the learned Judges were dealing with what is called a general power of appointment under the English Law which is a very different thing in law from the power of the Hindu father under the Hindu Law which we are dealing with. S. 52 of the Presidency Towns Insolvency Act itself speaks of such a power or capacity of the father to sell as a species of property. I hold, therefore, that the Receiver had in this case the power to sell the whole joint property to pay the father's debts as they were neither immoral nor illegal debts and his sale must be upheld.

I am fortified in my view as the same view was taken by a Bench of this Court in C. M. A. No. 115 of 1925 unreportad and also by the Lahore High Court in *Khem Chand* v. *Narain Das* (7). There is an expression of opinion to the contrary by Macleod, C. J., in *Shripad* v. *Basappa* (8) who says on page 787 :

> Speaking for myself, I do not think that when the manager of a joint Hindu family is adjudicated insolvent, the power which he had before his insolvency to dispose of family estate for proper purposes, must be considered as vesting in the Receiver or Official Assignee.

It does not seem to be a considered opinion nor is it shared by Coyajee, J., who sat with him. The Chief Justice makes no reference to S. 52 of the Presidency Towns Insolvency Act. With all respect I am unable to accept the Chief Justice's dictum.

In this case one further argument has to be considered and that is that because the insolvent father died before the Receiver effected his sale, the sale was without authority and void. It is argued that the power came to an end with the death of the father and that the Receiver was no longer entitled to exercise it. For this argument reliance is placed on the case of *Nichols* v. *Nixey* (9). The answer to this contention is provided for by S. 17 of the Act which deals with cases where the insolvent debtor dies pending proceedings in insolvency. That section enacts that unless the Court otherwise orders, the proceedings shall be continued so far as may be necessary for the realization and distribution of the property of the debtor. The power of sale can thus be exercised for the realisation of the assets of the insolvent though he is dead. The English case cited is thus not applicable. The appeal fails and is dismissed with costs, to be paid out of the estate, of the Official Receiver and alienees each one set.

Ramesam, J.—As I agree with the judgments of my learned brothers, I will briefly give my reasons for doing so. Having regard to the reference to S. 52 of the Act at page 24 of the judgment in *Sat Narayan* v. *Behari Lal* (5), I think there is very little doubt that the Privy Council intended to hold that the right of alienation of a Hindu father in respect of joint family property passes to the Official Assignee under the Presidency Towns Insolvency Act. I think the point is not capable of much argument. The more difficult question that arises before us is, whether in the case of the Provincial Insolvency Act the absence of a provision like S. 52 makes any difference, and, if so, what ? The question turns upon what construction one may place on the definition of 'property' in S. 2 (d) of the Act. This definition is identical in language with S. 2 (e) of the older Provincial Insolveney Act III of 1907 which has been repealed by the present Act. On the one hand Mr Varadachari contends that seeing that, under the Procedure Code of 1882 which contained provisions relating to Provincial Insolvency, S. 266 should vest in the Receiver and that the Provincial Insolvency Act is only intended to consolidate the preceding state of the law, the definition of the word property in the Provincial Insolvency Act ought to be construed so as to include the "property" itself and not merely the father's rights over it.

To this argument, however, there are three replies. First, the Privy Council

(6) [1886] 17 Q. B. D. 521=55 L.J.,Q.B. 578=55 L. T. 538.
(7) A. I. R. 1926 Lah. 41=6 Lah.493
(8) 49 Bom. 785=A. I. R. 1925 Bom. 416.
(9) [1885] 29 Ch. 1005=55 L. J. Ch. 146=52 L. T. 803=33 W. R. 840.

have pointed out that decisions under the Civil P. C. ought not to be used for construing the Insolvency Acts. The Code had a history of its own culminating in S. 53 of the present Code of 1908. Secondly, the house of Lords in *Bank of England* v. *Vagliano Bros.* (10) condemned this mode of construing an Act, that is, we ought to look at the Insolvency Act by itself and not to be influenced by the fact that it was a continuation of the previous Civil P. C. of 1882. Thirdly, the identical words in the Presidency Towns Insolvency Act have been construed by the Privy Council in *Sat Narain* v. *Behari Lal* (5) as applying only to property over which the insolvent had absolute power of disposal and until we see a reason to the contrary in the Act we are now considering I think, if possible, the words in this Act ought to receive the same construction. I must therefore reject Mr. Varadachari's contention that the property (including the son's share) itself vests in the Official Assignee. On the other hand it is contended by Mr. Rangachari that not even the father's rights over the property passed to the Official Assignee. Now, there is no doubt that the word "property" may include, without doing any violence to the term, the rights of a Hindu father over joint family property under the Mitakshara Law. This is shown by S. 52 in the Presidency Towns Insolvency Act. The only question is, whether we should construe the word "property.' in the Provincial Insolvency Act so as to exclude such rights. I am not able to see any reason why we should --the absence of a section like S. 52 of the Presidency Towns Insolvency Act throwing no light on the matter. I therefore agree with the conclusion of my learned brothers.

On the third point, namely, whether the death of the insolvent makes any difference, I agree that it does not.

Venkatasubba Rao, J.--This appeal raises a very important question, namely, what is the effect of the decision of the Judicial Committee in *Sat Narain* v. *Behari Lal* (5)? The Hindu Law recognizes the power of a father, subject to certain conditions and restrictions, to deal with his son's undivided interest in joint family property. On a father being adjudicated an insolvent, what is the nature of the right, if any, that passes to the Official Assignee or the Official Receiver as the case may be? This is the question that this appeal raises. The appellants before us are the sons of an insolvent and they challenge the act of the Official Receiver, who, for paying off the father's debts, exercised the power to sell the son's interest also in family properties. The learned District Judge has held that the Receiver could validly exercise such a power in respect of debts not shown to be either illegal or immoral.

Mr. Rangachari, the appellants' learned vakil, contends before us, that the judgment of the Judicial Committee must be taken to amount to a pronouncement, that on a father being adjudicated an insolvent, neither the son's undivided share nor the father's conditional power to dispose of that share vests in the Official Assignee. The case decides unmistakably so far as the Presidency Towns Insolvency Act is concerned, that the son's share as such does not vest in the Official Assignee. Does it further decide that the insolvent's conditional power to dispose of his son's interest does not also pass to the Official Assignee? The case having been decided with reference to the Presidency Towns Insolvency Act, a further question arises: what is the bearing of that decision on the scope, of the Provincial Insolvency Act—the Act under which the present appeal has to be decided?

The points raised being of considerable importance, this Bench, consisting of three Judges, has been specially constituted to hear this appeal.

In order to understand properly the decision of the Judicial Committee, it is necessary to have regard first to the facts with reference to which the judgment was given, and, secondly, to bear in mind the divergent views on the subject taken by the Courts in India. In the case before the Privy Council, the question arose in regard to the right of pre-emption, which a son as a member of a joint family, claimed to exercise, after adjudication of his father as an insolvent: and against the son the contention was put forward that the entire property having previously vested in the Official Assignee, the son ceased to have any proprietary interest in the property which would entitle him to exercise the right of

(10) [1891] A. C. 107=60 L. J. Q. B. 145=64 L. T. 353=39 W. R. 657=55 J. P. 676.

pre-emption. A Full Bench of the Lahore High Court decided that on adjudication of the father which was before the suit, the son's undivided interest also passed to the Official Assignee and that consequently there was no right left in the son outstanding, which could be enforced in the suit. Did the undivided share of the son vest or not vest in the Official Assignee? This was the question that the Judicial Committee had to decide, and disagreeing with the Full Bench of the Lahore High Court their Lordships held that it did not vest. If the High Court had held that what passed to the Official Assignee was not the son's undivided interest but the father's conditional power of disposal, the plaintiff's suit would not have been dismissed. In the light of these facts is there anything to show that the Judicial Committee intended to lay down that even the disposing power of the father did not pass? That the Judicial Committee has not said so in express terms is not disputed. The decreeing of the plaintiff's claim is not inconsistent, as I have said, with the recognition of the father's disposing power having passed to the Official Assignee.

Then, in regard to the views held by the Indian Courts, there was a sharp divergence of opinion as to what vested in the Official Assignee on the adjudication of a Hindu father belonging to a joint undivided Hindu family. To bring out the real point at issue, I shall refer to a few recent cases decided by the High Courts in India. In the *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) the Official Assignee contended that on the adjudication of the father, the interest of the minor sons of the insolvent in the family property vested in him. Sir Walter Schwabe, C. J., who delivered the judgment of the Court consisting of himself and Coutts-Trotter, J., observes that it may be taken as established law, that the Official Assignee is not entitled to have vested in him the shares of the other members, although he can deal with them if the insolvent could lawfully have done so had there been no insolvency. In *Sellamuthu Servai* v. *Ramaiya* (2) the question had to be considered whether the Privy Council decisions in *Sahu Ramachandra* v. *Bhup Singh* (11) and *Chet Ram* v. *Ram Singh* (12) affected the law as understood, in regard to the Official Assignee's power to deal with the son's interest during the insolvent's lifetime. In each of the three separate judgments that were delivered, the point is emphasized that the accepted law is that it is the father's power that vests in the Official Assignee and not the undivided share of the son Coutts-Trotter, J., says thus:

> It was decided by a Bench of this Court consisting of two members of the present Bench in *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, have nevertheless the same rights of disposition of the family property for the satisfaction of the debts of the manager as the manager would himself have been entitled to exercise, if he had not been adjudicated insolvent.

Krishnan, J., refers to it as settled law, that if the father has the right to sell the whole joint estate to pay off his antecedent debts, that power can be exercised by the Official Assignee. In *Sankaranarayana Pillai* v. *Rajamani* (3), the law was again stated in similar terms. Phillips, J., observes:

> Applying this principle to the present case, we find that the Official Receiver had power to sell not only the share of the adult insolvent but also it vested in him the power of these insolvents as father to sell their sons' interest in the property for the payment of antecedent debts.

In my own judgment in that case, I expressed myself thus:

> The learned Subordinate Judge has found that the debts of the 1st and 2nd defendants were not incurred for illegal or immoral purposes and it is now a settled rule that the Official Rsceiver can exercise the right of the father to dispose of the son's interest in ancestral immovable estate for the payment of the father's debts not tainted with illegality or immorality.

The first two cases arose under the Presidency Insolvency Act and the third under the Provincial Insolvency Act and in each of these cases it was assumed that what vested in the Official Assignee was not the undivided share of the son but the conditional power of disposal possessed by the Hindu father.

The point again came up before a Bench of the Madras High Court in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4). That was a case under the Provincial Insolvency Act. It was there decided, contrary to the trend of the authority of this Court, that the entire undivided interest of the son vested in the Official Receiver as distinguished from

(11) [1917] 39 All. 437=39 I. C. 280=44 I. A 126 (P. C.).

(12) A. I. R. 1922 P. C. 247=44 All. 368 (P. C.)

the mere disposing power of the father. Spencer, O. C. J., thought that *Official Assignee of Madras* v. *Ramachandra Aiyar* (1) was wrongly decided owing to a concession erroneously made by the Advocate-General who argued that case and preferred to follow the judgment of the Lahore High Court in *Behari Lal* v. *Sat Narain* (13), the very same decision which was later upset by the Privy Council in the case cited at the opening of this judgment, *Sat Narain* v. *Behari Lal* (5). Srinivasa Aiyangar, J., who concurred with Spencer, O. C. J., felt bound to follow the Lahore decision and held that the share itself vested. He observed, however, that if the matter had been res-integra he would have taken the view that it was the bare power that vested and not the corporal undivided interest.

It was after these cases were decided by the Madras High Court that the question was raised before the Judicial Committee in the appeal from the Lahore case. The Madras cases to which I have made reference illustrate the conflict that prevailed in the Indian Courts on this question. Sir Shadi Lal, C. J., as one of the members of the Full Bench of the Lahore High Court, clearly indicated that if he had not been bon d by authority he would have held that what vested was only the father's conditional power and not the son's undivided share. The Privy Council directed the whole of their judgmant to show that the Lahore High Court's view namely, that the share itself vested in the Official Assignee, was wrong. When their Lordships expressly say that they disapprove of one of these aforesaid two views, it seems to me that it would be most improper to read into their judgment, an intention to overrule by implication, the other and the exactly opposite view which had been repeatedly taken on this subject. These considerations seem to me to point strongly to the fact that the Judicial Committee could not have intended to lay down the very wide pro position for which Mr. Rangachari contends.

A careful examination of the judgment itself leads me, on the contrary to the conclusion, that their Lordships recognise that although the son's undivided share does not pass, the father's conditional power of disposal does pass. Reference is made to S. 2 (e) where the word 'property' is said to include any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. They then refer to S. 52 (2) (b) which enacts that the property of the insolvent shall comprise the capacity to exercise all such powers in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency. Under the first of these sections, it is the property that vests under the second it is the power that vests, and their Lordships point out that it is difficult to reconcile S. 52 with the proposition that the property itself vests in the Assignee. While thus they reject the doctrine that the property vests, they impliedly accept the theory that the power vests. They again refer to S. 52 as containing a provision which enables the Official Assignee to have recourse to the son's share for the payment of the father's just debts. S. 52 can be invoked only by reason of the fact that under the section the property that vests in the Official Assignee includes the capacity to exercise a power of disposal. The following sentence in their Lordships' judgment makes their meaning even more clear :

> It is certainly a startling proposition that the insolvency of one member of the family should of itself and immediately take from the other male members of the family their interests in the joint property and from the female members their right to maintenance and transfer the whole estate to an assignee of the insolvent for the benefit of his creditors.

It admits of no doubt, that what their Lordships were combating in the whole of their judgment, was the view that the physical, corporeal, undivided shares of the sons immediately vests in the Assignee as contrasted with, and distinguished from the bare right of conditional disposal possessed by the Hindu father. It is also significant that it is stated towards the close of their judgment that the cases cited by their Lordships are not inconsistent with the conclusion at which they have arrived.

I am, therefore, satisfied that *Sat Narain* v. *Behari Lal* (5) is not an authority for the proposition that under the Presidency Towns Insolvency Act the conditional power of disposal of the

(13) A. I. R. 1923 Lah. 1=3 Lah. 329 (F. B.).

father does not vest in the Official Assignee.

I shall now proceed to deal with the second part of the question, viz, what bearing has this ruling on the scope of of the Provincial Insolvency Act in this respect? The argument for the appellant may be shortly put thus: S. (2) (e) of the Presidency Towns Insolvency Act is identical in language with S. 2 (d) o ithe Provincial Insolvency Act. The interpretation put by the Judicial Committee on S. 2 (d) must, therefore, hold good in respect of S. 2 (e).

It is next urged that S. (2) (e) has been construed as referring only to property over which the insolvent has an absolute and unconditional power of disposal, whereas a Hindu father's right is only a conditional right. The answer is twofold. Their Lordships were concerned with pointing out that S. 52 which vests morely the power, is irreconcilable with S. 2 (e) which vests the property. In regard to S. 2 (e) at the top of page 22 after saying that property is defined as including any property over which any person has a disposing power which he may exercise for his own benefit, they go on to say:

> And it may be said that a Hindu father's power to sell the joint property and apply the proceeds to the payment of his debts, is such a power.

Later on at the same page they observe:

> And S. 2 seems to contemplate an absolute and unconditional power of disposal.

Their Lordships were clearly pointing out that the definition in S. 2 applied "unless there is something repugnant in the subject or context" and that S. 52 renders it repugnant to hold that in contravention of its express terms the property itself vests. However this may be, it seems to me to be somewhat far-fetched to suggest that such construction as might be deemed to have been placed upon the words in S. 2 (e) was intended to be absolute and final irrespective of the context or the enactment where those words may occur. In the Provincial Insolvency Act there is no provision corresponding to S. 52 (2) (b) which refers to the exercise of power over property. In construing, therefore, S. 2 (d) in the Provincial Insolvency Act we are not hampered by the fact of co-existence in the same enactment of another provision in apparent or real conflict with that section. These very words have been used by the Indian Legislature in enactment after enactment, in pari materia with the Provincial Insolvency Act, to signify the conditional and restricted power possessed by a Hindu father. These identical words are used in S. 266 of the Civil Procedure Code of 1877 and 1882 and are reproduced in S. 60 of the present Code of 1908. In all these enactments, as in the Provincial Insolvency Act with which we are at present concerned, these words stand alone and are not controlled by a different set of words such as those that occur in S. 52 of the Presidency Towns Insolvency Act. It must be borne in mind that their Lordships throughout in their judgment repeatedly point out that their decision is given in respect of the Presidency Towns Insolvency Act alone. When the Law of Insolvency for the mofussil was a part of the Civil Procedure Code itself, S. 266 was referred to in S. 354 of the two earlier Codes, under which section the property of the insolvent vested in the Receiver. I am, therefore, of opinion that whatever be the meaning of the words in S. 2 (e) of the Presidency Towns Insolvency Act, the expression in S. 2 (d) of the Provincial Insolvency Act includes the qualified and restricted power of a Hindu father.

The only difficulty that still remains is, under this section, is it the property or the power that vests in the Official Receiver? The Privy Council have in very emphatic terms shown the unsoundness of the position that the property itself vests and although the Presidency Towns Insolvency Act alone was under discussion, their observations are of general application. In the face of those remarks it is impossible to hold that the property itself vests. Sir Shadi Lal, C. J., in the Lahore case, after adverting to cases under the Civil P. C., felt bound to hold that it is the undivided share and not the qualified power that vests. It seems to me that there is nothing in the case decided under the various Codes that compels one to take the view that the property itself as distinguished from the power vests in the Official Receiver. The Legislature in using the phraseology it did in S. 2 (d) of the Provincial Insolvency Act did no more than intend to enact that the insolvent's property in-

cludes also, in the case of a Hindu father, his disposing power over his son's undivided interest. This construction seems to me to be equally applicable whether the words are used in the Civil P. C. or in the Provincial Insolvency Act. Till a contrary opinion was expressed in *Kuppuswami Goundan* v. *Marimuthu Goundan* (4) (which must now be regarded as overruled) this is the view that was taken by the Madras High Court in regard to the Presidency as well as the Provincial Insolvency Acts. In my opinion the authority of the Madras cases that have held that a Hindu father's qualified and restricted power to dispose of his son's undivided interest vests on his adjudication in the Official Receiver has not been shaken by the recent pronouncement of the Privy Council in *Sat Narain* v. *Behari Lal* (5).

I may add that my view receives support from two cases decided since the Privy Council ruling, one, a decision of a Bench of this Court (Phillips and Madhavan Nair, JJ.) in C. M. A. No. 115 of 1925, and the other a decision of the Lahore High Court, *Khem Chand* v. *Narain Das* (7).

In the present case, after adjudication, the insolvent died. Does this fact make any difference? As the learned District Judge points out, S. 17 provides for this contingency, which runs thus :

If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary, for the realization and distribution of the property of the debtor.

Nicholas v. *Nixey* (9) has been cited for the proposition that the trustee cannot exercise a power of appointment after the death of the bankrupt, the donee of the power. The obvious answer to this is, that a decision which applies to powers in the ordinary legal sense of that term cannot be treated as an authority in regard to what is an entirely different thing, namely, the right, which has come to be described as power, under the Hindu Law of the father to dispose of his son's interest in the joint family property.

The appeal fails and is dismissed with costs as provided for in the judgment of my learned brother Krishnan, J.

Appeal dismissed.

A. I. R. 1926 Madras 1001

WALLACE, J.

R. Subbaroya Goundan—Petitioner.

v.

P. Muthukomarasamy Goundan—Respondent.

Civil Revision Petition No. 37 of 1926, Decided on 29th April 1926, from the order of the Dist. J., Coimbatore, in O. P. No. 78 of 1925.

Madras Local Boards Act (14 *of* 1920), *Ss.* 56 *and* 57—*S.* 56 *should be read subject to S.* 57—*President cannot be compelled to report under S.* 56 (4)—*Member absenting—Cessation of office does not depend upon adverse order—Absence need not be voluntary.*

It seems an anamoly that no member can compel the President to report any absence of a member to the Board. But that is how the law runs, and if the President does not choose to report the matter to the Board, then the Board under the law has no power to restore the absenting member.

Section 57 (3) is not intended to mean that a member who had failed to attend three consecutive meetings, nevertheless remains a member until and unless there is an adverse decision against him under S. 57.

There is no justification in the language of S. 57 for holding that the mere presentation of an application under S. 57 has the effect of restoring protem to office one who has ceased to hold office. If an application is put in under S. 57 and the Distrtct Judge decided that a member did cease to be a member then he did cease to be a member from the date fixed in S. 56, but for the purpose of saving the validity of proceedings in which he may have taken part after he had ceased to be a member he is deemed to be qualified during that period.

[P. 1002, C. 1, 2, P. 1003, C. 1]

T. R. Ramchandra Iyer and *K. S. Venkatarama Iyer*—for Petitioner.

T. M. Krishnaswamy Iyer—for Respondent.

Judgment.—This revision petition raises a question of the intention of Ss. 56 and 57 of the Madras Local Boards Act 14 of 1920, a matter involved in some difficulty because of the loose drafting of the language of the sections.

The petitioner, who was the President of the Taluk Board of Palladam, failed for three consecutive months to attend the meetings of the Board. S. 56 says that in such a case, "subject to the provisions of S. 57," he shall cease to be a member of the Board. The three months expired on 21-9-1925.

Section 56 (4) says :

In the case of a person who has ceased to be a member in consequence of failure to attend

meetings, the matter shall be reported by the President at the next meeting of the Local Board which may at that meeting restore such person to office.

In the present case the acting President did not report the matter and therefore the petitioner has not been restored to office under that sub-section. S. 57 permits an application to the District Judge in cases of doubt under S. 56, on which the District Judge shall make an enquiry and determine whether or not the member is disqualified under S. 56, and his decision shall be final. Sub-S. 3 of that section says : " Pending such decision the member shall be deemed to be qualified."

The petitioner relies upon this sub-S. 3. As I understand his case, it is that, since S. 56 has to be read subject to the provisions of S. 57, the former section does not come into operation by itself, but only in conjuction with and after an enquiry under S. 57, and that, therefore, no member ceases to hold office under S. 56 unless and until the District Judge has been moved and has held an enquiry under S. 57 and has so declared, and that until such declaration he remains by force of Sub-S. 3 a member. It is true that in the present case the District Judge has under S. 57 declared that the petitioner has ceased to be a member ; but the petitioner pleads that the District Judge has come to that conclusion through an error of law and misterpretation of the sections, considering himself too strictly bound by the terms of S. 56. It is however obvious that it was the primary duty of the District Judge, in an enquiry under S. 57, to determine whether under the terms of S. 56 the petitioner has ceased to hold office. That the District Judge did and has held that he did so cease. His decision under S. 57 is final unless his order was without juriseiction or in an irregular exercise of jurisdiction.

It is contended (1) that as the petitioner was elected President on 5-10-25, the Board had in effect restored him to office and (2) that the District Judge was wrong in holding that he had ceased to hold office because by the force of S. 57 ; (3) he remained a member pending the decision of the Judge and therefore had not ceased to be a member. I do not think that either of these contentions is well founded. As to first the Board could restore him as a member only under S. 56 (4). That procedure was not adopted. No doubt, it seems an anomaly that no member can compel the President to report such a matter to the Board. But that is how the law runs, and if the President does not choose to report the matter to the Board then the Board under the law has no power to restore him.

It is contended that the language of S. 56 (4), " Who has ceased to be a member, " is not happy, and it means something else than " ceases to be a member." The language seems to me definite and clear and must be taken to mean what it says. In this connexion reference may be made to the judgment of Ramesam, J., in *S. K. Devasigamony* v. *M. R. Sethuratana Iyer* (1).

As to the second point it seems to me clear that S. 57 (3) was not intended to mean that a member who had failed to attend three consecutive meetings nevertheless remains a member until and unless there is an adverse decision against him under S. 57. If it were so, S. 56 (4) would have no point. The Board could not restore one whe had not ceased to be a member. There are two ways in which a member who has prima facie ceased to be a member can be restored : (a) the Board can restore him under S. 56 (4) ; and (b) the District Judge may declare under S. 57 that he never ceased to be a member. Obviously, these are independent and not interdependent. In most cases there would not be time to get a decision under S. 57 before the next meeting at which alone S. 56 (4) can be invoked. Therefore, the operation of S. 56 (4) does not have to await the declaration by the District Judge under S. 57 that the member has ceased to be a member. That means that the member has ceased to be a member even before S. 57 can be invoked. Again S. 57 (3) does not say that he remains a member. It says that he shall be " deemed to be qualified." That was intended, I have no doubt, to prevent the proceedings of meetings in which a member, who on an enquiry under S. 57 has been declared to have ceased to be a member had continued to attend and take part, being invalidated by his having taken part and is similar

(1) A. I. R. 1925 Mad. 1034.

in intention to S. 35. There is no justification in the language of S. 57 for holding that the mere presentation of an application under S. 57 has the effect of restoring protem to office one who has ceased to hold office.

Prima facie then, the petitioner ceased under S. 56, to be a member. If no application had been put in under S. 57, he is not restored under S. 56 (4), then his cessation continues. If an application was put in under S. 57 and the District Judge decided that he did cease to be a member, then he did cease to be a member from the date fixed in S. 56; but for the purpose of saving the validity of proceedings in which he may have taken part after he had ceased to be a member he is deemed to be qualified during that period.

From another point of view the same result is indicated. There is no limitation for an application under S. 57 and one might never be put in at all. This does not mean, for example, that a person of unsound mind, a deaf, a mute, a leper, a convict, an insolvent, etc., remain members until some one takes out an application under S. 57 to the District Judge. These persons cease ipso facto to be members, as S. 56 states, and the proviso to S. 56 " subject to the provisons of S. 57 " can only mean that in cases where an application under S. 57 is put in, the operation of S. 56 is not final, but is subject to the decision of the District Judge under S. 57.

Another contention has been put forward, viz., that failure implies voluntary act, i. e., that the non-attendance should not be due to matters not within the control of the member. I can see no warrant for this view. If it had been so intended, it would have been easy to use the phrase " voluntarily absent himself " instead of " fails. " This point was not raised before the District Judge.

I must hold, therefore, that the District Judge has not acted without jurisdiction or in an irregular exercise of jurisdiction. He has decided, and had jurisdiction to decide, that the petitioner ceased to be a member on 21-9-1925, and his decision is final.

I must, therefore, dismiss the petition with costs.

Petition dismissed.

A. I. R. 1926 Madras 1003

PHILLIPS AND MADHAVAN NAIR, JJ.

Telikicherla Kandalai Venkataramanujacharyulu—Appellant.

v.

Telikicherla Kandalai Appalacharyulu and *others*—Respondents.

Letters Patent Appeal No. 26 of 1925, Decided on 19th February 1926, from the judgment of Devadoss, J., D/- 18th September 1924, in Second Appeal No. 582 of 1922.

(a) *Evidence Act, S. 65—Facts entitling parties to give secondary evidence pointed out.*

Evidence as to a statement made by the executor under the Will as to the same having been burnt is admissible as justifying a party in giving secondary evidence of the Will: *The Queen* v. *Braintree* (120 *E. R.* 827) and *The Queen* v. *Kenilworth* (115 *E.R.* 631), *Rel. on.* [P. 1004, C. 1]

(b) *Practice—Evidence—Appellate Court.*

Appellate Court will interfere with decision as to admissibility of evidence to prevent a clear miscarriage of justice. [P. 1004, C. 2]

(c) *Evidence Act, S. 6—Evidence forming basis of certain action is admissible—Evidence—Hearsay evidence.*

Under the Evidence Act hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude evidence as to a statement having been made upon which certain action was taken or certain results followed. [P. 1004, C. 2]

(d) *Civil P. C., S. 103—Finding of lower appellate Court based on inadmissible evidence—Fresh finding should be called for.*

If the second appellate Court considers the finding of the lower appellate Court to be unsatisfactory because it was based on inadmissible document, a fresh finding on the rest of the evidence should be called for. [P. 1005, C. 1]

P. V. Vallacharyulu—for Appellant.

C. Rama Rao—for Respondents.

Judgment.—In this case one of the incidental questions at issue was whether one Lakshminarasamma had authority to adopt the 3rd defendant's father. The authority is said to have been given under a registered Will of 1873 and it has been found that the adoption actually took place in 1897. No specific issue was framed as to the validity of the adoption, the only issue on the point being the first issue:

Is the plaintiff the next reversioner entitled to sue or has Lakshminarasamma adopted any?

The frame of the issue is such that the question raised is as regards the factum of the adoption rather than its validity. The validity having been questioned the defendants sought to prove the Will by

secondary evidence. A registration copy of the Will was produced and was admitted in evidence and marked as Ex. XIII subject to proof. These words "subject to proof" apparently mean subject to proof that the defendants are entitled to adduce secondary evidence. Accordingly D. W. 3 was examined and he stated that at about the time the adoption deed, Ex. III, was drawn up he saw a registration copy of the Will in the hands of one Doddayacharlu, a brother of the widow and the father of the adopted boy, and that when he questioned Doddayacharlu the latter said that the Will had been burnt. The District Munsif did not expunge Ex. XIII from the record and apparently it was never rejected until the District Munsif pronounced his judgment. He then held that the loss of the original had not been proved and that Ex. XIII was inadmissible in evidence. In appeal the Subordinate Judge held that the defendants had shown sufficient reason for the production of secondary evidence. He states:

> I am really disposed to consider that the statement of D. W. 3 to Doddayacharlu having said at the time Ex. III came into existence that the original Will was lost is entitled to be regarded as sufficient basis for letting in evidence about the Will for admitting Ex. XIII as such evidence.

Under S. 65 of the Evidence Act secondary evidence may be adduced when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time. This statement of D. W. 2 even though it is mere hearsay evidence as to the loss, may be treated as offering reason for holding that the original could not be produced in reasonable time. Doddayacharlu was the son of the executor under the Will, brother of the widow, and the father of the adopted boy, and consequently was a person in whose custody the Will was likely to be. When he said that the original had been burnt, that afforded very good ground for supposing that any attempt to cause its production would be wasting the time of the Court. Similar evidence was held to be admissible in *The Queen* v. *Braintree* (1) where it was held that when enquiries had been made from parties who are likely to have the document in their possession the answers of such parties to the enquiries were admissible, although the parties themselves were not called, and that although such evidence might not be admissible as evidence on the main issue, it would be admissible upon the preliminary enquiry whether a proper search had been made. Similar evidence was acted upon in *The Queen* v. *Kenilworth* (2) where it was held that the trial Court must exercise its own judgment as to the reasonablenes of the search and that in appeal the decision thereon could not be interfered with.

It is contended for the respondent on the strength of *Harripria Debi* v. *Rukmini Debi* (3) that it was the trial Court alone that could come to a conclusion on this point and that the Subordinate Judge should not have interfered with its discretion, but in that case it was held that interference would be allowed in order to prevent a clear case of miscarriage of justice. Here we have the fact that until the trial was concluded the defendants were under the impression that secondary evidence was admissible for Ex. XIII had been admitted and filed as an exhibit and the Court had not subsequently rejected it as evidence. The defendants, therefore, had no opportunity of adducing other proof of their case and were seriously prejudiced by the District Munsif's procedure. This would be sufficient to justify the appellate Court's interference.

Two other English cases were relied on by the respondents *The King* v. *Castleton* (4) and *The King* v. *Benio* (5) but in both these cases the decisions went upon the question of whether there was sufficiency of evidence to prove proper enquiry.

Under the Evidence Act hearsay evidence is inadmissible to prove a fact which is deposed to on hearsay, but does not necessarily preclude euidence as to a statement having been made upon which certain action was taken or certain results followed.

Although the evidence of P. W. 3 cannot be held to prove the actual loss of the document, it is something upon which a party may act in concluding that further search for the original document is useless. That is the view taken by the

(1) 120 E. R. 827.

(2) 115 E. R. 631.

(3) [1892] 19 Cal. 438=19 I. A. 79=6 Sar. 177 (P. C.).

(4) 101 E. R. 530.

(5) 10 E. R. 854.

Subordinate Judge and there seems to be no reason why his finding should not be accepted in second appeal.

Apart from that, the learned Judge in second appeal has stated that the judgment of the Subordinate Judge is based entirely on a document inadmissible in evidence, but he has overlooked the following statement in the Subordinate Judge's judgment :

> Even if it were not so I should hold that there is in this case presumptive evidence about the loss.

In saying so he apparently considers that secondary evidence would be admissible under S. 64 although the actual loss of the document is excluded, there is evidence that adoption took place and was all along treated by the family as valid during the whole of the lifetime of the adopted son and the validity was admitted by the brother of the testator, and, apparently, the Subordinate Judge was of opinion that the validity had been proved without Ex. XIII ; because he says :

> If Lakshminarasamma was openly holding out shat she had made an adoption, and if the adopted son was in possession of the property of the adoptive father, unless the plaintiff was perfectly well aware that the adoption was duly and validly made he would have sued long ago for a declaration.

This aspect of the case has not been considered by the learned Judge who heard the second appeal. We think therefore that both on the ground that the Subordinate Judge was of opinion that the necessary proof had been given to justify the production of secondary evidence, and that the validity of the adoption had been otherwise proved, the finding is one which should not be interfered with in second appeal. If the finding were deemed to be unsatisfactory because it was based on an inadmissible document a fresh finding on the rest of the evidence could have been called for, more especially in view of the fact that the procedure of the District Munsif had seriously prejudiced the defendant.

As we consider that the finding of the Subordinate Judge should be accepted, we must allow this appeal and restore the judgment of the Subordinate Judge with costs both here and in second appeal.

Appeal allowed.

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* A. I. R. 1926 Madras 1005

PHILLIPS AND MADHAVAN NAIR, JJ.

Sankunni Variar and *another*—Counter-Petitioners—Appellants.

v.

Vasudevan Nambudripad and *others*—Petitioners—Respondents.

Appeal No. 382 of 1925, Decided on 10th March 1926, from the order of the Sub-J., South Malabar in E. P. No. 297 of 1925.

* *Civil P. C., S. 145—S. 145 applies only in the case of surety for payment of money under Court's order — Surety to produce property attached—Default in producing property — Surety bond can be enforced apart from S. 145 by way of execution.*

The liability under S 145 attaches only in the case of a person who is "surety" for the payment of any money under an order of the Court and not a surety liable to pay owing to default. But where the surety undertakes to produce certain property of the judgment-debtor attached in execution of a decree, or in default to be liable for its value the security bond can be enforced by way of execution apart from the provisions of S. 145 : (42 *All.* 158 (*P. C.*), *Foll.*) Although the case does not come within the terms of S. 145, the Court has the inherent power to enforce its bond without recourse to a suit. [P. 1006, C. 2 ; P. 1007, C. 1]

T. M. Krishnaswami Aiyar and *T. S. Anantaraman*—for Appellants.

C. V. Anantakrishna Aiyar, *N. Rama Aiyar* and *K. R. Narayana Aiyar*—for Respondents.

Phillips, J.—In this case some property consisting of machinery and other things belonging to the judgment-debtor was attached and was proclaimed for sale. The sale was adjourned, and the appellants and two others executed a surety bond undertaking to produce the property when called for. This was on the 3rd of July 1924. The sale was posted for 21st November 1924, and was adjourned to 19th December 1924, and then to 16th January 1925, and on each occasion it was adjourned because the decree-holder granted time on receipt of certain sums from the judgment-debtor. The sale was again adjourned to 16th March 1925, and the sureties failed to produce the property and consequently the sale could not take place. The decree-holder then put in a petition E. P. No. 297 of 1925 to enforce the liability of the sureties by a warrant of arrest.

The Subordinate Judge has found that the sureties have committed default and

has ordered that if they do not produce the attached articles or their value as per the bond a warrant of arrest will issue. Two of the sureties now appeal against this order and state that although they did not produce the property it was available in the factory close to the Court-house, and that therefore they should not be deemed to have committed default. It is also alleged that in July 1925, an interim Receiver was appointed to take charge of the judgment-debtor's properties, as he had been declared an insolvent, and that when the sureties applied to the insolvency Court that Court refused to allow them to remove the property. This latter contention is beside the point, because on 16th March 1925, when the property was not produced, no question of insolvency had arisen, and the sureties were not prevented from producing the property. It does not appear that they even informed the officer conducting the sale that the properties were available close at hand, and even if the pressing machines in the tile factory could not be easily moved the rest of the property was easily transportable. The sureties had therefore no excuse for the non-production and must be deemed to have committed default and forfeited their bond on 16th March 1925.

The next question, which is the more important one, is whether the Subordinate Judge had power to proceed against the sureties in execution. The appellants rely on a case reported in *Rajah of Venkatagiri* v. *Sura Krishna Reddi* (1) in which it was held that the only remedy open to the decree-holder was to get the bond assigned by the Judge and to sue upon it. I have looked at the papers in this case and the facts are almost identical with the facts of the present case; and if that case is to be followed this appeal must be allowed so far as execution is concerned. In another case *Kommareddi Subbareddi* v. *Kollipara Veerayya Tata* (2) Sadasiva Aiyar, J. held the view that the bond could not be enforced in execution, whereas Spencer, J., held the contrary view. The view of the latter Judge is also in accordance with the judgment of a single Judge of the Allahabad High Court reported in *Madha Prasad* v. *Pearey Lal* (3). The respondent, however, relied chiefly on a decision of the Privy Council reported in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4). The facts in that case are not quite the same as those here; for under the surety bond there under consideration the sureties undertook no personal liability but offered immovable property as security. It was held that S. 145 could have no application but nevertheless, their Lordships held that the security could be enforced by the Court making an order upon an application to which the sureties are parties. The reason given for this is as follows :

> It is suggested that they (viz., the sureties) are bound to the Court. But the Court is not a judicial person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it.

They conclude by saying that it can be enforced by an order of Court to which the sureties are parties. This is certainly authority for the proposition that, although the case does not come within the terms of S. 145, the Court has the inherent power to enforce its bond without recourse to a suit. In the present case, it is contended that S. 145 is applicable because the sureties had become liable under Cl. (c) for the payment of any money under an order of the Court in any suit or in any proceeding consequent thereon. This contention must be negatived; for the liability under S. 145 attaches only in the case of a person who is "surety" for the payment of any money under an order of the Court and not a surety liable to pay owing to default. In this case there was no order of the Court directing payment of any money by the judgment-debtor and consequently the sureties were not sureties for such payment. It is on this view of the question that the case of *Rajah of Venkatagiri* v. *Sura Krishna Reddi* (1) was decided, but that case was decided without any reference to the decision of the Privy Council referred to above, according to which it would appear that the Court has inherent power to enforce a security bond.

It has always seemed to me anomalous that, when the Court has granted indul-

(1) [1920] 39 M.L.J. 472=12 L.W. 329=60 I.C. 134=(1920) M.W.N. 784.
(2) [1919] 9 L.W. 476=52 I.C. 410=(1919) M. W.N. 219.
(3) [1921] 19 A.L.J. 247=62 I.C. 719.
(4) [1919] 42 All. 158=55 I.C. 550=46 I.A. 228 (P.C.).

gence to the judgment-debtor upon terms, that Court should not be able to enforce those terms without recourse to a separate suit. If the security had not been furnished, the property would have remained in the custody of the Court and would have been available for sale at any moment. The sureties having undertaken to produce the property or in default to be liable for its value, they cannot evade that liability. It would be a very roundabout proceeding to compel either the Court or the decree-holder, both of whom have been prejudiced by the conduct of the sureties, to proceed by way of a separate suit. In accordance, therefore, with the principle laid down in *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh* (4), I would hold that the security bond can be enforced by way of execution apart from the provisions of S. 145. The lower Court's order directing process to issue is therefore correct, but in view of the circumstances of the case the value of the property ordered to be produced in Court, viz., Rs. 11,061, appears to be excessive. The property is still available for sale in the hands of the Receiver in order to discharge the judgment-debtor's debts and, therefore, the loss o the other creditors is practically nil. The decree-holder has, however, to suffer, because instead of realizing the full amount of his decree at once he may be compelled to receive only a proportionate share of the assets of the judgment-debtor, who is now an insolvent. He has, therefore, been prejudiced to that extent and, consequently, the amount which should be produced by the sureties is the decree amount together with interest up to date of production.

The lower Court's order will, therefore, be modified by ordering the sureties to produce the property or Rs. 3,007-2-8 together with interest at 6 per cent. from 16th April 1925 to the date of production. Time : one month from this date. As the appellants have substantially failed on the main question, they must pay the 1st respondent's costs in this appeal.

Madhavan Nair, J.—I agree and have nothing to add.

Order modified.

A. I. R. 1926 Madras 1007

SPENCER, J.

Vadlamudai Brahmayya—Plaintiff—Petitioner.

v.

Guntur Municipal Council—Defendant—Respondent.

Civil Revision Petition No. 1009 of 1924, Decided on 30th March 1926, from the decree of the Principal Dist. Munsif Guntur, in S. C. S. No. 1031 of 1923.

(a) *Madras District Municipalities Act*, (1920), S. 82 (2)—*Building in existence only for part of year—Fact is immaterial in arriving at gross annual rent.*

The annual value of buildings, which are in existence for only a portion of the year, cannot be arrived at by distributing the gross rent for the period during which they are in existence over the period for which they are assessed.

[P. 1007, C. 2]

(b) *Madras District Municipalities Act*, (1920), S. 87—*Vacant house—Quare.*

Whether an unconstructed house can be said to be vacant within the meaning of S. 87.

[P. 1008 C. 1]

T. Ramachandra Rao—for Petitioner.

C. Sambasiva Rao—for Respondent.

Judgment.—The question for decision is whether the annual value of buildings which are in existence for only a portion of the year can be arrived at by distributing the gross rent for the period during which they are in existence over the period for which they are assessed.

I am of opinion that S. 82 (2) of Act V of 1920 does not permit this. It declares :

The annual value of land and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to month or from year to year.

The words "gross annual rent" and "reasonably be expected to let" do not permit the valuation to be fixed with reference to a shorter period than one year. R. 15 in Sch. 4 provided for the exemption of buildings which are first completed or occupied within the last two months of a half-year. It is a rule of thumb which does not work in every case to a nicety so as to adjust the tax to the exact circumstances of every case. But so is the case also with profession tax and tax on vehicles. The practice of a profession or the ownership of a motorcar for over 60 days in any half-year makes the individual liable to pay tax for the full half-year.

This is not a case in which there is a claim for a vacancy remission, so that I

do not decide whether an unconstructed house can be said to be vacant within the meaning of S. 87 because the site is unbuilt upon.

I am of opinion that the learned District Munsif was right in thinking that the Guntur Municipal Council was acting within the authority of the Act in calculating the gross annual rent upon the rent at which the plaintiff's house might be expected to let, irrespective of the fact that it actually was not in existence for the whole year. The civil revision petition is dismissed with costs.

Petition dismissed.

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* A. I. R. 1926 Madras 1008

DEVADOSS AND WALLER, JJ.

Raja Rao and *another*—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revisions Nos. 711 and 712 of 1925 and Criminal Revision Petitions Nos. 584 and 585 of 1925, Decided on 6th April 1926, from the orders of the Dist. Mag., Coimbatore, in Criminal Appeals Nos. 18 and 19 of 1925.

* *Criminal P. C., S. 476—Court holding preliminary enquiry under S. 476—Persons affected cannot claim to cross-examine witnesses.*

What a Court has to decide under S. 476 is (a) whether an offence of the kind contemplated appears to have been committed, (b) whether it s expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary enquiry, as it considers necessary. The nature, method and extent of the preliminary enquiry are, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed but merely that an offence appears to have been committed. If therefore a Court holds such an enquiry, the persons against whom it is carried on, cannot claim to cross-examine the witnesses: 34 *All.* 267, *Foll.*; *A. I. R.* 1923 *Mad.* 228, *Dist.* [P. 1008, C. 2]

K. S. Jayarama Aiyar and *P. J. Kuppanna Rao*—for Petitioners.

V. L. Ethiraj—for the Crown.

Waller, J.—The petitioners seek to have revised the order of the District Magistrate, Coimbatore, dismissing their appeals under S. 476 (B), Criminal Procedure Code. They were witnesses for the Crown, in C. C. No. 134 of 1925 on the file of the Sub-Magistrate, Dharapuram. That case ended in the discharge of the accused. The Sub-Magistrate held a preliminary enquiry under S. 476, Criminal Procedure Code, and ordered complaints to be filed against the petitioners before the 1st Class Magistrate at Erode.

Mr. Jayarama Aiyar's main ground of complaint is that his clients were not allowed to cross-examine the witnesses who gave evidence against them at the preliminary enquiry. He conceded that a Magistrate is under no necessity to hold any enquiry at all, but contends that if he does decide to enquire, the enquiry must be what some of the decisions on the point describe as a "real enquiry". By that expression is, I understand, meant an enquiry at which the future accused is entitled to be present, to cross-examine the witnesses against him and even (vide *Ganeswar Paharaj* v. *Emperor* (1) to produce evidence in his defence. I venture to doubt whether anything of the sort was intended by the legislature. What a Court has to decide under S. 476 is (a) whether an offence of the kind contemplated appears to have been committed, (b) whether it is expedient in the interests of justice that it should be further enquired into. In order to arrive at a decision the Court may, if it thinks fit, hold such preliminary enquiry, as it considers necessary. The nature, method and extent of the preliminary enquiry are, it seems to me, entirely at its discretion. The enquiry need not be such as to satisfy the Court that an offence actually has been committed but merely that an offence appears to have been committed. What Mr. Jayarama Aiyar asks for and some of the rulings quoted grant is the equivalent of a full dress trial, which cannot, I think, have been in the mind of the legislature.

This is the view taken in *Abdul Ghafur* v. *Raza Husain* (2). Other Allahabad cases have been cited to the contrary effect, but they have not considered the above ruling and none of them appears in the authorized reports. The latest Madras decision is reported in *Perumalla Venkatasubbiah, In re.* (3), where it was held that, in the particular circumstances the party should have been given an opportunity to cross-

(1) [1921] 6 Pat. L. J. 146=2 P. L. T. 552=61 I. C. 842=(1921) P. H. C. C. 176.

(2) [1912] 34 All. 267=13 I. C. 829=9 A. L. J. 231.

(3) A. I. R. 1923 Mad. 228.

examine the witnesses against him. With great respect I prefer the Allahabad view above referred to. I cannot believe that the law intends that a Court which has complete discretion to refuse to hold any enquiry at all must, if it holds an enquiry, issue notice to the party and give him the equivalent of a full dress trial.

The enquiry that many of the rulings prescribe seems to me to go far beyond the essential requirements of S. 476. As I have pointed out above, it is not necessary to find anything more than that an offence appears to have been committed, which ought to be enquired into further. I think that Mr. Jayarama Aiyar's first objection is groundless. His final request shows the complete undesirability of the procedure which he has been advocating. He asks for a transfer of the cases outside Coimbatore District on the ground that the District Magistrate has expressed a strong opinion on the merits. He has no legitimate cause for complaint. The appeals were argued on the merits at great length. Petitioners invited the opinion of the District Magistrate and cannot complain why they have been given what they asked for. If the correct procedure under S. 476 were that advocated by Mr. Jayarama Aiyar a discussion of and decision on the merits would be inevitable in every case. My own view is that the preliminary enquiry under that section should be of a nature merely to satisfy the Court that an offence "appears" to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary.

I see no reason to suppose that the Magistrate before whom the complaints have been presented have been influenced by the opinion of the District Magistrate. The petitions are dismissed.

Devadoss, J.—I agree.

Petitions dismissed.

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* A. I. R. 1926 Madras 1009

DEVADOSS AND WALLER, JJ.

Nagarambilli Tonkya—Complainant—Petitioner.

v.

Matta Jagannatha and *others*— Accused—Respondents.

Criminal Revision No. 772 and Criminal Rev. Petition No. 635 of 1925, Decided on 9th March 1926, from an order of the 2nd Cl. Mag., Sompeta, D/- 20th November 1925, in C. C. No. 200 of 1925.

(a) *Criminal P. C., S. 247—" Upon any day appointed for the appearance of the accused " does not mean any time before the close of the day.*

There is nothing in the section which would justify the construction that the words "upon any day appointed for the appearance of the accused," etc.' mean any time before the close of the working day. [P. 1010, C. 1]

(b) *Criminal P. C., S. 247—Object of S. 247 is to prevent complainant from being dilatory.*

The object of S. 247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case. [P. 1010, C. 1]

* (c) *Criminal P. C., S. 247—Complainant's vakil present—Section is not sufficiently complied with.*

The presence of the complainant's vakil alone is not sufficient compliance with the requirements of S. 247. A complainant cannot be represented by a pleader in order to take away the jurisdiction of the Magistrate to proceed under S. 247. [P. 1010, C. 1]

(d) *Criminal P. C., S. 247—Complainant absent at the time the case was taken up—Magistrate can proceed under S. 247, and is not bound to wait till the close of the day.*

The absence of the complainant at the time when the case is taken up for hearing is sufficient to justify the Magistrate in dealing with the case under S. 247, and acquit the accused, and the Court is not bound to wait till the close of the day to see, before proceeding under S. 247 whether the complainant appears: *Cr. R. C. No. 229 of 1925, Diss. from ; 7 Mad. 213, Foll.*

K. Bhashyam Iyengar—for Petitioner.
K. N. Ganapathi Iyer—for the Crown.

Devadoss, J.—This is a petition to revise the order of acquittal passed by the Second Class Magistrate of Sompeta under S. 247 of the Criminal P. C. It is contended by Mr. Bhashyam Iyengar for the petitioner that the complainant and his witnesses appeared at 11-30 A. M. on the date fixed for the trial of the case and the Magistrate acted illegally in acquitting the accused on the ground that the

complainant was absent and that the appearance of the accused on the date is a sufficient compliance with S. 247. The question is whether the absence of the complainant at the time when the case was taken up for hearing was sufficient to justify the Magistrate in dealing with the case under S. 247. That section is in these terms:

If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day.

The section makes it obligatory upon the Magistrate to acquit the accused if the complainant does not appear unless he thinks proper to adjourn the hearing of the case to some other day. The contention is that it is sufficient if the complainant appears at any time during the day, and that "the day" means the ordinary working hours of the Court, i. e., from 11 A. M. to 5 P. M. If the contention is to hold good, it would mean that the Magistrate has to wait till 5 P. M. before dealing with a case under S. 247. There is nothing in the section which would justify the construction that the words "upon any day appointed for the appearance of the accused," etc., mean any time before the close of the working day.

In O. 9, R. 8 of the Civil P. C., the wording is:

Where the. . . . plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, etc.

From this it is clear that the plaintiff should be present when the case is called on for hearing. The object of S. 247 is to prevent the complainant from being dilatory in the prosecution of the case, and if he does not care to be present when the case is called on, the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case. It may, no doubt, appear to be a hardship that a complainant who was present from 11 A. M. to 4-30 P. M. should have his case dismissed if he happens to be away for a few minutes when the case is taken up; but the question is not whether there is hardship or not, but what is the meaning of the section. The complainant is bound to be present on he date to which the case is posted; and if he wants to be absent during any portion of the day he should take the Court's permission for doing so. But, if he does not do so, he does so at his risk. It is suggested that such a construction would entitle the Magistrate to dismiss a complaint under S. 247 even after the prosecution case is closed and before he delivers judgment. No doubt, it would be so: but that is not a ground for giving a construction to a section different from what the clear words would justify.

The presence of the complainant's vakil alone is not sufficient compliance with the requirements of S. 247. In civil cases the presence of a party's vakil is considered as the appearance of a party. But in criminal cases, except where the Court dispenses with the personal attendance of the accused and allows him to appear by a pleader or agent, his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of the Magistrate to proceed under S. 247. Where a vakil appears for the complainant, it is not likely that the Magistrate would dismiss the complaint under S. 247; for the vakil would represent to the Court that his client is unavoidably absent or that he has just gone out of the Court house for a very proper purpose.

This case has been referred to a Bench by Wallace, J., by reason of the view taken by Jackson, J., in Cr. R. C. No. 229 of 1925. In that case Jackson, J., held that S. 247 must be strictly interpreted and the appearance of the complainant during any portion of the day was sufficient compliance with S. 247. With great respect, I am unable to agree with that view. We should not consider the hardship that may be caused to the complainant in construing the section. Instructions may be given to Magistrates not to dismiss cases under S. 247 unless they are satisfied that the complainant is keeping out of the way, and to wait for a reasonable time to enable the complainant to appear, but the absence of such instructions would not be a ground for giving a forced construction to the very clear words of the section. The view of Jackson, J., is opposed to the view taken by Hutchins, J., in *Kuttiyali v. Pari Makri* (1). There the learned

(1) [1884] 7 Mad. 356.

Judge overruled the contention that the Magistrate should wait till the close of the day before he could act under S. 247.

It is next contended that, on the merits, the petitioner is entitled to have the order of the Magistrate set aside. The petitioner appeared with his witnesses at 11-30 A. M. and it is alleged that the case was taken up and dismissed five minutes before the appearance of the complainant. Though the Magistrate could very well have waited for a short time, it cannot be said that the order of the Magistrate is illegal. He acted within his powers, and when the order is not illegal it would not be right for this Court to interfere with it. Though the conduct of the accused was not all that could be desired, yet I do not think it would be right to set aside the order of the Magistrate in a case of this kind. The petition is dismissed.

Waller, J. — This petition raises a question as to the construction of S. 247, Criminal P. C. A summons case was called on for hearing. The complainant not appearing, the Magistrate acquitted the accused under S. 247. Later on in the day the complainant put in an appearance. It is now argued on his behalf that as he appeared on the day to which the case had been adjourned, the Magistrate had no jurisdiction to acquit the accused; in other words, that a Magistrate cannot act under the section before the Court day has closed.

There is direct authority to the contrary: vide, *Rangasami Ayyangar* v. *Narasimhulu Nayak* (2) and *Kuttiyali* v. *Pari Makri* (1). The earlier of these two rulings, which date back over 40 years, following a still older decision of the year 1874. So far as I am aware the view that had prevailed for over 50 years was not questioned till it was dissented from by Jackson, J., last year in Criminal R. C. No. 229 of 1925. With great respect, I am unable to follow his line of reasoning. He appears to think that there is something in the section that prevents a Magistrate from taking up a particular case twice on the same day; that, in fact, a Magistrate cannot, if a complainant does not appear in the morning, adjourn the case till the afternoon. I can myself see nothing in the section that prevents a Magistrate from so doing. Indeed, I think that as a rule, he would be well advised to give a complainant, whose case is called on early in the day, some latitude before he decides to apply S. 247. If, however, he decides to act at once, when a complainant fails to appear on his case being called on, I am of opinion that he has jurisdiction to do so and that he is not obliged to wait till the close of the Court day before doing so. I agree, therefore, in dismissing the petition.

Petition dismissed.

(2) [1884] 7 Mad. 213.

A. I. R. 1926 Madras 1011

KRISHNAN, J.

R. Pethu Naidu—Plaintiff—Petitioner.

v.

Chuna Lakshmana Pillai— Defendant —Respondent.

Civil Revision Petition No. 809 of 1924, Decided on 22nd March 1926, from the decree of the Sub-J., Mayavaram, in S. C. S. No. 1053 of 1923.

Civil P. C., O. 21. R. 46—Garnishee can show that nothing is due when the question is not already decided.

Where the garnishee denies the debt but nothing is done regarding it and the Court merely records the fact and directs the debt to be sold, but the existence of and the amount of the debt were at no time in issue.

Held: that the order to sell the debt had not the effect of barring the garnishee from showing subsequently that no debt is due: 17 *L. W.* 582, *Dist.* [P. 1011, C. 2]

C. A. Seshagiri Sastri—for Petitioner.

K. P. Raman Menon—for Respondent.

Judgment.—The garnishee no doubt denied the debt but nothing was done regarding it; the Court merely recorded the fact and directed the debt to be sold. The existence of and the amount of the debt were at no time in issue. This case, therefore, is different from the case in *Subbier* v. *Moideen Pitchai* (1) where the learned Judges say "the whole matter was in issue in the execution and garnishee proceedings." The order to sell the debt has, therefore, not got the effect of barring the garnishee from showing subsequently that no debt is due. This is the only point taken. The petition is dismissed.

Petition dismissed.

(1) A. I. R. 1923 Mad. 562=17 L. W. 582.

* * A. I. R. 1926 Madras 1012

KRISHNAN AND VENKATASUBBA RAO, JJ.

(*Sri Mahant*) *Paramananda Das Goswami*—Plaintiff—Appellant.

v.

Radhakrishna Das and *others*—Defendants—Respondents.

Appeal No. 445 of 1922, Decided on 26th March 1926, from the decree of the Dist. J., Ganjam, in Original Suit No. 31 of 1921.

* * *Hindu Law—Succession—Mutt—Succession by nomination of successor is not hereditary within Limitation Act, Art.* 124—*Limitation Act, Arts.* 120 *and* 144.

Where succession to a religious office is by nomination by the holder in office of his successor, it is not a hereditary succession within Art. 124. Hereditary succession is succession by the heir to the deceased under the law; the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but, the right of the latter should not depend upon the choice of any individual. Therefore the only article applicable to cases of succession after nomination is Art. 120. Art. 144 also is not applicable as the claim to possession is also barred if the claim to office is barred under Art. 120. [P. 1015, C. 1, 2]

A. V. Viswanatha Sastri for *C. Padmanabha Aiyangar*—for Appellant.

A. Krishnaswami Aiyar and *B. Jagannadha Doss*—for Respondents.

Venkatasubba Rao, J.—The plaintiff filed the suit which gives rise to this appeal, for a declaration that he was the lawful Mahant of the Ganga Mata Mutt and for recovery of properties belonging to it. The Mutt is situated at Puri, but it owns properties of considerable value in the District of Ganjam. The District Judge who tried the suit dismissed it on the ground that the plaintiff's suit was barred by limitation. No question of fact was tried in the case and the learned Judge held that on the allegations in the plaint the claim was barred. We are not therefore concerned with the truth or falsity of the statements in the plaint but the only question is whether on these averments made in it the suit is in time or is barred. If the plaint can be construed as one for possession of a hereditary office the article applicable is Art. 124 of the Limitation Act. which prescribes a period of 12 years and the suit would not be barred. If, on the other hand, the claim cannot be regarded as one to an hereditary office, Art. 120, which prescribes a period of six years, applies and the suit would then be barred. The point to be decided is, on the allegations in the plaint, is this a suit for possession of a hereditary office?

In paragraph 6 of the plaint the plaintiff refers to the fact that the late Mahant Sri Madhava Das nominated him as his successor and wrote in his own hand the Guru Pranali and the Sidha Pranali containing the plaintiff's name and handed the Pranalis to the plaintiff in token of his appointment of his successor. He further says that the appointment is irrevocable and was not revoked by the late Mahant.

In paragraphs 8 and 9, the plaintiff alleges that the 1st defendant puts himself forward as the successor to the late Mahant on the strength of a will executed by the latter, the genuineness of which the plaintiff does not admit. He adds that he denies that the 1st defendant was nominated by the previous Mahant as his successor.

In para. 13 he says that the 1st defendant's nomination, even if true, is invalid by reason of his own previous nomination.

These are the principal paragraphs where the plaintiff's title to the office is set out and in these he very clearly bases his title upon nomination by the previous Mahant.

In paragraph 5 he says thus:

> The petitioner (plaintiff) is the patta Chela which means the principal Chela and also a Chela chosen to succeed to the Mutt after the Mahant.

And again in paragraph 7 he says:

> Moreover the petitioner (plaintiff) is the only Chela fit to become the successor left behind the late Mahant.

I do not think that the plaintiff puts forward in either of these two paragraphs any claim to a hereditary office. The statement that he is the principal Chela implies that there are other Chelas. Why he describes himself as "principal Chela" he does not explain. I do not think it can be said that the allegation means that he occupies a particular character, which, apart from and independent of nomination, clothes him with the right to succeed. It is not as if he has made an allegation that he is the senior-most Chela and as such entitled to

succeed without the intervention of the previous Mahant. The reference in paragraph 7 to his being "the only Chela fit" again shows that he is not relying upon his filling any definite legal character which entitles him to succeed. The word 'fit' connotes that he is personally qualified from moral and such other standpoints of view.

Paragraph 15 of the plaint asks for the removal of the defendant and appointment of a suitable Mahant, which means of course not necessarily the plaintiff. In paragraph 16 he reiterates his claim that he is the only person entitled according to law and custom of the Mutt.

On a careful reading of the plaint, I find that the claim is put forward only on the ground of nomination or appointment by the previous Mahant. The appellant's learned vakil's contention is that the plaint must be so construed as if there is an allegation that the plaintiff, by reason of a certain legal character that he possesses, is entitled to the succession of the Mutt. This contention seems to be unfounded and must be overruled. This is, however, a minor contention and I shall now proceed to deal with the principal argument advanced by him.

Mr. A. V. Viswanatha Sastri, the appellant's learned vakil, put his case thus:

> In the case of a Mutt, he contends, if the incumbent nominates and duly instals his successor the latter succeeds not by force of the nomination but by reason of the fact that the heir has been irrevocably fixed who succeeds under the law of inheritance.

There is a fallacy underlying this argument. The learned vakil relies upon the text of the Hindu Law which says:

> As regards the property of a hermit or an ascetic the heirs are in their order the proprietor, the virtuous pupil and the spiritual brother and associate in holiness. (Yajnavalkya, II. 138.)

In the case of a Chela or pupil succeeding to his Master there can be no difficulty as he is under the Hindu Law of inheritance the heir entitled to succeed. As the son is the heir of his father, so is the disciple the heir of his spiritual teacher. If, therefore, the matter stops there and the Chela succeeds by the mere reason of his being Chela, there can be no question that the succession is hereditary. Similarly if there are several Chelas and, by the usage of the Mutt, the office is transmitted according to certain definite rules of descent, say to the seniormost Chela, even then the office can rightly be said to be hereditary; for it vests on the death of the holder, in the person designated by law or usage as his heir. If, however, a particular Chela's title to succeed depends on his being preferred to the rest and nominated by a voluntary act of the incumbent it seems to me that such a claim cannot be described as a claim to an hereditary office. Such a nomination, it has been urged, is analogous to adoption; but this position seems to be unsound, as though by some stretch of language the affiliation of a Chela may be said to amount to an adoption, it seems difficult to hold that nomination of one out of several Chelas stands on a similar legal footing. If there is a single Chela he succeeds by virtue of his being the heir. When there are several Chelas the position is that each of them having been affiliated has on this theory been adopted. Ex hypothesi, the particular Chela nominated is one of those that had been adopted. And is it suggested that nomination is equivalent to a second adoption? This argument shows the danger of extending the fiction of adoption and I am not prepared to hold that when one out of several Chelas is nominated to the office, his position is that of an heir who succeeds under the Law of Inheritance. The observations in *Achyutananda Das* v. *Jagannath Das* (1) were made with reference to the affiliation or adoption of a Chela, who under the law, is entitled to inherit to the Guru and cannot have any bearing on the question at issue.

The appellant's learned vakil to be logical had to contend that although the nomination may be under a will of the late incumbent, the tranmission must be deemed to be in the nature of a hereditary succession. This shows the fundamental unsoundness of the argument. Intestate succession and succession under a will are two distinct and entirely different conceptions known to law. To say that a person who succeeds under a will inherits as heir is clearly a contradiction in terms. If the successor owes

(1) [1915] 20 C. W. N. 122=27 I. C. 739=21 C. L. J. 96.

his title to nomination or appointment, that is, his succession depends upon the volition of the last incumbent and does not rest upon independent title, I am inclined to the view that the office cannot be said to be hereditary. In this case the appellant does not rest his title on his filling a particular legal character, say, that of a senior Chela who succeeds to the office whether he is nominated or not nominated ; and his claim therefore is not, in my opinion, one under Art. 124 for possession of a hereditary office. This is the view I am disposed to take on principle and on the reason of the thing and no case that has been cited at the bar compels me to take a different view.

In *Satyadeo Dass* v. *Santoke Dass* (2) it was found that the plaintiff was the late Mahant's only Chela and that in the mutt in question a Chela succeeds if there be one and if there be more than one a successor is appointed by the Mahant from amongst the Chelas. When it was found that the plaintiff was the only Chela, it was unnecessary to discuss the further question whether he was duly installed and nominated, but the Court for some reason discussed the evidence bearing on that point and found that the plaintiff was duly appointed. In the course of the judgment the word " hereditary " is used in connexion alike with the succession of the only Chela as as well as the Chela preferred out of many. (See page 364). The learned vakil relies upon this passage but I do not think that from the casual use of a word like this such a legal inference can be drawn. The appellant next relies upon what may be said to be implied in a dictum in *Sita Pershad* v. *Thakur Das* (3). Here again there is neither a direct nor an indirect statement bearing on the question but from the use of the word " hereditary " in connexion with succession resting upon appointment it is urged that the passage may be treated as an authority in favour of the appellant. I cannot agree to this. In *Raghubhushana* v. *Vidyavaridhi* (4) there is an observation to the effect that spiritual affiliation is analogous to adoption, but as I have already shown, this is beside the point. In *Achyutananda Das* v. *Jagannath Das* (1) there is a passage where it is said that the office of the Chief Mahant is hereditary and devolves upon the chief disciple of the Mahant " who moreover usually nominates him as his successor." It was not intended to state the law in this passage and this cannot be availed of by the appellant. I have already referred to this case on another point. In *Sammantha Pandara* v. *Sellappa Chetti* (5) the word "inheritance" occurs in respect of a disciple chosen who succeeds to the property. This cannot warrant the inference that the learned Judges intended to lay down that the office is hereditary.

I do not think it worth while to discuss in detail *Rangachariar* v. *Yegna Dikshitar* (6), *Tiruvambala Desikar* v. *Manikkavachaka Desikar* (7) and *Kailasam Pillai* v, *Nataraja Thambiran* (8) as the dicta in each of the cases afford very little basis for the contention put forward. *Rajah of Palghat* v. *Raman Unni* (9) has also been relied on by the appellant. It was held there that adverse possession for over the statutory period of the office of trustee against a prior stanee is a bar to a suit by his successor. Dealing with the position of a stanam-holder under the law of Malabar, the learned Judges said that a stanam is descendible in a peculiar line of succession and that each successive holder is in the same position as an ordinary heir succeeding on intestacy. There is a statement in the judgment that the succession to mutts and stanam stands on the same footing. On the strength of this it is contended that when a person succeeds to the office of the head of the mutt by nomination he must be deemed to succeed as if on intestacy. There is clearly no warrant for this suggestion and indeed any such inference is repelled by the sentence in the same judgment.

In either case (in the case of an ordinary heir or that of a stanee) it is the law of the land and not any act of the previous holder or owner that confers title on the successor..

None of the cases that have been cited to us has any direct bearing on the question. But the learned vakil for the

(2) [1907] 5 C. L. J. 360.
(3) [1879] 5 C. L. R. 73.
(4) [1916] 34 I. C. 875.

(5) [1879] 2 Mad. 175.
(6) [1890] 13 Mad. 524.
(7) [1915] 40 Mad. 177=30 M. L. J. 274=4 L. W. 306=34 I. C. 57=(1916) 2 M. W. N. 43.
(8) [1916] 32 M. L. J. 271=40 I. C. 627.
(9) [1918] 41 Mad. 4=33 M. L. J. 26=(1917) M. W. N. 552=42 I. C. 22=6 L. W. 195.

appellant has been able to place before us these various dicta which according to him implies that his position is correct. I am not prepared to take this view. In the result I hold that on the allegations in the plaint the suit is governed by Art. 120 of the Limitation Act and that it is barred by limitation. The appeal fails and is dismissed with costs as stated by my learned brother.

Krishnan, J.—I agree with my learned brother that this appeal fails. There can be no doubt that the rule of succession to the deceased Mahant as stated in the plaint in this mutt is one by nomination by him of successor from among his Chelas. The plaintiff clearly bases his claim on being the person so nominated and on no other ground. The allegation that he is the patta Chela or principal Chela and that he is a fit person to be the Mahant are made to show that his nomination is unexceptionable but no claim to the Mahant's office is based on those allegations. The matter is made quite clear by the form in which he got the first issue framed which runs thus:

Whether plaintiff was duly nominated as his successor by the late Mahant and if so whether plaintiff is therefore entitled to succeed to the office of Mahant.

This is the sole issue raised as to plaintiff's title.

The question that then arises for decision on the plaint allegations is whether the office of the Mahant of the suit mutt is a hereditary office within the meaning of Art. 124 of the Limitation Act. If that article does not apply the only article that can be applied for the recovery of that office is Art. 120. [See *Kidambi Raghavachariar* v. *Tirumalai Asari, Nallus Raghavachariar* (10) and *Jagannath Das* v. *Birbhadra Das* (11)]. Art. 144 was sought to be relied on so far as the suit seeks recovery of possession of the immovable properties of the Mutt but as they go with the Mahantship, if plaintiff is barred from claiming the office, he cannot get the properties.

Where succession is by nomination by the holder in office of his successor it seems to me impossible to contend that it is a hereditary succession. Hereditary succession is succession by the heir to the deceased under the law, the office must be transmitted to the successor according to some definite rules of descent which by their own force designate the person to succeed. There need be no blood relationship between the deceased and his successor but the right of the latter should not depend upon the choice of any individual. If the rule were that the senior living Chela of the Guru succeeds to his office on his death that might be a case of hereditary succession even if the Guru nominated him, as his successor, when no rights flowed from such nomination. But where the right to succession is based solely on nomination, I agree with my learned brother that the succession cannot be treated as hereditary.

Stray sentences quoted by the appellant's vakil in the cases which he cited and which have been referred to by my learned brother cannot be treated as any authority on the point before us. On the other hand, the case in *Jagannath Das* v. *Birbhadra Das* (11) referred to above is in point and against him. It is true that it was a case of election but the learned Judge treated the cases of election and nomination as standing on the same footing. Art. 124 cannot therefore apply to the present case and the suit was rightly dismissed as barred by limitation. I agree that the appeal should be dismissed with costs. The appellant will pay the Court-fees to the Government.

Appeal dismissed.

(10) [1902] 26 Mad. 113.
(11) [1892] 19 Cal. 776.

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* * A. I. R. 1926 Madras 1015

KRISHNAN, J.

S. M. A. Khuddus—Defendant—Petitioner.

v.

Sowdagar Mahammad Hussain — Plaintiff—Respondent.

Civil Revision Petition No. 798 of 1924, Decided on 22nd March 1926, from the decree of the Dist. Munsif, Bezwada, D/- 28th March 1924, in S. C. S. No. 520 of 1923.

* * *Civil P. C., O. 2, R. 2—First suit for mesne profits for certain period—Second suit for possession and future mesne profits—Third suit for mesne profits between end of period in the first suit and date of second suit is not barred.*

The plaintiff brought a suit originally for rent of mesne profits for two months and odd and got a decree. Subsequently, he brought a suit

for the recovery of possession of the property and asked in that suit for future mesne profits and that also was decreed in his favour. He brought a third suit claiming mesne profits from the end of the period for which he had claimed mesne profits in the first suit up to the date of the second suit.

Held : that the third suit was not barred under O. 2, R. 2, by reason of the second suit. [P. 1016, C. 1]

S. Swaminadhan—for Petitioner.

Krishna Arya and *Viraraghavulu*—for Respondent.

Judgment.—This is a revision petition which raises a somewhat curious point of law. The plaintiff had brought a suit originally for rent or mesne profits for two months and odd, and for that he got a decree. Subsequently, he brought a suit for the recovery of possession of the property and asked in that suit for future mesne profits and that suit also was decreed in his favour. In the present suit he claims mesne profits from the end of the period for which he had claimed mesne profits in the first suit up to the date of the second suit. A question is raised whether this present suit is not barred by reason of the second suit under O. 2, R, 2. There is no direct authority on the point. We have therefore to decide it on general principles.

In *Ponnammal* v. *Ramamirda Aiyar* (1) a Full Bench of this Court decided that where a person had brought a suit for possession of property, he could bring a second suit for past mesne profits in respect of the same property, the two causes of action being distinct. There is also a ruling in *Doraiswami* v. *Subramania* (2), that after a suit is brought for possession and future mesne profits, if ths Court refuses future mesne profits, a second suit will lie for such future mesne profits, the reasons given being that the refusal of the Court in the first suit to give the mesne profits will not make the matter res judicata. No other authorities have been brought to my notice. On the authority of *Ponnammal* v. *Ramamirda Aiyar* (1) it would follow that the fact that the second suit here was brought for recovery of possession of the property would not make the third suit barred under O. 2, R. 2, for they expressly held that in such a case a suit for past profits would lie.

The only question is, whether the fact that in the second suit here the plaintiff had asked for future profits would have the effect of barring the present suit. I am inclined to think that it would not have, for O. 2, R. 2 (1) only says that the plaintiff is bound to include in the same suit only such claims as he is entitled to make in respect of the cause of action. If there is difference in the causes of action between the first suit and the second suit O. 2, R. 2, will not apply. The claim for future mesne profits was not a claim based upon any cause of action accrued to the plaintiff but upon the permission given under the Code to join a claim for future profits in suits for possession. It is entirely in the discretion of the Courts to grant or not to grant future profits. In the present suit we have a claim for past profits already accrued for which a cause of action had arisen. For the claim for future profits in the second suit there was no cause of action. It cannot be said therefore that there was a common cause of action for this suit and for the claim for future profits in the last suit. In this view O. 2, R. 2 cannot apply and the District Munsif's view is therefore right. The revision petition fails and is dismissed with costs.

Petition dismissed.

(1) [1914] 38 Mad. 829=28 M. L. J. 127=27 I. C. 697=(1915) M. W. N. 130 (F. B.).

(2) [1917] 41 Mad. 188=33 M. L. J. 699=42 I. C. 929=6 L. W. 784=(1917) M. W. N. 847 (F. B.).

A. I. R. 1926 Madras 1016

PHILLIPS AND ODGERS, JJ.

M. S. Subramania Aiyar and *others*—Appellants.

v.

Collector of Tanjore—Respondent.

Appeal No. 301 of 1924, Decided on 3rd November 1925, from the order of the Dist. J., West Tanjore, D/- 3rd December 1923, in O. P. No. 170 of 1922.

Land Acquisition Act, S. 28—Interest can be allowed in appropriate cases.

Where it appeared that the claimants did not put forward any extravagant claims but claims which were allowed to a considerable extent.

Held : that they were entitled to interest at 6 p. c. [P. 1017. C. 1]

Quaere : Whether S. 28 is mandatory or not in the matter of award of interest. [P. 1017, C. 1]

K. S. Sankara Aiyar—for Appellants.

Govt. Pleader—for Respondent.

Judgment.—Two points have been raised in this appeal: (1) that interest at 6 per cent. should have been awarded under S. 28 of the Land Acquisition Act, and (2) that compensation for Survey No. 791 should have been fixed at Rs. 16-8-0 per cent instead of Rs. 15.

As regards the first point we have been referred to the case in *Rangaswami Chetty* v. *Collector of Coimbatore* (1) in which it was stated that the claimants were entitled to interest at 6 per cent. per annum and also to a judgment of the Privy Council in *Narsingh Das* v. *Secretary of State for India* (2), where at the very end of the judgment, their Lordships state:

> A small matter of the judgment was the omission of the right to interest to which the appellant is entitled at the rate of 6 per cent.

In neither of these cases is the question whether the Court is bound to award interest under S. 28 discussed and that point is not altogether free from doubt. However, in the present case, it appears that the claimants did not put forward any extravagant claims but claims which were allowed to a considerable extent. This being so, we think, to use the words in *Rangaswami Chetty* v. *The Collector of Coimbatore* (1) that they were entitled to interest at 6 per cent., but in coming to this conclusion we must not be held to express any opinion as to whether S. 28 is mandatory or not. The claim to interest will be allowed on the merits of the case from the date of taking possession of the land, namely, 9th March 1922, to the date of payment.

As regards the second point, it appears that the question has not been dealt with by the District Judge and possibly this may be due to the fact that the original claim in respect of Survey No. 791 was put in by Abhirami Ammal who was not one of the claimants in the District Court. The award in respect of this land and a number of other lands has been made jointly in the names of Abhirami Ammal, her sister and three reversioners and the objection was raised in the District Court by the reversioners. As they are interested in the compensation, the question could be raised by them and we must enhance the rate awarded as it is admitted that Survey No. 791 stands in the same category as the other lands for which Rs. 16-8-0 per cent. was awarded.

The appeal is, therefore, allowed with costs and the lower Court's order modified accordingly. Under S. 82 we fix the time for performance as one month from this date.

Appeal allowed.

(1) [1909] 7 M. L. T. 78=5 I. C. 744=12 Cr. L. J. 179.

(2) A. I. R. 1925 P. C. 91=6 Lah. 69 (P. C.).

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* A. I. R. 1926 Madras 1017

COUTTS-TROTTER, C. J.

Varanasi Annapurnamma—Plaintiff—Appellant.

v.

Kandikappa Venkamma and *others*—Defendants—Respondents

Second Appeal No. 1409 of 1923, Decided on 6th April. 1926, from the decree of the Addl. Sub-J., Ganjam in A. S. No. 311 of 1922.

* (a) *Hindu Law—Succession—Daughter is not disqualified by reason of unchastity.*

A daughter who is unchaste is not under the same rule of exclusion as a widow and is not prohibited by reason of such unchastity from inheriting her father's or mother's estate. [P. 1017, C. 2]

(b) *Practice—Moral rules should not be brought in.*

Moral rules which may be very satisfactory as moral rules should not be introduced into the administration of justice. [P. 1018, C. 1]

B. Jagannadha Das—for Appellant.

K. N. Rajagopala Sasthri for *Y. Suryanarayana*—for Respondents.

Judgment.—This is an audacious attempt by a Brahmin Judge to invent a new rule of law, namely, that a daughter who is unchaste is under the same rule of exclusion as a widow, and cannot inherit her father's or mother's estate. The only colour for such a contention which has throughout been rejected in Western India is to say that a portion of a text of Brihaspati is to be treated as a binding rule in Southern India. Now the Dayabhaga has adopted that position of the Text of Brihaspathi, and consequently this rule of exclusion has been applied against the daughter under the Dayabhaga Law in Bengal. The Mitakshara while incorporating a portion of the very passage of Brihaspathi in which this prohibition is contained deliberately omits the passage that insists upon the chastity of the daughter.

The only possible conclusion by all rules of construction known to me is that it was deliberately omitted because it was not intended to be reproduced. We are governed by the Mitakshara and by nothing else. Therefore, I have come to the conclusion that there is no warrant whatever for making this woman's unchastity, which seems to have been proved as a fact, to be ground of exclusion known to the Hindu Law as administered in Southern India under the Mitakshara. The reason why the learned Judge seems to have stretched the law was that, while apparently he was prepared to admit that ordinary unchastity might not be fatal, cohabitation with a Muhammadan was such an aggravated form of unchastity that different considerations should apply. He has no right to introduce moral rules which may be very satisfactory as moral rules into the administration of justice. The appeal must be allowed with costs in this Court.

Appeal allowed.

A. I. R. 1926 Madras 1018

PHILLIPS AND MADHAVAN NAIR, JJ.

Madhura Gramani—Appellant.

v.

Thummala Sesha Reddi and *others*—Respondents.

Appeal No. 380 of 1925, Decided on 1st March 1926, from the order of the Sub-J., Nellore, in A. S. No. 11 of 1925.

(a) *Civil P. C., O. 9, R. 9—Dismissal of suit, for partition and separate enjoyment' for default —Subsequent suit by assignee for partition is not barred.*

Where the assignor obtained a decree for joint possession with respect to a certain share in a piece of property, and his subsequent suit for partition and separate enjoyment of that share is dismissed under O. 9, R. 8, a subsequent suit by assignee for partition based on assignor's right of partition is not barred by O. 9, R. 9, as the right to partition is a right accruing from time to time. [P. 1018, C. 1]

(b) *Co-owners—Partition suit—No distinction can be drawn between joint tenants and tenants-in common.*

In cases of partition, on principle no distinction can be drawn between joint tenants and tenants-in-common for the right of partition belongs equally to each of them. [P. 1018, C. 2]

V. C. Viraraghavachariar—for Appellant.

B. Somayya—for Respondents.

Judgment.—This is an appeal against an order of remand by the Subordinate Judge of Nellore. The District Munsif had held that the suit was barred under the provisions of O. 9, R. 9, and had dismissed it. The suit was one for the partition of certain property in which the plaintiff claimed a three-fourths share. In the year 1911 the plaintiff's assignor had brought a suit for obtaining joint possession of this three-fourths share and it had been decreed. In 1917 she filed for partition of her share and separate enjoyment and that suit was dismissed under O. 9, R. 8. It is now contended for the appellant that the present suit which is also one for partition is barred under O. 9, R. 9. The Subordinate Judge has relied on several cases of the Allahabad High Court and one in *Madan Mohan Mondul* v. *Baikanta Nath* (1) cases which dealt with suits for partition in families which were originally joint Hindu families, and the contention now raised is that these decisions must be deemed to be solely applicable to the case of joint Hindu families and cannot be applied in the case of joint owners as tenants-in-common.

In the first place, it must be observed that in most of these cases, although the family was a joint Hindu family, it had become divided in status prior to the suit. On principle, it is difficult to see how any distinction can be drawn between joint tenants and tenants-in-common for the right of partition belongs equally to each of them. In the present case, when the suit of the plaintiff's assignor was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It is not contended for the appellant that the question is res judicata and consequently the present suit which is based on the plaintiff's assignor's right of partition, is not barred by O. 9, R. 9.

The appeal is dismissed.

Appeal dismissed.

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(1) [1906] 10 C. W. N. 839.

A. I. R. 1926 Madras 1019

PHILLIPS AND MADHAVAN NAIR, JJ.

Muthuswami Chettiar — Petitioner—Appellant.

v.

Official Receiver of North Arcot and *another*—Respondents.

Appeal No. 327 of 1924, Decided on 9th March 1926, from appellate order of the Dist. J., North Arcot, D/- 21st March 1924, in C.M.P. No. 374 of 1923.

Provincial Insolvency Act (1920), *Ss.* 53 *and* 50 —*Receiver has no power to decide as to voidness of a transaction.*

An application by the petitioning creditor for an adjudication that a mortgage deed by the insolvent was not a binding transaction, is substantially an application to declare the instrument void as against the Receiver under S. 53, and such applications are to be decided by the Court and not by the Receiver as against whom the instrument is sought to be declared void, as this would in effect make the Official Receiver the Judge in his own case : *A. I. R.* 1922 *Mad.* 246, *Appl.* [P. 1019, C. 2]

Where the Receiver exercises his power of framing a schedule, that is to say, altering and amending the schedule filed by the debtor, S. 50 is applicable which lays down that where the Receiver thinks that a debt has been improperly entered in the schedule the Court may, on an application of the Receiver, expunge such entry. Cl. (2) gives power to the Court to do so in certain cases on the application of the creditor or of the debtor, but nowhere is the power given to the Receiver to expunge a debt entered in the schedule of the insolvent. *A. I. R.* 1923 *Mad.* 641, *Dist.* [P. 1019, C. 2, P. 1020, C. 1]

K. Rajah Aiyar—for Appellant.

A. Viswanatha Aiyar and *A. Ramaswami Aiyar*—for Respondents.

Judgment.—In this case the appellant's name was included in the insolvent's schedule of creditors. Another creditor put in an application before the Official Receiver under S. 53 of the Provincial Insolvency Act asking that the mortgage in favour of the appellant should be treated as a nominal transaction unsupported by consideration. The Official Receiver held an enquiry and passed an order that the appellant's debt would not be included in the schedule. The appellant appealed under S. 68 to the District Court, where objection was taken as to the jurisdiction of the Receiver. The objection was overruled. On the merits the District Judge confirmed the order of the Official Receiver. Objection is again taken in this Court to the jurisdiction of the Receiver to pass any order in the matter, and reliance is placed on *Appireddi* v. *Appireddi* (1). The facts of that case are not the same as those of the present one but the principle would appear to be applicable here. What the petitioning creditor wanted was an adjudication that the mortgage deed in appellant's favour was not a binding transaction, and, as stated in the petition, it was substantially an application to declare the instrument void as against the Receiver under S. 53. It has always been held that such applications are to be decided by the Court and not by the Receiver as against whom the instrument is sought to be declared void, as this would in effect make the Official Receiver the Judge in his own case.

It is, however, contended for the respondents that an application under S. 53 is unnecessary, as the Receiver was merely exercising the powers given to him under S. 80 (b) to frame a schedule and to admit or reject proofs of credits. So far as the framing of schedules is concerned, the matter need not be discussed, but such schedules of debts can only be framed after the admission or rejection of proofs. We must, therefore, consider whether in this case the Receiver can be deemed to have rejected proof of the creditor within the meaning of S. 80. S. 33 is the section applicable to proof of debts and that lays down that when an order of adjudication has been made all persons alleging themselves to be creditors of the insolvent shall tender proof of their respective debts by producing evidence. The appellant here did not allege that he was a creditor but merely put in a counter to a petition wherein the allegation was made that the mortgage in his favour was a void transaction. This can in no sense be termed tendering proof of his debt. If the Receiver was exercising his power of framing a schedule, that is to say, altering and amending the schedule filed by the debtor, which is the main schedule in insolvency proceedings, S. 50 is applicable which lays down that where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on an application of the Receiver, expunge such entry. Cl. (2) gives power to the Court to do so in certain cases on the application of the creditor or of the debtor. Nowhere is

(1) A. I. R. 1922 Mad. 246 = 45 Mad. 189.

the power given to Receiver to expunge a debt entered in the schedule of the insolvent. The order made by the Receiver is, therefore, wholly without jurisdiction.

The case relied on by the respondents in *Dronadula Sriramulu* v. *Ponakavira Reddi* (2) has really no bearing on this question. That case was concerned with the question of the jurisdiction of the insolvency Court in transactions which do not come within Ss. 53 and 54, and that has nothing to do with the present case, in which a transaction which does come within S. 53 is concerned. It will of course be open to the Receiver to take action under S. 53 if so advised, or, if he thinks it is the better course, to ask for the expunging of the debt, though what effect that would have on the transaction so far as the appellant is concerned, is not clear and need not be discussed.

The appeal is allowed and the order of the District Judge is set aside with costs throughout.

Appeal allowed.

(2) A. I. R. 1923 Mad. 641.

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* A. I. R. 1926 Madras 1020

DEVADOSS, J.

Draksharam Chandramouli—Plaintiff—Petitioner.

v.

Gunda Satya Narayana and *another*—Defendants—Respondents.

Civil Revision Petition No. 806 of 1924, Decided on 26th March 1926, from the judgment and decree of the Sub-J., Bezwada in S. C. S. No. 223 of 1923.

* *Civil P. C., S. 11—Failure to plead set off or counter claim does not bar fresh suit for the claim—Civil P. C., O. 8, R. 6.*

Where a person who could put forward a counter claim or plead an equitable set off does not do so, his subsequent suit for such a claim, or claim to set off would not be barred by reason of his not having put it forward in the suit against him. *A. I. R.* 1925 *Mad.* 830; 28 *M. L. J.* 513 *Rel. on.* 20 *Cal.* 79 (*P. C.*), and *A. I. R.* 1925 *Cal.* 427, *Dist.* [P1021 C 2]

M. V. Ramaswami and *C. Viswanathan*—for Petitioner.

P. Satyanrayana Rao—for Respondents.

Judgment.—This is an application to revise the decree of the Subordinate Judge of Bezwada in Small Cause Suit No. 223 of 1923. The petitioner brought a suit for Rs. 224-4-6 being the wages due for dyeing work done by him to the defendants. The defendants filed a S. C. S. No. 820 of 1922 in the Bezwada District Munsif's Court against the plaintiff for damages on the ground that the plaintiff damaged the material when he dyed it. In S. C. S. No. 820 of 1922 the plaintiff (defendants in S. C. S. No. 223 of 1923) got a decree for damages and when the Small Cause Suit No. 223 of 1923 came on for hearing they raised the plea of res judicata. The Subordiuete Judge has upheld this plea and the plaintiff has filed this Revision Petition. The question is whether a defendant is bound to raise as defence a counter-claim or a claim for set off against the plaintiff's claim.

The defendants' S.C.S. No. 820 of 1922 was for damages on account of the material being spoiled by the plaintiff. The plaintiff's claim in S. C. S. No. 223 of 1923 is for the wages due for dyeing work done by him. The plaintiff herein could have put forward a counter-claim against the defendants in their S. C. S. The point for decision is, was the plaintiff bound to do so and whether his not having done so would bar his suit on the ground of res judicata. Explanatlon 4, to S. 11, Civil P. C. runs thus:

> Any matter which might or ought to have been made ground of defence of attack in such former suit shall be deemed to have been a matter directly and substantially in issue.

According to this explanation any matter which could have been made a ground of defence or attack, should relate to the claim in the former suit.

The plaintiff herein could have pleaded in answer to the defendants' suit that the material was not damaged or that the damage was much less than that claimed by the plaintiff or that he paid some amount towards damages. The plaintiff's claims could not be pleaded in answer to the suit by the defendants but could be put forward only by way of set off or counter-claim and, therefore, it cannot be said that the present claim ought to have been put forward in answer to the previous suit of the defendants. What is contended for the respondents is that both causes of action arose out of the same transaction, that is to say the claim of the plaintiff is for the wages

due to him by the defendants and the claim of the defendants in S. C. S. No. 820 of 1922 was for damages for spoiling the material when dyeing and that, therefore, a second suit does not lie.

The plaintiff in this case could no doubt have put forward a counter-claim but his failure to do so would not bar the suit by him for the amount which he claims. It was held recently by Mr. Justice Venkatasubba Rao in *Govinda Rao* v. *Rudrayya* (1) that where the plaintiff's claim to damages was in the nature of an equitable set off it was not obligatory on him to plead it in the defence at all. I agres with the learned Judge's reasoning for the conclusion that a defendant who has a claim against the plaintiff is not bound to put it forward to the suit and his not doing so would not bar a subsequent suit. The same view was upheld by a Bench of this Court in *Pichi Aiyar* v. *Subbarayar* (2) There it was held that.

a defendant who has a claim for set off is not bound to put it forward in answer to the suit against him and his failure to do so cannot take away his right subsequently.

The learned vakil for the respondents relies upon two cases in supporting his contention. The case in *Kameswar Pershad* v. *Raj Kumari Rattan Koer* (3), has no application to the present case. There the plaintiff brought a suit on a bond the amount of which was made a charge upon an immovable property and he afterwards sued for personal liability against the mortgagor. It was held that the second suit was barred by res judicata under S. 13 of the old Civil P. C. As observed by Lord Morris in that case

it was only an alternative way of seeking to impose a liability upon Run Bahadur and it appears to their Lordships that the matter 'ought' to have been made a ground of attsck in the former suit and therefore that it should be deemed to have been a matter directly and substantially in issue,' in the former suit and is res judicata.

The case in *Shib Chandra Talukdar* v. *Lakhi Priya* (4) is distinguishable on the facts. There the plaintiffs obtained an ex parte decree against the defendants jointly. In a subsequent suit against the same defendants the defence was raised that there was a division of the tenancy with the consent and the knowledge of the landlord and that the the defendents were not jointly but severally liable for the rent. It was held that such a defence could not be put forward in a subsequent suit as it should have been put forward in the previous suit.

I hold that where a person who could put forward a counter-claim or plead an equitable set off does not do so, his subsequent suit on such a claim, or claim to set off would not be barred by reason of his not having put it forward in the suit against him.

The decision of the Subordinate Judge is set aside and the suit remanded to the lower Cnurt for disposal on the merits.

The petitioner will be entitled to the costs of this civil Revision Petition.

Case remanded.

(1) A. I R. 1925 Mad. 830.
(2) [1915] 28 M. L. J. 513=29 I. C. 34.
(3) [1893] 20 Cal. 79=19 I. A. 234=6 Sar. 241 (P. C.).
(4) A. I. R. 1925 Cal. 427.

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* A. I. R. 1926 Madras 1021

SPENCER AND VENKATASUBBA RAO, JJ.

Ramalingam Chettiyar— Plaintiff — Appellant.

v.

Gokuldas Madavji & Co.—Defendants —Respondents.

Appeal No. 330 of 1923, Decided on 12th November 1925, from the decree of the Addl. Sub-J., Ramnad, in O. S. No. 27 of 1919.

* (a) *Civil P. C., S. 34—" Money " also includes unascertained damages.*

The word " money " in the section should not be understood in the limited sense of an unascertained sum. The expression " decree for the payment of money " is very general and to give it due effect, it must be construed as including a claim to unliquidated damages : 32 *C. L. J.* 239, *not Foll.* ;32 *Mad.* 95 (*F. B.*) ; and (1913) *M. W. N.* 874,' *Foll.* [P 1023 C 2]

(b) *Damages—Breach of contract of sale—Difference between contract rate and market rate on date of breach is the basis—Plaintiff pleading special measure must prove it.*

When there is an available market for the goods, the difference between the contract price and the market price on the date of the breach is the amount of the damages prima facie payable and when the plaintiff claims damages on any other special basis he must prove his case. [P 1023 C 1]

C. V. Anantakrishna Aiyar and *C. V. Harihara Aiyar*—for Appellant.

N. Rama Aiyar for *P. N. Marthandam Pillai*—for Respondents.

Spencer, J.—This is a suit for damages upon a contract to sell 80 candies of cotton at Rs. 414 a candy entered into in June 1918. The plaintiff appeals.

He tendered and the defendants took delivery of 36 and odd candies. They declined to take delivery of the remaining 43 and odd candies as the market was falling. The plaintiff re-sold the rejected goods and brought this suit for damages and got a decree. The learned Subordinate Judge gave the plaintiff a decree for damages based on the price prevailing at the end of December. The goods which the defendants would not receive were actually sold in March 1919, the breach of contract baving been on December 26, 1918. The Subordinate Judge took an earlier date, upon the principle that every party to a contract is bound to mitigate the damages as far as possible. The plaintiff got the goods sold through a broker who is P. W, 4. He stated that the cotton season ends with 31st December and that there was no market for cotton for two or three months and so they were unable to sell the goods till Messrs. Harvey & Co. purchased them in March at Rs. 282 a candy. His statement that there was no market for cotton for two or three months is belied by the market report book, Ex. L. which has been filed as evidence on plaintiff's behalf. This shows sales of cotton at varying prices in December 1918, and January, February and March 1919. On certain dates there is an entry that no business was done. The man who kept this book has not been examined as a witness and, therefore, it is impossible to accept the suggestion now put forward that the prices entered therein do not represent real sales of cotton offered for sale on the dates upon which the price is entered. The Subordinate Judge, therefore, acted reasonably in taking a date in December when the market price of cotton was Rs. 330 as being the price at a date nearer the date of breach than the date on which the goods were actually sold in March.

The next point which has been argued before us is that the plaintiff is entitled to cartage upon the goods taken from Virudupatti to Tuticorin for which he claimed Rs. 265-12-0 in his plaint. The defendants contented themselves with a statement that the plaintiff was not entitled to any cart-hire and that the amount claimed was excessive. The goods were taken to Tuticorin because the defendants closed their branch of business at Virudupatti. The plaintiff alleged that the defendants asked him to deliver the goods at Tuticorin when they ceased to keep their branch open at Virudupatti. It was evidently on the defendants' account that the goods were taken to Tuticorin and delivered there, and the defendants, as they changed their place of business, must bear the cost incurred by the plaintiff in doing an act necessary on defendants' account to be done for the performance of the contract. Although the plaintiff did not specifically include this claim for cartage among his grounds of appeal he appealed in respect of the whole amount claimed by him in the lower Court which was disallowed. We must, therefore, allow his appeal in respect of the sum of Rs. 265-12-0 the details of which have not been questioned.

The lower Court gave interest to the plaintiff from the date of plaint only upon the sum of Rs. 778-2-0 which related to a prior contract. Interest was not given upon the main sum of Rs. 3,690 and odd found to be due as damages and the plaintiff makes this a ground of appeal. In many cases decided by this Court interest has been given upon damages from the date of plaint, of which *Sheik Mahamad Ravuther* v. *British India Steam Navigation Co. Ltd.*, (1) and *Boddu Sanyasiraju* v. *Kotra Ramamurthi* (2) are instances, In *Pannalal* v. *Radha Kissen* (3) interest was similarly allowed by a Bench consisting of the Chief Justice and another Judge. In *Crewdson* v. *Ganesh Das Hari Bux* (4), Mookerjee, J., observed that he could see no difference between interest prior to suit and interest pendente lite when the claim is for an unliquidated amount of damages. In my opinion it is discretionary for the Court to allow interest upon damages from the date of plaint under S. 34 of the Code of Civil Procedure. I see no reason why a successful party should be made to suffer because his claim is not

(1) [1908] 32 Mad. 95=18 M. L. J. 497 (F. B.).
(2) [1913] M. W. N. 874=21 I. C. 543.
(3) A. I. R. 1924 Cal. 637.
(4) [1921] 32 C. L. J. 239=60 I. C. 288.

decided soon after the filing of his plaint. When he files his plaint he puts the matter in the hands of the Court for decision. If it be held that the plaintiff cannot get interest from the date of his filing his plaint, it is equivalent to saying that the plaintiff must be deprived of the fruits of his success to the extent of losing interest from day to day during the pendency of his suit on the sum that he was entitled to at the date of his going to Court. The date of instituting the suit is the date upon which the rights of parties are ordinarily determined, and when the decree fixes the amount of damages due, I think that they may be taken as fixed as on the date of the suit, and interest allowed upon that sum. In this view plaintiff's appeal must be allowed to the extent of the claim for cartage and the interest from the date of suit at 6 per cent. The plaintiff will also get proportionate costs on the amount in respect of which his appeal has succeeded.

Venkatasubba Rao, J.—I agree. The first question to be decided is: What is the correct measure of damages? The contract was broken on the 25th December 1918. The plaintiff sold the goods on the 24th March 1919, and claims the difference between the contract price and the price realized at the sale. When there is an available market for the goods, the difference between the contract price and the market price on the date of the breach is the amount of the damages prima facie payable. Mr. Anantakrishna Aiyar the learned vakil for the plaintiff, urges that his client postponed the sale as there was no market for cotton at Tuticorin for a period of three months subsequent to the breach. This is extremely unlikely and the evidence on the record shows that the contention is unfounded. The plaintiff must make out the very special case set up by him and he has failed to do so. The damages have been rightly fixed with reference to the date of the breach.

The second question that arises is: Is the plaintiff entitled to interest on damages from the date of the suit to date of the decree? The right to interest may fall under three heads: (1) Interest that accrued due prior to the institution of the suit; (2) interest from the date of the suit to the date of the decree; (3) interest from the date of the decree to the date of realization. No claim has been made to interest for the period previous to the institution of the suit. The right to such interest is governed by the general law and we are not at present concerned with any question relating to it. The right to interest under the second and third heads must be determined with reference to S. 34 of the Civil Procedure Code. The plaintiff's right to interest from the date of the decree to the date of realization is conceded and the point to be decided is therefore confined to the plaintiff's right to interest that has accrued during the pendency of the suit. The material portion of S. 34 reads thus:

> Where and in so far as a decree is for the payment of money, the Court may in the decree order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged *from the date of the suit to the date of the decree.*

A decree for payment of damages is undoubtedly a decree "for the payment of money." It is however contended for the defendant that if at the time of the suit the damages were unliquidated, interest cannot be awarded under the section. No distinction is made in the section between an ascertained sum of money and unliquidated damages. As a question of construction, I find it difficult to accept the suggestion that the word "money" in the section should be understood in the limited sense of an ascertained sum. The expression "decree for the payment of money" is very general and to give it due effect, it must be construed as including a claim to unliquidated damages. The Court is not bound to give interest; for, it must be noted, that the section gives a discretion to give or refuse interest; and whatever the nature of the claim is, whether it is a claim to a fixed sum of money or to unliquidated damages, the Court is bound in every case to exercise a sound discretion. The mere fact that the decree is for the payment of damages cannot by itself be a bar to the plaintiff being awarded interest. It is important to bear in mind that S. 34 contains the rule of law applicable and that reference to the Interest Act is irrelevant.

On this question there is not much authority. There are two cases of the Calcutta High Court in which two

different views have been taken *Crewdson* v. *Ganesh Das Hari Bux* (4) and *Pannalal* v. *Radha Kissen* (3). In the first case it was held that interest should not be awarded on damages from the date of the suit to the date of the decree. Mookerjee, J., refers to cases where interest was refused from the date of the breach to the date of the suit and observes that there is no distinction in principle between a claim to interest for the period previous to the suit and for the period subsequent to the suit. With all respect I am unable to agree. The distinction is clear. The claim to interest prior to the suit must be determined with reference to the general law, whereas a claim to interest for the period during which a suit is pending is governed by a specific provision, S. 34 of the Code of Civil Procedure. Mookerjee, J. does not cite any authority in support of his view.

In *Pannalal* v. *Radha Kissen* (3) Sanderson, C. J. points out that on the Original Side of the Calcutta High Court it was usual to grant interest on unliquidated damages from the date of the decree. That the Court has a discretion even in such a case under S. 34 was not disputed before the learned Chief Justice who, however, observes that it is advisable to give reasons when interest is awarded on unliquidated damages. This is more in the nature of a rule for the guidance of Subordinate Courts, and it may probably be followed by them with advantage. The Code, however, does not say that reasons shall be given, and when they are not given, the High Court may examine the material before it with a view to find out if the lower Court has exercised the discretion properly. In the present case the lower Court has not awarded interest and its attention does not seem to have been called to the point. In my opinion, we shall be exercising our discretion soundly by awarding interest to the plaintiff. He filed his plaint within a few months of the breach and a few weeks of the sale.

In coming to Court, therefore, he did not make any delay. It has not been shown that he has protracted the trial of the suit. It stands to reason that the plaintiff's right must not be made to depend upon the mere accident of a speedy disposal or otherwise of a case. In a Court where there is a congestion of work, a plaintiff may obtain a decree only after the lapse of six years, in another Court in six months Why should the plaintiff's right to get interest be made to depend upon circumstances over which he has no control ? In regard to cartage claimed I agree that the plaintiff is entitled to it. The place of performance was changed to suit the convenience of the defendants and he cannot be heard to say that cartage is not payable. The result is that the appeal succeeds to this extent, namely that to the amount awarded by the Subordinate Judge, the amount of cartage will be added and the total sum will carry interest at 6 per cent. per annum from the date of the suit to the date of realization.

I agree in the order proposed by my learned brother regarding costs.

Decree modified.

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* A. I. R. 1926 Madras 1024

PHILLIPS AND ODGERS, JJ.

Ramanathan Chetti—Petitioner.

v.

Subramanian Chetti and *others*—Respondents.

Civil Misc. Petition No. 1517 of 1926, Decided on 30th April 1926, against the decree of the High Court for leave to appeal to Privy Council, in Appeal No. 99 of 1922.

* *Civil P. C., S. 110—Privy Council appeal—High Court's decree in main appeal affirming lower Court's decree—Cross-appeal allowed and composite decree drawn up—No right to appeal arises.*

Where the High Court's decree in the main appeal confirms that of the lower Court, the mere fact that a cross-appeal has been allowed and the lower Court's decree modified accordingly does not give the right of appeal to the appellant who otherwise would not have that right. 16 *A. L. J.* 864, *Foll.* [P 1025 C2]

C. Padmanabha Aiyangar—for Petitioner.

K. V. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar*—for Respondents.

Phillips, J.—The petitioner was the second appellant in Appeal No. 99 of 1922, and he now applies for leave to appeal to His Majesty in Council against the decree of this Court. His appeal was

dismissed and the lower Court's decree confirmed, and it is not suggested that any substantial question of law is involved in the appeal. If, therefore, this appeal stood alone, the petitioner would have no right to appeal to the Privy Council under Ss. 109 and 110 of the Code of Civil Procedure. The petitioner however relies on the fact that a memorandum of objections was filed by the respondents in Appeal No. 99 of 1922 and allowed, and consequently, when the appellate decree was drawn up the lower Court's decree was modified to the extent of about Rs. 300 in respect of some rent disallowed in the lower Court.

It is contended for the petitioner that, as the only decree of this Court has modified the decree of the lower Court, it is not an affirming decree and that therefore an appeal lies to the Privy Council. Respondents 1 and 2 contend that in accordance with the decision in *Raja Sree Nath Roy Bahadur* v. *Secretary of State* (1), which was followed in this Court in *Mulraju Lakshmi Venkayamma Rao Bahadur* v. *Venkatadri Appa Rao* (2), the decree of this Court substantially affirms the decree of the lower Court and no appeal lies. In these cases it was decided that where a High Court has affirmed the decree of the Court of first instance, though it made some modifications in the decree as regards another portion of the claim, it is essential for the grant of a certificate of leave to the Privy Council that the appeal must involve some substantial question of law. The petitioner relies on the recent decision of the Privy Council reported in *Annapurna Bai* v. *Rup Rao* (3), where it was held that there was a right of appeal in a case where the High Court had modified the decree of the lower Court by increasing in favour of the appellant the maintenance allowance decreed by the lower Court, whereas in all other respects the decree was affirmed. In view of this decision it is possible that the two former decisions require reconsideration, but I do not think that any of these cases is directly applicable here. If no memorandum of objections had been filed admittedly the plaintiff would have no right of appeal. Does the mere fact of an order on the memorandum of objections modifying the decree of the lower Court give the plaintiff the right to reopen the whole of the case? It was held in *Chiranji Lal* v. *Behari Lal* (4) that when there had been two cross-appeals against the decree of the Court of first instance and one cross-appeal had been allowed and the other dismissed, there was no right of appeal against the decree dismissing the appeal, whereas an appeal lay against the decree allowing the appeal. The Court proceeded on the view that in cross-appeals the decree in each was a separate one. A memorandum of objections is in effect a cross-appeal, and although it is the practice in this Court to draft only one decree with reference to both the main appeal and the memorandum of objections, it is also the practice to do the same in respect of two or more cross-appeals from the same decree. In effect there are two orders of this Court, dismissing the appeal and affirming the decree of the lower Court and the other allowing the memorandum of objections or cross-appeal and modyfying the decree of the lower Court. So far, then, as the decree affirming the decree of the lower Court is concerned, no appeal would lie to the Privy Council. Similarly, no appeal would lie to the Privy Councsl in respect of the order on the memorandum of objections because the subject-matter of that appeal was only Rs. 300. I would therefore hold that the mere fact that a cross-appeal has been allowed and the lower Court's decree modified accordingly does not give the right of appeal to the appellant who otherwise would not have that right.

I, therefore, dismiss this petition with costs of Respondents 1 and 2.

Odgers, J. —The question is whether where an appeal is dismissed, i. e., the decree of the lower Court is confirmed, but on appeal a memorandum of objection is allowed the decree or final order affirms the decision of the Court immediately below the Court passing such decree or final order. The question in appeal was a pure question of fact and the only ground on which the conditions of S. 110, Civil P. C. can be fulfilled is that the decree on appeal is not one of affirmance.

(1) [1904] 8 C. W. N. 294.
(2) [1915] 30 I. C. 372.
(3) A. I. R. 1925 P. C. 60=51 Cal. 969.
(4) [1918] 16 A. L. J. 864=48 I. C. 124.

There is no doubt that cross-objections are in the nature of an appeal. They were formerly held to depend on the appeal, i. e., they could not be heard unless the appeal itself was heard; this has been altered by O. 41, R. 22 (4) and the hearing of the memorandum of objections does not depend on the hearing of the appeal, but may be heard as a substantive cross-appeal. If this is so, it seems clear that the two things, dismissal of the appeal and allowance of the memorandum of objections, are two distinct things and could appropriately be the subject-matter of a separate decree. There is no question here of appealing against the memorandum of objections. In *Vikrama Deo Garu* v. *Maharaja of Jeypore* (5) my learned brother was of opinion that where a claim for Rs. 15,000 was entirely disallowed by the first Court and allowed only to the extent of Rs. 5,000 by the appellate Court, the latter could not be said to be a decree of affirmance and in any case the appeal was Rs. 10,000 in value. In *Raja Sree Nath Roy Bahadur* v. *Secretary of State* (1) the appellate Court allowed the appellant an additional sum of Rs. 7,000 to that allowed by the lower Court. The appellant sought to appeal to the Privy Council on the ground that the appellate Court had not confirmed the decree of the lower Court. It was held in substance that it did and that the appeal was dismissed except as to the additional sum given. In *Bhagwan Singh* v. *Allahabad Bank, Ltd.* (6) the appellate Court not only allowed a deduction of Rs. 6,000 on account of a mistake, but saddled the applicant with a liability for interest in excess of what the lower Court had awarded. The decree of the lower Court was in fact modified to appellant's prejudice by about Rs. 8,000. It refused to follow *Raja Sree Nath Roy Bahadur* v. *The Secretary of State for India in Council* (1) as the decree of the High Court modified that of the lower Court. In *Annapurna Bai* v. *Rup Rao* (3) special leave to appeal was granted from a decree of the High Court which modified the decree of the lower Court by increasing the rate of maintenance from Rs. 800 to Rs. 1,000 per annum.

(5) [1916] 1 M. W. N. 122=31 I. C. 272=18 M. L T. 387.

(6) [1920] 43 All. 220=19 A. L. J. 3.

I think the present case is clearly distinguishable. The appellate judgment confirmed that of the lower Court though it in the same decree allowed the cross-appeal by the appellant.

It appears to me that this case is similar to that in *Chiranji Lal* v. *Behari Lal* (4) which was a case of cross-appeals, no certificate being granted in respect of the appeal from the portion of the judgment which affirmed that of the lower Court. In *Mulraju Lakshmi Venkayamma Rao Bahadur* v. *Venkatadri Appa Rao* (2) a Bench of this Court saw no reason to differ from the decision in *Raja Sree Nath Roy Bahadur* v. *Secretary of State* (1). Whether that decision is correct or not seems to me to be unnecessary to decide in the present case which is really one of cross-appeals similar to *Chiranji Lal* v. *Behari Lal* (4). I think the decree is one of affirmance and that leave to appeal to the Privy Council must be refused.

Leave to appeal to Privy Council refused.

A. I. R. 1926 Madras 1026

KRISHNAN AND VENKATASUBBA RAO, JJ.

Thatha Seetharama Chetty — Petitioner—Appellant.

v.

Administrator-General of Madras—Respondent.

O. S. Appeal No. 98 of 1925, Decided on 16th April 1926, from the order of Srinivasa Aiyangar, J., D/- 1st September 1925.

Administrator-General's Act (1874), S. 52 (1)—*"Assets" include both immovable as well as moveable property—Whether assets have been "collected" depends on facts of each case—Mere taking letters of administration is not sufficient to get commission.*

Assets in S. 52 include both moveable and immovable properties.

The Administrator-General does not earn a commission by merely taking out letters of administration and thereby getting the legal right to deal with the properties, if he does not do anything more. In each case the question whether assets have been "collected" or not has to be decided on its own particular facts.

On obtaining letters of administration vesting the estate of the deceased in him, the Adminis-

trator-General took possession of all the properties belonging to the estate and administered them for over 10 years. He sold some of them and paid off debts and claims. He leased out two shops from time to time to tenants and collected the rents and paid the revenue and taxes and kept them in proper repair and generally managed them as an owner would. The properties were entirely under his control during the period of administration and he was prepared to hand over the shops to the heir-at-law.

Held: that the shops were "assets collected and distributed in due course of administration" and the Administrator-General was entitled to a 5 per cent., commission on their estimated value. [P 1027 C 1, 2, P 1028 C 1]

N. Chandrasekhara Aiyar and *P. Sankaranarayana Aiyar*—for Appellant.

Administrator-General of Madras—for Respondent.

Krishnan, J.—The question for decision in this appeal relates to the commission payable to the Administrator-General. The estate he was administering in the present case consisted in part of immovable properties. Administration having been completed he has been directed by the Court to hand over the two shops in question here to the heir. He claims a 5 per cent. commission on their estimated value under S. 52 of Act 2 of 1874, that Act being admittedly the governing statute. The heir-at-law, the appellant, denied the claim and has appealed to us against the order of the learned Judge on the Original Side allowing it.

On obtaining letters of admistration vesting the estate of the deceased in him, the Administrator-General took possession of all the properties belonging to the estate and has been administering them for over 10 years now. He sold some of them and paid off debts and claims. He leased out the two shops now in question from time to time to tenants and collected the rents and paid the revenue and taxes, and kept them in proper repair and generally managed them as an owner would. The properties were entirely under his control during the period of administration and he is now prepared to hand over the shops to the heir-at-law. The question is whether in these circumstances the shops can be held to be "assets collected and distributed in due course of administration" by the Administrator-General within the meaning of S. 52, Cl. (2) of Act 2 of 1874 and whether the Administrator-General is entitled to a 5 per cent. commission on their estimated value.

Assets may consist of both moveable and immovable properties. The definition of the word in S. 3 of the Act, last clause, makes this quite clear, Assets have been defined as "the property of a deceased person chargeable with and applicable to the payment of debts and legacies" by Sale, J., in *In the goods of Courjon* (1). The properties in question here are certainly assets of the deceased as they belonged to him. Section 52 refers to all kinds of assets including immovable assets for there is no restriction in it as there is in S. 18 which speaks of "moveable assets". The shops are, therefore, assets within the meaning of S. 52.

The question then is, have they been "collected and distributed" by the Administrator-General? There is no difficulty about the word "distributed" for they will be distributed when the Administrator-General hands them over to the heir-at-law. But it is contended that they cannot be said to have been "collected" by the Administrator-General. In fact the argument is that the term "collected" cannot properly be applied to immovable property; it is said you cannot properly speak of collecting land and houses. But the expression in the Act is "collecting assets." It is not very clear what the expression connotes when such assets are immovables: there is no clue in the Act to its exact meaning. Some authorities have, however, been cited to us which I shall now consider.

The first case cited is *In the goods of Simpson* (2). It was ruled in it by Scotland, C. J., that under S. 27 of Act 8 of 1855 (corresponding to S. 52 of Act 2 of 1874) the word "assets" included leaseholds as well as cash and Government promissory notes and that "collection" did not necessarily imply realization by sale or by actual receipt or possession. The learned Chief Justice held that the Government promissory notes were collected as soon as they were taken possession of just like Bank notes, as they could be sold in the market and readily converted into cash. Bittleston, J., expressed a doubt on this point but

(1) [1898] 25 Cal. 65.
(2) [1863] 1 M. H. C. R. 171.

nevertheless agreed to the order. As regards leaseholds which were the only immovables in the case the learned Judges held that though the Administrator-General had got the title deeds in his possession, he had not brought himself fairly within S. 27 and they disallowed commission to him in the exercise of their discretion under S. 22 as he had done nothing further.

This case was quoted and followed by Sale, J., in *In the goods of Courjon* (1). already cited above The learned Judge points out that in the Madras case it was implied that to apply the term 'collection'

> the doing of some act in connexion with the assets whereby the Administrator-General incurred trouble or expense or responsibility

was necessary and as in the case before him the property was in possession of a patnidar and all that the Administrator-General did was to collect the rents he could not be given a commission on the value of the property but on the rents collected.

The question arose again in *Watkins* v. *Sarat Chunder Ghose Moulick* (3), where commission calculated on the value of the corpus of the testator's estate was claimed but refused to the Administrator-General on the ground that possession was with a Receiver appointed by Court and not with the Administrator-General who only received such sums as the Receiver paid. Their Lordships held that though the estate vested in him the Administrator-General could not be said to have "collected" ths estate. These authorities show that the Administrator-General does not earn a commission by merely taking out letters of administration and thereby getting the legal right to deal with the properties, if he does not do anything more. It seems to me that in each case the question whether assets have been "collected" or not has to be decided on its own particular facts. It is not possible to lay down general rules. On the facts of the present case I am inclined to think that there has been "collection" of the assets including the two shops and there will be distribution on the delivery over of the shops to the heir-at-law. The Administrator-General is, therefore, in my opinion entitled to his 5 per cent. commission on their market value as well The appeal is dismissed with costs.

Venkatasubba Rao, J.—The point to be decided in this appeal is: What constitutes under S. 52 of the Administrator-General's Act (2 of 1874) collecting of assets with reference to immovable property. It has been contended by the Administrator-General that under the Act commission is payable to him when he gets legal control over the estate. To take a concrete case: a man dies possessed of immovable property of great value; the Administrator-General obtains letters of administration and does nothing more and finds himself in a position to exercise without question acts of ownership over that property: in such a case he contends he is entitled to his 5 per cent. commission. This argument is clearly opposed to authority. "Assets" includes immovable as well as moveable property see S. 3. When it is intended to confine assets to moveable property only, the expression that is used in the Act is " moveable assets " see S. 18. It is therefore, clear beyond doubt that the word "assets" in S. 52 includes both moveable and immovable property. What constitutes collecting of immovable assets has been the subject of some decisions. In *In the goods of Simpson* (2) dealing with leaseholds, Scotland, C. J., observed:

> With regard to the leaseholds I think the claim to commission is not brought fairly within the provisions of the 27th section. What 'expense' or 'trouble' has the Administrator-General incurred in reference to these leaseholds (The evidence shows that all he did was to take the title-deeds which were handed over to him. He incurred no 'responsibility' by so doing.

It may be observed that S. 27 of Act 8 of 1886 which was then under consideration corresponds to S. 52 of Act 2 of 1874. In *In the goods of Courjon* (1) the testator was entitled to a certain zemindari property which he had leased in perpetuity, the lessee or patnidar being in possession subject to payment of a fixed rent. Sale, J., accepted the test laid down by Scotland C. J., in the Madras case and held:

> But as regards the rest or corpus of the zemindari property the Administrator-General has not, it would appear, done any act which would constitute it an asset collected by him.

The Administrator-General was not allowed commission in respect of this portion of the estate. In *Watkins* v. *Sarat Chunder Ghose* (3) commission was

(3) [1904] 31 Cal. 572.

claimed on the value of the corpus of the testator's share in a joint estate of which the Receiver was in possession. It was decided by a Bench of three Judges that the Administrator-General was not entitled to commission. Maclean, C. J., observed:

> It would, I consider, be straining the language of the section to say that he had 'collected' this asset. I do not see how he can successfully say so.

The language of the section is unhappy and is calculated to create much difficulty. However that may be, there is, as I have shown, considerable authority for the position that the Administrator-General's argument is untenable. The point whether assets have been collected within the meaning of the section is treated in each case, as a question of fact, in the rulings to which I have referred. I am free to confess that I find it difficult to accept some of the reasoning adopted in these cases, but I am not willing to treat these authorities as not binding. On the facts of the present case, I am not satisfied that the learned Judge is wrong in his view that there has been "collection" under the section. In the result, the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1029

SPENCER, J.

Innasimuthu Pillai and *another*—Appellants.

v.

Rev. A. J. Lutz and *others*—Respondents.

Second Appeal No. 700 of 1923, Decided on the 10th March 1926, from the decree of the Addl. Sub-J., Tinnevelly, in A. S. No. 226 of 1921.

Civil P. C., S. 92—Specific Relief Act, S. 42.

The requirement of S. 92 cannot be evaded by asking for a bare declaration under the Specific Relief Act: *A. I. R. 1922 All. 349, Ref.*

[P 1030 C 2]

F. S. Vaz—for Appellants.

P. V. Krishnaswami Aiyar—for Respondents.

Judgment.—This is a representative suit under O. 1, R. 8, of the Code of Civil Procedure. The plaintiffs claim to represent the Roman Catholic Vellalas and Mudaliars of Vedakkankulam. They sued for possession of a school building and site which had been sold by Defendants 2 to 6 to the 1st defendant, who is an American Lutheran Missionary of Nagercoil. The 6th defendant having died during the suit, the 7th defendant was brought on record as his legal representative. Further reliefs were also claimed in the shape of declarations and injunctions. The suit failed in the first Court on the District Munsif's findings: (1) that the suit property was not trust property; (2) that the sale to 1st defendant was valid and binding on the plaintiffs; and (3) that a body of Roman Catholics distinguishable as belonging to the Vellala and Mudaliar castes cannot be legally recognized as there are no caste distinctions among Christians. The appeal to the Sub-Court failed for the same reasons.

It is conceded now that the plaintiffs are not entitled to the 1st relief—that of possession of the suit property in the present suit. Mr. Vaz argues for the appellants that it should have been found that there was a public trust created and that his clients should have been given a bare declaration that the suit property belongs to the entire body of Roman Catholic Christian Vellalas and Mudaliars of Vedakkankulam, and that the sale for the purpose of its being used for teaching by a person like the 1st defendant antagonistic to the Roman Catholic religion, was invalid.

There is no deed of trust in the present case. Counsel relied on user as evidenced by Exs. E and C and he quoted the case of *Clifford's Inn* in *Smith* v. *Kerr* (1) and the same case in appeal in *Smith* v. *Kerr* (2) and the *Attorney-General* v. *Webster* (3) as instances where there was no trust expressed but on long user for charitable purposes a trust was held to have been established. In the former case there was clear divestant of the title under the Indenture of 1618 by the original owners, the Earl of Cumberland and Lord Clifford, the purpose being the maintenance of a school of learning. The carrying out of that purpose for three centuries stamped the institution with the character of a trust. In the

(1) [1900] 2 Ch. 511.
(2) [1902] 1 Ch. 774=71 L. J. Ch. 369=86 L.T. 477=18 T. L. R. 456.
(3) [1875] 20 Eq. 483=44 L. J. Ch. 766.

latter case, the property originally given for superstitious uses became vested in the Crown by statute. The Crown in turn granted the property to Lord Wentworth, who conveyed it to two individuals for the use of the parish at St. Stephen in the City of London. There was evidence that the lands were applied for charitable purposes. In the end it was held that the property was not a private property of the parish but was subject to the powers of the Charity Commissioners.

In the present case there appears to have been never any vesting of the property in trustees. In fact, in paragraph 5 of the plaint it is still claimed that the property forms the common property of the entire body of Roman Catholic Christian Vellalas and Mudaliars. Reference was made to Ex. E, in which one Susai Maria Pillai declared that the property was given for the purpose of constructing a school for the education of Pillai and Mudaliar boys alone of Vadakkankulam, and that the donees should have no power to encumber the property. Susai Maria Pillai was examined as P. W. 5 and he admitted that he executed Ex. E, because the patta of the suit land stood in his name and he was asked to execute this document by the representative of the Prior or Priest but that he never paid the kist for the land and never enjoyed it. The District Munsif found that the title to this land passed under Ex. III and that Ex. E was only taken as a formal document for getting the patta transferred. It is clear that the recital of the purpose for which the land was transferred upon which the school had already been built will not create a trust where no trust existed previously. Ex. C is a document, termed an agreement, executed by 60 of the inhabitants of Vadakkankulam who had seceded from the authority of the Roman Catholic Father Caussanel and purporting to delegate to four persons named therein the power of management of a common fund for carrying on litigation against the opposing party. It does not purport to create a trust, nor is it evidence of the existence of a trust.

The plaintiffs are truly on the horns of a dilemma. If the school and the site upon which it was built form the common property of the community of Roman Catholic Christians drawn from the Vellala and Mudaliar castes, then the sale in favour of the 1st defendant was effected with full authority from the majority of the same body of persons who signed Ex. C; and Ex. V is a record of the proceedings of that body at a meeting held in January, 1917, whereat it was resolved by a unanimous vote of those present to sell the suit property in order to discharge half of their debts.

On the other hand, if the plaintiffs succeed in showing that the property is trust property, then the present suit, not having been brought after obtaining the sanction required by S. 92 of the Code of Civil Procedure, cannot be maintained. S. 92 is intended to cover cases in which there has been a breach of trust in relation to a public charitable or religious trust. Persons interested in such a trust must obtain the sanction of the Advocate-General for instituting a suit to obtain an order of Court vesting the property in trustees. The requirement of the section cannot be evaded by asking for a bare declaration under the Specific Relief Act: vide *Mufti Ali Jafar* v. *Fazul Husain Khan* (4). The case *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* (5) upon which the appellant's counsel relied, was a case in which some class of the worshippers of a temple asked for a declaration as to the future disposal of the offerings made to the god. It was held that S. 92 was not applicable to a suit of that nature. The present suit is of a different character and is based upon an alleged breach of trust. If the plaintiffs have succeeded in establishing the existence of a trust, S. 92 would be a bar to their suit. But in the opinion of the Courts below, with which I agree, there is no proof that the properties in suit had ever been dedicated or vested in trustees and the suit failed because the plaintiffs failed to show that the disposal of the property under Ex. IV was not a valid and authorized disposal to which the majority of the proprietors had given their assent in a public meeting summoned for that purpose. The suit was, therefore, rightly dismissed.

The second appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(4) A. I. R. 1922 All. 349=44 All. 622.
(5) [1917] 40 Mad. 212=31 M. L. J. 777=5 L. W. 625=38 I. C. 73=(1917) M. W. N. 400 (F. B.).

A. I. R. 1926 Madras 1031

PHILLIPS AND MADHAVAN NAIR, JJ.

Kasi Vasi Chokkalinga Tambiran—Appellant.

v.

Ramanadan and *others* — Respondents.

Civil Miscellaneous Appeal No. 6 of 1926, Decided on 23rd February 1926, from the order of the Sub-J., Tanjore, D/- 20th November 1925, in E. A. Nos. 430 and 602 of 1925.

(a) *Transfer of Property Act, S. 55—Money left with vendee of mortgaged property but not paid by him to mortgagee—Vendee must pay interest on the amount.*

When purchase money is left with vendee for paying a prior mortgage debt and he has not paid it, he is liable in a mortgage suit to pay it to the mortgagee with interest unless it is left with him as a security for the payment of balance of mortgage money by mortgagor, and the property purchased by him is liable to be sold in execution in preference to another purchased free from incumbrances: 21 *All.* 223, *P. C.* *Dist.* [P 1032 C 1]

(b) *Execution—Decree binding — Transfer of Property Act, S.* 81.

Executing Court can determine the order in which property would be sold in execution of a mortgage decree when the question has not been decided during trial. [P 1032 C 1]

S. Panchapagesa Sastri—for Appellant.

T. M. Krishnaswami Aiyar, C. A. Seshagiri Sastri and *R. Visvanatha Aiyar*—for Respondents.

Judgment.—This is an appeal by an alienee of mortgaged property against an order declaring in what order the mortgaged properties are to be sold. The Subordinate Judge has directed that the property alienated to the appellant should be sold first, and the property in the hands of Defendants 4 to 6 which was sold to them free from all encumbrances, should be sold next and that the property in the possession of the mortgagor should be sold last. Under the sale-deed by the mortgagor to the appellant a sum of Rs. 1,1500 was directed to be paid towards the balance due on the mortgage. Admittedly no portion of this amount was paid until after the mortgage suit was filed and, consequently, it is only fair to hold as the Subordinate Judge has held that the appellant was most largely in default in the payment of the mortgage-debt. It is now contended in appeal that the appellant's alienees having paid Rs. 11,500 into Court appellant is not liable to pay any further amount towards interest or costs on the ground that he was not bound to pay this amount of Rs. 11,500, until the mortgagor had tendered the balance of the mortgage amount to the mortgagee. He relies on a decision of the Privy Council in *Muhammad Siddiq Khan* v. *Nasir Ullah Khan* (1) but that case can be distinguished on the facts. There it was held by the Allahabad High Court that when the sale was effected by the mortgago r there was an agreement that a portion of the consideration which was to be applied in discharge of the mortgage-debt was to be retained by the vendee as security for the balance of the payment by the vendor-mortgagor. It was also found that a tender had been made by the vendee of the amount due by him, but that the vendor declined to offer. In appeal to the Privy Council their Lordships remarked that:

they are of opinion that there is no ground for the appeal.

And they go on to state,

"The Rs. 17,000 were not left with the vendees simply as a deposit of the money of the vendor. They were to retain it as a security that the property sold should be freed from encumbrances upon it and that they should have a good title. They were entitled to retain it until the vendor provided the rest of the money necessary for this purpose.

Then they proceed:

"From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy what was due. Without that balance they were not bound to pay or tender to him the Rs. 17,000.

Ordinarily the purchase money must be treated as deposit in the hands of the vendee which is payable to the vendor, but in the circumstances of that case their Lordships held that it was not a simple case of purchase money, but that there was according to the terms of the sale an agreement that this money should be treated as security, that the property sold should be free from incumbrances. In the present case the facts are very different. There is one passage relied upon by the appellant in the sale-deed which is as follows:

If there should be any excess or deficit in the amounts directed to be paid towards the aforesaid hypothecations we shall ourselves be personally present and discharge the same in full.

(1) [1899] 21 All. 223=26 I. A. 45=3 C. W. N. 201=7 Sar. 472 (P. C.).

From this recital it is contended that we must assume that it was a sale free of incumbrances and that the money to be paid was to be held merely as security for the discharge of the incumbrances. As against this contention we have first of all the statement of the appellant himself that the amount of Rs. 11,500 was not the full amount due under the mortgage-deed and that there was a balance still due by the mortgagor. If this is so the clause as to excess or deficit cannot refer to the question of Rs. 11,500, being the exact amount due under the mortgage, for both the parties were aware that this was not the whole of the amount due. No doubt the vendor would be liable to make good any loss to the vendee provided that the vendee had paid the amount due by him. The sale deed expressly states that there are no incumbrances of any kind "except the two mortgages above-mentioned." It was clearly understood between the parties that these mortgages were subsisting and that the payment by the vendee would not fully discharge the liability. In such circumstances it is impossible to hold that there was any agreement such as is referred to in *Muhammad Siddiq Khan* v. *Nasir Ullah Khan* (1), and, therefore, the ordinary rule of vendor and purchaser must be applied and the purchaser is liable for interest on the amount not paid by him. This was not disputed in the lower Court and we must accept that fact as further evidence of the agreement between the parties.

A further point is raised that the executing Court is not competent to marshal the order in which the mortgaged property shall be sold when the question has been decided in the trial of the suit. The point was raised in the written statement in the suit but there has been no reference in the judgment. The only part of the judgment relating to this question refers to an agreement between the mortgagee and the mortgagor and to this agreement the alienees were apparently not parties, there having been no adjudication on this point. It was, therefore, open to the executing Court to declare the order of sale. The appeal consequently fails and is dismissed with costs.

Appeal dismissed.

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* * A. I. R. 1926 Madras 1032

Full Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

Commissioner of Income-tax, Madras—Petitioner.

v.

Mangalagiri Sri Umamaheswara Gin and Rice Factory Ltd., Guntur and *another*—Respondents.

References Nos. 4 and 6 of 1925, Decided on 23rd April 1926, made by the Income-tax Commissioner, Madras.

* * *Income Tax Act* (1922), *S.* 10 (2) (*vi*)—*Owners of rice mill letting it for working can deduct depreciation.*

Owners of rice mill who have let it out on annual rent can, as carrying on the business of letting a rice mill, deduct from their assessment any sum which is due to depreciation of the lettable value of the property by reason of wear and tear of machinery which falls upon them under the contract of lease, and the lessees as carrying on the business of rice milling, are entitled to a deduction of such repairs as fall upon them under the lease. [P. 1033, C. 2]

Ch. Raghava Rao and *A. Sundaram Aiyar*—for Assessees.

M. Patanjali Sastri—for the Crown.

Reference.—The assessee in the case—the Mangalagiri Sri Umamaheswara Gin and Rice Factory—is a company incorporated under the Indian Companies Act, 1912. It was registered on the 11th January 1921 and, according to its Memorandum of Association, its objects are :

To prepare and sell raw rice, boiled rice, cotton, cotton seeds, bran, husk ; and

to purchase and lease out buildings, vacant sites and lands.

There is a subsidiary provision in the articles to the effect that

it it is deemed beneficial to the company with reference to circumstances it may lease or give its factory for contract.

In accordance with this provision the company, instead of working its mill on its own account, leased it out to Messrs. Parapalli Subbarayadu and R. Punniah on 29th March 1923 for a consideration of Rs. 1,500 per annum. The terms of the lease were that the machinery was to be kept in good working order by the lessee (repairs being executed by him), but that the lessor was to bear the cost of any renewals worth more than

Rs. 100. i.e., for practical purposes the the lessor was responsible for wear and tear.

For the assessment of the year 1924-25 the company furnished a return of its income to the Income-tax Officer, Guntur. It showed therein that its income during the previous years was Rs. 995 and claimed a further deduction of Rs. 1,037 on account of depreciation under S. 10 (2) (vi). The Income-tax Officer refused to allow depreciation as, in his opinion, the company was not entitled to this allowance under S. 10 (2) (vi), and made the assessment on a taxable income of Rs. 995. The company's appeal to the Assistant Commissioner of Income-tax, Guntur, against the assessment was dismissed on similar grounds.

The company has now asked me to state a case to the High Court under S. 66 (2) of the Income-tax Act. As the question involves the interpretation of S. 10 (2) (vi), of the Act read with S. 10 (2) (iv), I state the case as framed above.

In my opnion the allowance claimed is not admissible. In order to make an assessee eligible for the allowance under S. 10 (2) (vi) two conditions have to be satisfied, namely :

(1) That the buildings, machinery, plant, etc., in respect of which depreciation is claimed, are the property of the assessee [(S. 10 (2) (vi)] and

(2) that they are "used for the purposes of the business:" S. 10 (2) (vi). In the present case the first condition is satisfied, but the second is not. The machinery and plant in question is not used by the petitioners in their capacity as lessors of the factory, but by the firm of Messrs. Parapalli Subbarayudu and R. Punniah, who actually carry on the processes of milling in the factory. Before an assessee can claim the benefit of S. 10 (2) (vi), it must be clear that he is making the profits by using and causing the wear and tear of the machinery, buildings, plant, etc. In the present case the buildings, machinery, etc., are used by the lessees, and the wear and tear is caused for the purpose of earning their profits and not those of the assessee.

I may add that the petitioners, in the event of their claim under S. 10 (2) (vi) not being admitted, urge that in equity they should be given the allowance, and pray that it be given under S. 9 (1). In regard to this I need only say that where the Legislature has prescribed certain definite allowance, and laid down the conditions under which they may be granted, it is not my sphere, nor that of a Court of law, to enquire into questions of equity. The depreciation allowance claimed clearly cannot be granted under S. 9 (1), as that section only relates to "property consisting of lands and buildings appurtenant thereto." The income derived from the lease of machinery plant is not income from property within the meaning of the Income-tax Act.

Opinion

Coutts-Trotter, C. J.—The assessees in this case are a limited company registered on the 11th January 1921, which is the owner of a mill equipped with machinery for the milling of rice. The company elected not to work its mill on its own account, but leased it out to another firm in consideration of Rs. 1,500 per annum which it is entitled to do under the provisions of its Memorandum and Articles of association. I think it is clear that the assessees cannot come to Court and ask for deductions on the footing that they are carrying on a business of rice milling. The business they are carrying on is that of lessors of a building which derives its lettable value from the fact that it is equipped with certain machinery which is available for the purpose of milling rice. And of course it is on that lettable value that the lessors have been assessed. It seems to me that this is the not infrequent case of the same building and its contents being taxable both in the case of the lessors and the lessees. Different deductions will be allowable in the case of the lessors and the lessees. The lessors, as carrying on the business of letting a rice mill, can justly deduct from their assessment any sum which is due to depreciation of the lettable value of the property by reason of wear and tear of machinery which falls upon them under the contract of lease. Similarly the lessees, being taxable as carrying on the business of rice-milling will, be entitled to a deduction of such repairs as fall upon them under the lease. The Crown does not suffer from the fact that the parties can distribute the incidence of

the liability for repairs as they choose, because only one total sum can be allowed as deduction. If that principle be right, it answers the question raised by the case and it is not our function to apportion which deduction can be rightly claimed by the lessors and which by the lessees, which is a matter for the Commissioner to work out as a question of fact.

Krishnan, J.—This is a reference under S. 66 (2) of the Indian Income-tax Act (11 of 1922); the question referred for our decision is

Whether the allowance provided in S. 10 (2) (vi) of the Indian Income-tax Act, 1922, is admissible in computing the income of an assessee who has leased out his plant, machinery and buildings.

The Commissioner has answered the question in the negative.

S. 10 (2) (vi) is as follows :

In respect of depreciation of such buildings, machinary, plant or furniture being the property of the assessee a sum equivalent to such percentage on the original cost thereof to the assessee as may in any case or class of cases be prescribed.

The assessee here is a limited company formed primarily for the purpose of milling rice, and to carry out that object the company had acquired buildings, mill, machinery and plant. They did not, however, carry on that business. There is a provision in the Memorandum of Association authorizing the Directors to lease out the mill to third parties for rent if it is beneficial to the company to do so ; acting under this authority the mill was leased out to certain lessees for a fixed annual rent for a period of three years. The arrangement was that the lessees were to work the mill and take the profits, and do the necessary repairs to it and hand it back at the end of the period to the lessors in proper working order ; the lessors were, however, to bear the loss by depreciation by wear and tear caused by the working of the mill. The company is assessed on the rent received by them. It is clear from the facts that the company was carrying on the business of letting the mill for the purpose of being worked by the lessees.

As very correctly observed by the learned Commissioner of Income-tak two conditions must be fulfilled by the assessees before they became entitled to the deduction claimed for depreciation under S. 10 (2) (vi) : the property depreciated must belong to the assessees and must be "used for the purpose of the business." The first condition is admittedly fulfilled. But the Commissioner thinks the second is not. I am inclined to think he is not right in that view. The business here is the business of leasing the buildings and mill machinery for being worked as a mill. The rent received is not only for the use of the mill, but also to cover the necessary wear and tear. A portion of that rent represents the loss by wear and tear. The lease being of the mill as a working concern it is not straining the language of Cl. (vi) to hold that the machinery and buildings are used for the purpose of the lease and that the depreciation caused to them by wear and tear arises, so far as the assessees are concerned, from that user. Though the direct cause of the wear and tear may be the working of the mill by the lessees such working is authorized by the lease and is part of the business of the lease. That part of the rent which represents the loss due to depreciation is not really income to the lessors, but is meant to make good the loss on capital value of the machinery. I agree with the learned Chief Justice in holding that the assessees here are entitled to a deduction for depreciation of their buildings, machinery and plants which under the lease they have to bear. What that amount properly is for the year of assessment is for the taxing authorities to find. My answer to the reference on the facts of this case is as stated above.

Beasley, J.—The only point upon which I had any doubt was whether it could be said that the assessees were themselves carrying on business, because it is not only necessary for an assessee, before becoming entitled to the deduction for depreciation under S. 10 (2) (vi) of the Act, to be the owners of the property in respect of the property depreciated, but that also that property must be used for the purpose of the business. There is no doubt of course that the assessees are the owners of the property ; but is the property used for the purpose of the business ? This is a case of a limited company formed for the purpose of milling rice and in pursuance of that object the company acquired buildings, mill, machinery and plant. The company is, however, authorized in the Memorandum of Association to lease out the mill to other people for

rent. The company did not carry on the business of milling rice; it availed itself of the authority given to it of leasing out the mill for a fixed annual rental. The lessees worked the mill and took the profits, and under the lease had to do the necessary repairs to the mill. They had not however to bear loss by depreciation by wear and tear and it is in respect of the latter loss that the company claims the deduction under S. 10 (2) (vi). The Commissioner of Income-tax has held that the property is not used by the assessee for the purpose of the business, but I agree with the learned Chief Justice and with my brother Krishnan, J., that the view he has taken is incorrect. The company could either work the mill itself or could let it out to others to do so. One is the business of milling and the other is the business of letting out the mill for others to do so. Both, in my view, are equally a business, and my answer, therefore to the reference would be that the company is entitled to a deduction for depreciation of the buildings, machinery and plant.

Government will pay the assessees in each case Rs. 100 for their costs.

Reference answered in the affirmative.

A. I. R. 1926 Madras 1035

COUTTS-TROTTER, C.J., AND RAMESAM, J.

S. K. Mohideen Batcha Sahib—Plaintiff—Appellant.

v.

K. A. Sheik Dawood Sahib and *others* Defendants—Respondents.

Appeal No. 290 of 1925, Decided on 5th March 1926, from the decree of the Addl. J., Coimbatore, in O. S. No. 26 of 1925.

Contract Act, S. 145—Surety can be indemnified in proper cases before actual payment.

In one sense all sureties are only joint debtors so far as the creditor is concerned. But in a special sense, a surety is only a surety and not a joint debtor though the creditor is entitled to a joint and several decree or even can exclusively sue the surety. In either case, if the amount is exclusively recovered by the creditor from the surety or one of the debtors who has not received its benefit at the time of the borrowing, it can be recovered from the principal debtor or the joint debtor respectively. But the exact form of the transaction is important. A person, who is merely a surety, can be indemnified in an appropriate case, before actual payment, by an anticipatory action. [P. 1037, C.1]

T. M. Krishnaswami Aiyar and *N. Rajagopal*—for Appellant.

S. T. Srinivasagopalachariar, *S. Varadachariar* and *C. V. Anantakrishna Aiyar*—for Respondents.

Ramesam, J.—It will be convenient to set forth the facts of this appeal by the plaintiff as it arises out of a suit "of an unusual character." The 1st defendant (Sheik Dawood) and his brother, the late Kadir Mohideen carried on business under the name and style of K. Allauddin Sahib and Sons. The plaintiff is a father-in-law of the 1st defendant, but the 1st defendant has since discarded the plaintiff's daughter and married another wife, the daughter of the 4th defendant. In 1919 when the transactions commenced, no such misunderstandings existed between the plaintiff and 1st defendant. The brothers executed Ex. D in March 1919 in favour of the Agent to the Bank of Madras at Erode in which they stated that all transactions entered into by one of the brothers or both, whether under the firm name or not, may be regarded as entered on behalf of the firm. On 30th July 1919 the plaintiff, who is also a merchant of Erode, executed Ex. F, a promissory note for Rs. 30,000, in favour of the firm. This was delivered to the Bank by the firm as an enclosure with Ex. C (in O. S. No. 9 of 1923 on the file of the Court of the Additional Subordinate Judge of Coimbatore) of the same date as collateral security for the firm's drawings from the Bank on current account.

It is admitted by both sides that the firm did not pay to plaintiff Rs. 30,000 at the time of execution of Ex. F. The firm began to draw various amounts from the Bank and the current account of the Bank showing the drawings of the firm and payments by it in reduction of its indebtedness to the Bank is Ex. G. It shows that on the 30th July the firm drew Rs. 11,500 from the Bank by issuing a cheque in favour of plaintiff. Ex. I is the ledger of the firm showing the amount between the firm and the present plaintiff. It shows that Rs. 11500 was lent by the firm to the

plaintiff. Thus the amount drawn by the firm from the Bank on that date was shown in the documents as a debt of the firm to the Bank and secondly as a debt of the plaintiff to the firm and thus ultimately reached the plaintiff's hands. Other amounts were drawn by the firm from the Bank. Some portions of the amounts reached the plaintiff and appears in Ex. 1 as lent to the plaintiff. Other portions were utilized by the firm for their own purposes or for being lent to other customers of theirs. By 31st August 1921, the total amount drawn by the firm from the Bank amounted to Rs. 30,000 and odd, and the account closed. On the same date the Bank endorsed the note to the 4th defendant who filed on 21st September 1921 a suit to recover the amount. (O. S. No. 172 of 1921 of the Principal Sub-Court afterwards renumbered as O. S No. 9 of 1923 of the Additional Sub-Court.) By that time the 1st defendant's brother died and his widow and daughter were sued in his stead. The present plaintiff was 1st defendant and the present 1st defendant was 2nd defendant and the present 2nd and 3rd defendants were 3rd and 4th defendants in that suit. It may be added that the deceased Kadir Mohideen and the present plaintiff married sisters and the plaintiff's brother married the daughter of Kadir Mohideen (now 3rd defendant). The suit was decreed, the amount to be recovered in the first instance from the assets of the firm and after exhausting the assets from the present plaintiff. On appeal the decree was modified by the High Court into an unconditional decree against all the defendants in that suit, but the execution against the present plaintiff was postponed to 16th March 1925 to enable him to file the present suit which was accordingly filed on 10th January 1925.

The plaintiff's contention briefly is that so far as the current account between the firm and the Bank is concerned, the firm was the principal debtor and he himself was only a surety by the execution of the promissory note Ex. F, which was endorsed to the Bank as collateral security, and that, though the Bank or its endorsee may obtain a joint and several decree against himself and the partners of the firm, he is entitled to equitable relief from being ruined by the execution of the decree-holder solely against himself acting in collusion with the principal debtor. The vakil for the 4th defendant frankly stated before us that his motive for executing the decree against the plaintiff solely is that the 1st defendant discarded plaintiff's daughter and that he (4th defendant) is anxious that his daughter should not be similarly discarded and that he runs such risk if he executes the decree against 1st defendant and that he is not colluding with the 1st defendant. This may not be actual collusion, but is very nearly akin to it. It may be also stated here that so far as the account between the firm and the plaintiff (Ex. 1) is concerned, another suit has been filed by the 1st defendant against the plaintiff (O. S. No. 124 of 1923). Ex. C is the plaint and Ex. V is the written siatement in that suit. The defence of the plaintiff is that he discharged all the dues to 1st defendant. Thus, even if some of the amounts drawn from the Bank by the firm ultimately reached plaintiff's hands and it is admitted some amounts did so reach them, they were the subject of independent loan transactions between the firm and the plaintiff and the subject of a separate account and of a separate suit. The plaintiff, therefore, contends that if it is found that he is owing any amount to the 1st defendant, it can be lawfully decreed in that suit and there is no justification for the 1st defendant's attempt to throw the whole burden of the firm's debts to the Bank on him.

Mr. Varadachari who appeared for the 1st defendant contends that the real view to take of the transactions with the Bank is that the plaintiff and the firm were both principal debtors and the plaintiff is not entitled to any relief as surety. He concedes that if this suit is dismissed and if his other suit is decreed it amounts to plaintiff being made to pay doubly for the same amount, that if this suit is dismissed, his other suit, in so far as it covers all amounts drawn from the Bank ought to be dismissed and consequently, if the suit by the plaintiff is decreed, his own suit ought to be decreed subject to any plea of discharge; but he contends that, of these two alternatives, the former is the more proper course to take, i. e., that this

plaintiff's suit ought to be dismissed and that his own suit, in so far as it covers amounts drawn from the Bank and re-lent to the plaintiff ought to be dismissed ; and as to other amounts not so re-lent, the plaintiff, after payment to the decree-holder (4th defendant), will be entitled to his remedy against the 1st defendant as a joint debtor for contribution even if such a round about way may end in plaintiff's ruin. Thus it is clear from the contentions of the respondent's vakil, the 1st defendant's description of the present suit in paragraph 4 of his written statement as a counter blast to the other suit is not accurate.

The main point to be determined resolves itself into the question.—what is the legal relation of the parties as between themselves in respect of the drawings from the Bank? Were they joint debtors or was the plaintiff as surety for the firm ? In one sense all sureties are only joint debtors so far as the creditor is concerned. But in a special sense, a surety is only a surety and not a joint debtor though the creditor is entitled to a joint and several decree or even can exclusively sue the surety. In either case, if the amount is exclusively recovered by the creditor from the surety or one of the debtors who has not received its benefit at the time of the borrowing, it can be recovered from the principal debtor or the joint debtor respectively. But the exact form of the transaction is important. If the plaintiff is a surety, he can be indemnified in an appropriate case before actual payment, by an anticipatory action of this kind [vide *In re Richardson : Ex parte The Governors of St. Thomas's Hospital* (1) cf. *Wolmerhausen* v. *Gullick* (2) —a case of suing a co-surety, and *Veerappa Chetty* v. *Arunachalam Chetty* (3)— a case of partners].

When we examine Ex. G, we find that a considerable part of the amount drawn from the Bank reached the plaintiff's hand and, relying on this fact, the Subordinate Judge held that the account was opened substantially for his benefit and dismissed the suit. It is true that considerable amounts out of the drawings by the firm reched the plaintiff's hands. But it is necessary to remember two points : (1) other portions were utilized by the firm itself (2) the drawings appeared first in the account of the firm with the Bank, and such portions of then as were lent to the plaintiff appeared in another account between the firm and the plaintiff. That the drawings were regarded in the first instance as the firm's drawings is clear from several considerations. For example, the net value of the amounts drawn from the Bank that reached the plaintiff after giving credit to payments never exceeded Rs. 18,000 and at the close of the account amounted only to Rs. 3,050., If, on the other hand, we look at the account between the firm and the plaintiff which covered not only sums re-lent to the plaintiff, out of the drawings from the Bank but several other transactions, the indebtedness of the plaintiff was sometimes much less than Rs. 30,000, at other times it far exceeded it. It is clear that the sole object of Ex. F was to serve as collateral security for the Bank and did not represent a voucher for money borrowed. Ex. G and Ex. I must be regarded as the two separate and distinct accounts which they purport to be. It is true we have to look at the substance of a transaction and not the form. But where the form itself is part of the substance, we must attach weight to the form also. Mr. Varadachari relied on S. 37 of the Negotiable Instruments Act. But on the facts relating to Ex. F the section has no application. It it conceded that the plaintiff is entitled to an equitable relief if the facts justify it : see Buckley' L. J.'s remarks in the case already cited. The only question is one of fact and we agree with the learned Advocate-General's contention for the plaintiff. The Subordinate Judge seems to have been led away by certain false statements which the plaintiff made in the pleadings and depositions in the other case on matters which have really no bearing on the material point before us in his anxiety to save himself from the joint pressure of the 1st defendant and 4th defendant. It is true the Subordinate Judge has observed the witnesses and we have not, as he seems to be anxious to point out. But the point before us is not one of choosing between the oral evidence, but what is the real meaning of Exs. G, I, F with such light as is thrown

(1) [1911] 2 K. B. 705
(2) [1893] 2 Ch. 514=3 R. 610=68 L. T. 753.
(3) A. I. R. 1924 P. C. 192=4 Rang. 48.

on them by the oral evidence if necessary. It is true, as Mr. Varadachari contends, that the real effect of the transactions of 1919 should be ascertained from the documents of the time and not from the later conduct of the parties, such as the filing of the connected suit O. S. No. 124 of 1923 by the 1st defendant. Our conclusion is based on the documents of 1919 only and the plaint in O. S. No. 124 of 1923 only corroborates and supports it.

There will be a decree declaring that the plaintiff is only a surety for the firm Allauddin and Sons represented by Defendants 1 to 3, and that Defendants 1 to 3 are bound to indemnify the plaintiff in respect of the decree in O. S. No. 9 of 1923 and Defendants 1 to 3 are liable in the first instance to satisfy the 4th defendant's decree as per the terms of the Sub-Court's decree in O. S. No. 9 of 1923. In the event of non-satisfaction of 4th defendant's decree by Defendants 1 to 3, to the extent of the amount as decreed by the Sub-Court in O. S. No. 9 of 1923 within three weeks, plaintiff will have liberty to apply in execution to raise the amount due under the said decree by appointment of a Receiver or otherwise from the assets of the firm and have the same paid to the 4th defendant in satisfaction of the said decree.

If the said decree is executed against the plaintiff in whole or in part the plaintiff shall have liberty to apply to the Court to have paid to him out of the funds raised under the last paragraph the amounts realized by the decree-holder from the plaintiff by such execution. Plaintiff's prayer (2) in paragraph 18 will be dismissed and the appeal is dismissed as against 4th defendant. Plaintiff will have proportionate costs throughout on the footing that the relief in respect of which he succeeds if worth Rs. 35,000 and will pay proportionate costs in respect of the first three amounts in Sch. II (the costs will include the costs of private printing). Plaintiff will pay half the costs to 4th defendant and the 1st defendant will pay the other half of the costs of 4th defendant throughout.

Decree modified.

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* A. I. R. 1926 Madras 1038

Full Bench

SPENCER, KRISHNAN AND BEASLEY, JJ.

Board of Revenue, Madras—Referring Authority.

v.

Moopanna Somarazu and *another*—Respondents.

Reference No. 19 of 1925, Decided on 21st April 1926, made by the Secy. to the Excise Comr., Triplicane, Madras, on 22nd September 1925.

* (*a*) *Practice—Precedents—Case under repealed Act is useful for interpretation—Interpretation of statutes.*

Though a case under an Act which is no longer in force cannot be treated as an authority, nevertheless, it is a useful guide as to the contruction of the Act in force instead. [P 1039, C 2]

(*b*) *Madras Stamp Act* (6 *of* 1922), *Sch.* 1-*A*, *Art.* 33 (*a*)—*Possession to be delivered on the happening of a future event is not "agreed to be given."*

The words "agreed to be given" in Art. 33 (a) should not be construed as covering cases of agreement to give possession on the breach of a certain covenant, or on the happening of a future event which may or may not happen, but only cases where by the words of the document possession is directly agreed to be given : 10 *Cal.* 274, *Appl.* [P 1040, C 1]

Advocate-General and *Govt. Solicitor*—for Referor.

P. V. Rangaram—for Respondents.

Opinion.

Spencer, J.—The question before us is whether documents, of which we have a specimen form here, are mortgage deeds of the description defined in Art. 33 (*a*), Sch. I-A of the Madras Stamp Act (VI of 1922) in these words .

> Mortgage deed.....when possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.

In the Stamp Act (18 of 1869) the description ran differently. It was a mortgage deed of this class only when possession of property comprised therein was given by the mortgagor at the time of execution. Then in Act I of 1879 the words "at the time of execution" were transposed from the end to the beginning of the sentence and the description ran thus :

> When at the time of execution possession of the property or any part of the property comprised in such deed is given by the mortgagor or agreed to be given.

In the present Act, the words "at the time of execution" have been altogether dropped. Therefore, we have only to consider whether possession of the property is either given by the mortgagor or agreed to be given under the document that is before us. The decisions in the *Anonymous case* (1) and *Hinganghat Mill Co., Ltd.* v. *Rekchand Bhikamchand* (2) being decisions upon Acts which are not now in force, serve rather as guides for the interpretation of the present Act than as authorities. The mortgage deed before us is in the form of an English mortgage. The mortgagor gives a certain parcel or piece of land to the mortgagee "have and to hold", "subject to the proviso for redemption" therein contained. Then there is a covenant that the mortgagee shall permit the mortgagor to retain possession of the premises so long as he shall make the annual payments as stipulated, the net result of which is that the mortgagor remains in possession and thus possession is not immediately given by the mortgagor of the property comprised in the deed. But there is a provision at the end of the document providing that, if default is made in payment of certain annual instalments, the mortgagee may at any time thereafter enter into and upon the said piece of land and premises and shall thenceforth quietly possess and enjoy the same. The question is whether this covenant amounts to an agreement to give possession.

I think that the main agreement between the parties is that possession should not be given to the mortgagee in the first instance as the result of the execution of the mortgage deed and that this covenant for the mortgagee entering on the property in case of the mortgagor making default in payment is a subsidiary agreement which is only to take effect upon a certain contingent event happening which may never happen. Under these circumstances I am of opinion that this document is one in which possession is not given or agreed to be given and that it falls under Art. 33 (*b*) of the Act.

Krishnan, J.—This is a reference by the Board of Revenue for the decision of the High Court of the question of the proper stamp duty payable on the document submitted to us. That document is in the form of an English mortgage. The question we are called upon to decide is whether this mortgage falls under Art. 33 (*a*) or 33 (*b*) of the present Madras Stamp Act, Sch. I-A. To make it fall under Cl. (*a*) it is necessary that

> the possession of the property or any part of the property comprised in the deed should be given or agreed to be given.

If it does not fall under Cl. (*a*) it must fall under Cl. (*b*). This question was considered on a reference with regard to a similar document in the *Anonymous case* (1), but under the previous Stamp Act of 1879, Art. 44, Sch. 1. There is a difference in the wording of that Act and the present Act with which we are now dealing. The words "at the time of execution" have been omitted in the present Act. It was held by the learned Judges that the document before them did not fall under Cl. (*a*), but only under (*b*). As the Act has been changed, it is no doubt true as my learned brother says, that the case cannot be treated as an authority, neverthless, it is a useful guide as to the construction to be placed upon the article as it is now worded. The question of what stamp duty is payable on a document must necessarily be decided on the words of the document and the terms it embodies. There can be no doubt that, under the document before us possession is not given by the mortgagor to the mortgagee for by express stipulation the mortgagor is to continue in possession.

The covenant with reference to possession is that on a certain event happening, namely, on the mortgagor's default to pay in time the instalments fixed in the document, the mortgagee has the power to sell the property if he so chooses, or to take possession of the property in case he thinks fit to do so. The question then is, whether this document can be treated as a document by which the mortgagor has agreed that possession of the property should be given to the mortgagee within the meaning of Cl. (*a*). I am inclined to think that the words "agreed to be given" in Cl. (*a*) should not be construed in too wide a sense as the Advocate-General argues, but that these words should be restricted in the manner the Judges of the Calcutta High Court did. Mitter, J., says, with reference to these words in Cl. (*a*) :

> I am of opinion that Cl. (a) of Art. 44 covers only those mortgage deeds in which, as security

(1) [1884] 10 Cal. 274.
(2) [1884] 8 Bom. 310 (F. B.).

for the money advanced on mortgage, possession of the property or any part of the property mortgaged is actually given or agreed to be given. But it does not include mortgage deeds in which it is stipulated that the mortgagee would be entitled to take possession of the property, or any portion of the property mortgaged in case there should be any breach of the covenants of the deed. The word 'given' in the clause in question seems to me to point out that only those transactions are intended to be covered where the transfer of possession takes place in consequence of the agreement on the part of the mortgagor to deliver over possession as part of the security of the mortgage money. But, where by virtue of a stipulation in the mortgage deed, the mortgagee becomes entitled to enter upon possession quite irrespective of the consent of the mortgagor to make over possession, the clause in question does not apply.

I am inclined to think that this is the proper connotation of the words "agreed to be given." These words do not really cover a case where on a breach of covenant power is reserved for the mortgagee to take possession if he thinks fit. That will be putting too large an interpretation upon the words "agreed to be given." The principle is that in cases where a Taxing Act like the Stamp Act imposes a pecuniary burden upon the subject, the construction most beneficial to the subject should be adopted in cases of doubt. I am therefore of opinion that the words "agreed to be given" should not be construed as covering cases of agreement to give possession on the breach of a certain covenant, or on the happening of a future event which may or may not happen, but only cases where by the words of the document possession is directly agreed to be given. This view is also supported by the judgment of Field, J., in the same Calcutta case. Garth, C. J., takes a slightly different view based upon the words "at the time of execution." But these words are not now in the Act and therefore his judgment is not of much use to us. There is, however, one sentence in it to which I shall draw attention. It expresses forcibly that too large a construction should not be placed upon the words. He says at page 278 :

Again, if the Advocate-General's view were correct, Cl. (a) would be applicable in all cases where possession of the property is agreed to be given at any distance of time, or under any conditions, even temporarily, for non-payment of interest. I cannot think that the Legislature meant to extend so largely, or so unreasonably, the class of mortgages which are to be chargeable with the higher duty.

There is a further point here and that is, that even if we construe the words "agreed to be given" as covering cases where on the breach of a covenant possession is to be given to the mortgagee, such an agreement does not exist here, for here the agreement is not for the mortgagor to give possession but for the mortgagee to take possession if he thinks fit. Such a case does not seem to come under cl. (*a*). This is what Field, J., says on the point.

Now, although there is an authority to the mortgagees and trustees to take possession upon the happening of certain events, I think it impossible to say that there is any agreement by the mortgagor to give possession.

The mortgagor, on the breach of a covenant, may refuse to give possession and drive the mortgagee to a suit to enable him to enforce the covenant as regards possession. A document that contains such a provision is, I think, not contemplated by Cl. (*a*) of Art. 33.

I, therefore, agree with my learned brother that this document is not a document which falls under Cl. (*a*), but under Cl. (*b*), and should be stamped accordingly.

Beasley, J.—I agree.

Reference answered.

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* * A. I. R. 1926 Madras 1040

PHILLIPS AND MADHAVAN NAIR, JJ.

Chitturi Venkataratnam and *others*—Defendants—Appellants.

v.

Siram Subba Rao and *others*—Plaintiffs—Respondents.

Letters Patent Appeals Nos. 42 and 43 of 1925, Decided on 24th February 1926, from the judgment of Devadoss, J., D/- 2nd October 1924, in Second Appeals Nos. 848 and 849 of 1922.

* * (*a*) *Registration Act, S. 17—Partnership owning immovable property—Release by a partner of his share in partnership property—Deed is not compulsorily registrable.*

In a partnership business owning immovable property a partner may be a co-owner in the property, but he has no right to ask for a share in that property but only that the partnership business should be wound up, including therein the sale of the immovable property and to ask for his share in the resulting assets. Before a partner releases his right in the partnership property, that property belongs to the partnership and incidentally to him as a member of the partnership but not in his individual capacity. When, therefore, he retires from the partnership by releasing his rights therein; the property still

remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immovable property, for he receives his share of the assets on going out of the partnership and the immovable property still remains the property of the partnership as it was before ; 25 *Mad.* 149 and *A. I. R.* 1922 *P. C.* 115, *Rel. on.*

A release deed by which a partner relinquishes his share of the partnership property is not compulsorily registrable under S. 17. [P. 1042, C. 2]

* (b) *Registration Act, S. 49—Unregistered deed affecting immovable property is admissible otherwise than as affecting immovable property.*

An unregistered document affecting interest in immovable property is admissible in evidence otherwise than as evidence affecting the immovable property. [P. 1042, C. 2]

A. Krishnaswami Iyer—for Appellants.

V. Ramadoss—for Respondents.

Appeal No. 42 of 1925.

Phillips, J.—The only question for consideration in this appeal is whether the document, Ex. 3, is admissible in evidence. It purports to be a kararnamah or release of partnership share and it recites that in consideration of a sum of Rs. 2,100 settled by the mediators, the executant relinquishes his share, title and interest in the partnership business. Admittedly, the partnership was possessed of immovable property and the learned Judge in second appeal has held that as the document is one creating or extinguishing an interest in immovable property within the meaning of S. 17 of the Registration Act, it requires registration and is, therefore, inadmissible in evidence as not having been registered. The learned Judge finds that this document is a relinquishment of the executant's share in the partnership and that instead of Subba Rao being paid his share of the assets of the partnership, the partners entered into an arrangement by which he purported to release his right in the partnership.

Inasmuch as he received a consideration of Rs. 2,100 for this release, that amount is clearly the amount settled by the mediators as being the share in the assets of the partnership to which he was at that time entitled.

The real question at issue is whether this is a document surrendering an interest in immovable property. Under S. 253 of the Contract Act all partners are joint owners of the partnership property, but the share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss, i. e., he can only claim to receive his share of the assets of the partnership after all accounts have been taken. This is clearly shown in a case reported as *Sudarsanam Maistri* v. *Narasimulu Maistri* (1). In that case the plaintiff sued for a share in the partnership which admittedly was possessed of immovable property, and it was held that his suit was barred by limitation. It was argued that in respect of the immovable property the suit would be in time, although as a suit for dissolution of partnership, it was barred by limitation. It was, however, held that the only suit which he could bring would be for winding up the business of the partnership and for distributing the surplus and not a suit for partition of the partnership properties.

Similarly, in *Gopala Chetty* v. *V. Vijayaraghavachariar* (2) it was held by the Judicial Committee that a suit to recover a share in property which fell in after the dissolution of the partnership could not be maintained when the right to sue for an account was barred by limitation. These two cases are certainly authority for holding that a partner, as such, cannot sue for a specific share in the partnership property, but his only remedy is to sue for taking accounts and ascertainment of his share. A question similar to the present one arose in *Joharmal* v. *Tejram Jagrup* (3) where it was held by Jardine, J., that a certain document transferring a share in the assets of a firm which was possessed of immovable property did not require registration. Telang, J., however, held the contrary view; Jardine, J's. judgment is based on the English Law which he discusses at great length. Under the English Law, the share of a partner in the assets of the partnership is undoubtedly personalty and not realty, but, it is contended here that that does not conclude the case and that where a document relinquishing a share is executed, that document must be registered.

The question is not free from doubt in England. There is a case reported as *Gray* v. *Smith* (4) where an agreement to withdraw from a firm was under consideration and it was held by Kekewich, J., that such an agreement required a document under S. 4 of the Statute of

(1) [1902] 25 Mad. 149=11 M. L. J. 353.
(2) A. I. R. 1922 P. C. 115=45 Mad. 378.
(3) [1893] 17 Bom. 235.
(4) [1890] 43 Ch. D. 206=59 L. J. Ch. 145=38 W. R. 310=62 L. T. 335.

Frauds inasmuch as it conveyed an interest in land. In appeal the point was not determined, but Cotton, L. J., expressed his concurrence with Kekewich, J's. view. On the other hand in *Forster* v. *Hale* (5) it was held that the lease of a colliery was a mere incident in the partnership and no signed writing was necessary. The same principle was adopted in *Dale* v. *Hamilton* (6). In *Watson* v. *Spratley* (7) it was held that a contract to sell a share in a joint stock company did not come within the Statute of Frauds. In page 236 Martin, J., observed :

Indeed land or real property is the main substratum of their joint stock or partnership property, and their profits are directly obtained from its use. It is true, the legal interest in such real property is generally vested in the Corporation, and not in the individual partner or partners as in the cost book mine; but the interest of the share-holder in the great incorporated joint stock companies, and in the smallest mine conducted upon the cost book principle is, in its essential nature and quality, identical. In both, the share-holder has only the right to receive the dividends payable on his share, that is, a right to his just proportion of the profits arising from the employment of the joint stock, consisting indeed partly of land; but, whilst he holds his share, he has no interest or separate right to the land, or any part of it. He is, indeed, interested in the employment of it, but he cannot proceed against it directly, for anything which is due to him, or make any part of it his own, for the purpose of satisfying any demand which he may have as share-holder. He is not in the situation of a mortgagee, who has a direct interest in the land; or of a joint tenant, or tenant-in-common, who may make a part of it his own in severalty.

Again in *In re DeNicols, De Nicols* v. *Curlier* (8), Kekewich, J., observed :

It is settled that there may be an agreement of partnership by parol, notwithstanding that the partnership is intended to deal with land, and that to an action to enforce such agreement the plea of the Statute of Frauds will not avail.

He quotes for his authority *Forster* v. *Hale* (5) and *Dale* v. *Hamilton* (6) but he still adheres to the view expressed by him in *Grey* v. *Smith* (4). There seems to be some conflict, therefore, between the decisions of the English Courts, and I think the question must be examined to see whether this deed of release is really a document which extinguishes an interest in immovable property.

It is well settled law that a contract for the sale of shares in companies owning immovable property is not affected by the Statute of Frauds, and it is somewhat difficult to see what distinction can be drawn between the interest of a share-holder in immovable property belonging to the company and that of a partner in immovable property belonging to the partnership business. A share-holder, although he may not have any power to dispose of the property of the company, yet has an interest in it as it is out of such property that he derives his share in the profits of the company. Similarly, in a partnership business, a partner may be a co-owner in the property, but he has no right to ask for a share in that property but only that the partnership business should be wound up, including therein the sale of the immovable property and to ask for his share in the resulting assets. Before a partner releases his right in the partnership property, that property belongs to the partnership and incidentally to him as a member of the partnership but not in his individual capacity. When, therefore, he retires from the partnership by releasing his rights therein, the property still remains the property of the partnership and the action in releasing his rights does not actually extinguish his right in the immovable property, for he receives his share of the assets on going out of the partnership and the immovable property still remains the property of the partnership as it was before. I would, therefore, hold that Ex. 3 does not require registration. Even if this view is not correct, I think there is another ground for holding that Ex. 3 is admissible in evidence based on S. 49 of the Registration Act which says that no document required by S. 17 to be registered shall be received as evidence of any transaction affecting such property. Although, therefore, this release deed may require registration under S. 17, yet it may be received as evidence, if it is not received as evidence of any transaction affecting such property. Here, the transaction has the effect of leaving the immovable property in the same state as it was before, namely, as property belonging to the partnership. The fact that that partnership consists of one partner less than before does not affect the immovable property. This seems to be clear from the decisions regarding shares

(5) [1798] 3 Ves. 696=4 R. R. 128.
(6) [1846] 5 Hare 369=16 L. J. Ch. 126=11 Jur. 163.
(7) [1854] 10 Ex. 222=24 L. J. Ex. 53=2 W. R. 627=2 C. L. R. 1434.
(8) [1900] 2 Ch. D. 410.

in joint stock companies, whether incorporated or unincorporated. The property remains the partnership property and is not affected by the change in the body of persons owning it. In this view, then Ex. 3 is admissible in evidence, even if it requires registration as a document extinguishing an interest in immovable property. I must, therefore, come to the conclusion that the judgment of the learned Judge is wrong and that the decree of the learned Sub-Judge must be restored with costs both here and in second appeal.

Appeal No. 43 of 1925 follows this and there will be a similar order in that appeal.

Madhavan Nair, J. — I agree and have nothing to add.

Appeals allowed.

A. I. R. 1926 Madras 1043

COUTTS-TROTTER, C. J., PHILLIPS AND KUMARASWAMI SASTRI, JJ.

Appaswami Padayachi—Petitioner.

v.

V. A. Ethirajulu Naidu and *another*—Respondents.

Civil Revision Petition No. 223 of 1923, Decided on 10th February 1925, from an order of the Sub-J., Mayavaram, in Original Petition No. 137 of 1922.

(a) *Madras District Municipal Election Rules—Election petition—Original charge can be amended according to evidence—Civil P. C., O. 6, R. 17.*

The tribunal should be guided wherever possible in its procedure by the provisions of the Civil P. C., and it is obvious that it would be a great hampering to the course of justice, if in a proper case with proper safeguards, the learned Judge were not allowed to entertain an amendment in accordance with the evidence.

[P 1043, C 2]

(b) *Madras District Municipalities Act — Election petition—Vague objections without particulars cannot be gone into.*

Where only vague objections are raised to an election petition without giving any particulars the objections cannot be gone into. [P 1044, C 1]

K. S. Jayarama Iyer—for Petitioner.

S. Muthiah Mudaliar — for Respondents.

Coutts-Trotter, C. J.—Four points were taken in this petition. The first was that the respondent here had no locus standi as he was not on the roll of voters. What happened was that his name had been on the draft roll of one ward, and when the fair roll was made his name was put twice over in two wards, Ward No. 2 and Ward No. 3. When they looked through the roll, the Chairman struck his name out of Ward No. 2 because it was in Ward No. 3; and then apparently by an oversight or slip of memory, he struck his name out in Ward No. 3 because it was in Ward No. 2. He put it right by restoring the name to the proper ward, whichever it was, on the ground that under the rules what was done was a clerical error. It is quite unnecessary for us to say whether it is superabundantly clear that this is a clerical error. We are inclined to think it is pretty clear that it was; but all that is necessary for us to say is that it was a matter entirely within the power and jurisdiction of the learned Judge to deal with, and he has dealt with it.

The next point taken was that it was illegal under the Electoral Rules to add a fresh charge after the original charge had been filed. It is quite clear that the intention was that the tribunal should be guided, wherever possible, in its procedure by the provisions of the Civil P. C., and it is obvious that it would be a great hampering to the course of justice if, in a proper case with proper safeguards, the learned Judge were not allowed to entertain an amendment in accordance with the evidence. The third point was that a certain vote has been rejected by the chairman, who had done that which we have held in a former case cannot be done, gone behind the roll and enquired into the qualification of an elector whose name was on the roll. The answer to it is that that was not what he did. What he really did was to treat this voter as having been guilty of personation and the matters about his having paid taxes and so forth are apparently merely grounds given by the learned Judge for his position, and that being so, it is a mere finding of fact with which we cannot interfere. I am glad to be able to say that my learned brothers are quite clear that that is what the learned Judge really did mean to say because speaking for myself, that paragraph of the judgment is to me absolutely unintelligible and I find it difficult to be sure as to what he did mean and what he did not. But it

is quite clear, when that paragraph is read in conjunction with the pleadings that he only meant to decide a question of fact. That is the only possible interpretation.

The fourth point made by the petitioner was that the learned Judge had refused to go into certain objections of his to certain votes. The objection was put forward in this vague form in para. 13 of his written statement :

This respondent also understands and believes it to be true that in the matter of the counting of votes, some invalid votes have been improperly received and taken into account in petitioner's favour and at the same time some valid votes in this respondent's favour have been improperly rejected and not taken into account.

No particulars were given; no names were mentioned; and the learned Judge declined to go into it; and rightly so because it would have involved an opening of all the ballot boxes and a roving enquiry over the whole range of votes. That was entirely within the discretion of the learned Judge and he very properly refused to exercise it in favour of the petitioner.

The petition is dismissed with costs.

The memorandum of objections is dismissed.

Phillips, J.—I agree.

Kumaraswami Sastri, J.—I agree.

Petition dismissed.

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* A. I. R. 1926 Madras 1044

DEVADOSS AND WALLER, JJ.

In re. Venugopal Nayudu — Petitioner.

Criminal Misc. Petition No. 180 of 1925, Decided on 23rd July 1925, against the proceedings in Current No. 91-B of 1925, D/- 22nd February 1925, in the Court of the First Class Sub-Divl. Mag., Pattukottah.

* (a) *Legal Practitioners Act, S. 14—Charge need not necessarily be enquired into by the Court in which misconduct is committed.*

S. 14 does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed : *A. I. R.* 1922 *Cal.* 484, *Foll.* ; 1 *P. L. T.* 379 and 10 *C. W. N.* 1059, *not Foll.* [P 1045 C 1]

* (b) *Legal Practitioners Act, S. 14—Section does not contemplate either a preliminary enquiry or a transfer of enquiry.*

The Act makes no provision either for the transfer of proceedings or for the holding of a preliminary enquiry.

The Additional District Magistrate to whom charges were made forwarded the charges to the Sub-Divisional Magistrate for enquiry and the latter issued notice to petitioner under S. 14 of the Act.

Held : whether the Additional District Magistrate intended that the Sub-Divisional Magistrate should himself dispose of the charges or whether his idea was that a sort of preliminary enquiry should be held and a report should be submitted with a view to possible future action by himself, from either point of view he acted without jurisdiction. [P 1044 C 2]

K. S. Jayarama Aiyer—for Petitioner.

Public Prosecutor—for the Crown.

Order.—Petitioner who is a First Grade Pleader has been charged under S. 14 of the Legal Practitioners Act by the Sub-Divisional Magistrate, Pattukottah. He was engaged to represent the accused in a security case and all the charges against him, except one, alleged various acts of misconduct in relation to that case. These charges were made to the District Magistrate, Tanjore, by the Deputy Superintendent of Police, who suggested that proceedings should be taken against petitioner under the Legal Practitioners Act. In the result the Additional District Magistrate forwarded the police report to the Sub-Divisional Magistrate, Pattukottah for enquiry and the latter issued notice to petitioner under S. 14 of the Act. It is not quite clear what was in the mind of the Additional District Magistrate whether he intended that the Sub-Divisional Magistrate should himself dispose of the charges or whether his idea was that a sort of preliminary enquiry should be held and a report should be submitted with a view to possible future action by himself. From either point of view, he acted without jurisdiction. The Legal Practitioners Act makes no provision either for the transfer of proceedings or for the holding of a preliminary enquiry of such a nature. Mr. Jayarama Aiyar contends that in any event most of the charges against his client cannot be enquired into as they relate to alleged acts of misconduct not committed in or in relation to the Court which proposes to enquire into them. That, we consider, is an objection that should more properly be taken before the District Magistrate, who will now proceed to deal with the matter himself. As, however, it has been taken here, we may as well dispose of it at once. The view relied on by Mr. Jayarama Iyer finds support in several decisions of the Patna High Court of which

we may quote that reported in *Emperor v. Satyendra Nath Ray* (1) as an example. The same view has been expressed by the Calcutta High Court in *In re Radha Nath Charan Chukerbutty* (2). With great respect, we prefer to follow the ruling of the Calcutta High Court reported as *In re Rabindra Nath Chatterjee* (3). As pointed out by Woodroffe, J., and Mookerjee, J., S. 14 of the Legal Practitioners Act does not limit the consideration of a charge to the Court in which the misconduct is alleged to have been committed. To say that it does, is, we think, to read into S. 14 something that is not there.

The District Magistrate will now dispose of the report made to him in accordance with law, but we think it undesirable that proceedings for misconduct against the defence vakil should be taken before the security case against his client has been disposed of.

Case remanded.

(1) [1920] 1 P.L.T. 379=57 I.C. 277=(1920) P. H.C C. 225.
(2) [1905] 4 C.L.J. 229=10 C.W.N. 1059.
(3) A.I.R. 1922 Cal. 484 (S.B.).

A. I. R. 1926 Madras 1045

SPENCER, J.

Raja Ganpatiraju—Defendant 1—Appellant.

v.

Pogaru Ramamurthi—Plaintiff 2—Respondent.

Second Appeal No. 951 of 1923, Decided on 8th February 1926, from the decree of the Dist. J., Vizagapatam, in A. S. No. 329 of 1920.

Madras Survey and Boundaries Act (4 of 1897), S. 13—Dispute must be a boundary dispute—Person claiming should be party to dispute or should claim under a party—Survey Officer's decision that certain jeroyati land is Government inam is without jurisdiction and binds nobody.

Under S. 13 a decision of a Survey Officer under S. 12 becomes final if no suit is brought within one year to establish the rights claimed in respect of boundary of the property surveyed; but the section requires that the party should be a party to a boundary dispute or some person claiming under him, and that the right he claims must be in respect of the bouudary of the property surveyed. Any such decision is not binding on a person who is not a party to the dispute.

Where the effect of an order, of the Survey Officer, right or wrong was to register as a Government service inam land, which had hitherto been enjoyed as jeroyati land.

Held: that the Act 4 of 1897 does not authorise a Survey Officer to do anything of that sort and therefore his decision was an erroneous decision being given upon a matter which he had no jurisdiction to deal with.

[P. 1046, C. 1, 2, P. 1047, C. 1]

S. Srinivasa Aiyangar and *R. Ganapathi Aiyar*—for Appellant.

V. Govindarajachari—for Respondent.

Judgment.—The plaintiffs sued to recover possesssion of Survey No. 339 and another land of Laveru village in the Zamindari of Vizayanagaram and they made the trustee of the Vizayanagaram estate, the 1st defendant and the tenants in occupation of S. No.339, Defendants 2 to 12. The Subordinate Judge dismissed the suit against Defendants 2 to 12 on the ground that they had acquired an occupancy right on the coming into force of the Madras Estates Land Act and he also rejected the plaintiff's claim to recover possession of S. No. 339 as against the 1st defendant, but he gave them a declaration that they are entitled to the melwaram of landholder's right in this survey number as against the 1st defendant and a decree for recovery of rent for 3 years prior to suit. In appeal the District Judge confirmed the decree of the lower Court.

The plaintiffs alleged in their plaint that about 1820 A. D. which was after the Permanent Settlement, the suit land was granted by the villagers of Laveru. who were the predecessors-in-title of Defendants 2 to 12 as sarvadumbala inam to 1st plaintiff's grandfather in lieu of the customary fees (rusums) which they were paying for his service. In 1904 the village was surveyed and the suit land was demarcated as mirasi inam. The 1st defendant appealed against that order but his claim was rejected by the Assistant Superintendent of Survey. The plaint goes on to allege that the 1st defendant trespassed on the suit land and took lease deed from the other defendants in 1906 and collected rents from them subsequently. On these allegations, the plaintiffs claimed to be put in possession of the properties together with mesne profits for three years.

The Subordinate Judge, besides holding that Defendants 2 to 12 had acquired occupancy rights, found that the plaintiffs had not proved their own possession within 12 years of the suit. He rightly

rejected the plaintiffs prayer for a decree for possession as the 1st defendant admittedly was not in actual possession of S. No. 339 and the plaintiffs failed to prove that he had trespassed upon it as alleged in the plaint. He then proceeded, without any amendment of the plaint, to give the plaintiffs a declaratory decree against 1st defendant that they were entitled to the melwaram right in S. No. 339 and to recover the rents paid to him by Defendants 2 to 12 for three years prior to suit in spite of the fact that such a claim altered the character of the suit. The District Judge was of opinion that the decision of the Settlement Officer in Ex. G, in 1905, was final as between the plaintiffs and the 1st defendant seeing that the 1st defendant did not bring a suit within one year of the decision, as provided by S. 13 of the Survey and Boundaries Act IV of 1897.

The District Judge, however, held that the Assistant Superintendent's order was erroneous, because he assumed that the inam was a pre-settlement inam. The admission of 1st plaintiff, who was respondent in those proceedings, that the land had been enjoyed as ryoti land for 20 years negatived any such possibility and his present plaint treats it as a post-settlement grant. The order appears to be further based on a mistaken impression that the Government was a party to the complaint under the Survey and Boundaries Act as the limitation period for acquiring a prescriptive title is taken to be 60 years, whereas the heading to Ex. (a) shows that this was not the case.

Under S. 13 of the Madras Act IV of 1897, a decision of a Survey Officer under S. 12 becomes final if no suit is brought within one year to establish the rights claimed in respect of the boundary of the property surveyed; but the section requires that the party should be a party to a boundary dispute or some person claiming under him, and that the right he claims must be in respect of the boundary of the property surveyed. This point is clearly brought out in the Full Bench case of *Muthirulandi Poosari* v. *Sethuram Aiyar* (1) and in *Subramania Mudali* v. *Meenakshi Ammal* (2). The observation in *Chinna Venkatrayudu* v. *Ramamurti* (3) that landholders are not altogether precluded from afterwards disputing the correctness of the boundary in a Court of law reads like an attempt to whittle down the meaning of the word "conclusive" in S. 13. The cases of *Kamaraju* v. *Secretary of State for India* (4) and *Muthammal* v. *Secretary of State for India* (5), quoted for the respondents, were decisions in respect of orders passed under the Madras Forests Act V of 1882 and under the repealed Boundary Marks Act 28 of 1860, which provided for the investigation of other claims and the adjustment of other disputes besides those connected with the physical boundary of lands. The Survey Officer's decision (Ex. XXIII) purports to have confirmed the demarcation of the land, and the complaint which gave rise to it speaks of S. No. 339 as having been wrongly "demarcated" as jeroyati land. Both the Courts below were somehow of opinion that the effect of a Survey Officer's order was to alter the demarcation of the disputed land and to execlude it from the zamindari limits although somewhat inconsistently the Subordinate Judge applied to it the provisions of the Madras Estates Land Act, which relate only to lands situated in an estate as defined in S. 3 (2) of that Act.

In my opinion, that is not the real effect of the order. The land in dispute both at the time of settlement and since, has continued to be within the ambit of the zamindari and nobody, even in second appeal has questioned the correctness of the boundaries of S. No. 339. Any order, that the Survey Officer might pass could not have the effect of making this inam one excluded from the zamindari at the time of the Permanent Settlement, nor could it operate as a recognition of the 1st plaintiff's title to the office of karnam or his right to claim this land or the profits of it as part of the village karnam's emoluments. The effect of his order right or wrong, was to register as a Government service inam this land, which had hitherto been enjoyed as jeroyati land but Act IV of 1897 does not authorize a Survey Officer

(1) [1919] 42 Mad. 425=9 L.W. 323=36 M.L.J. 356=50 I.C. 43=(1919) M.W.N. 226 (F. B.).

(2) A. I. R. 1922 Mad. 392.

(3) [1921] 44 Mad. 340=40 M.L.J. 149=13 L.W. 451=61 I.C. 986=(1921) M.W.N. 117.

(4) [1888] 11 Mad. 309 (F.B.).

(5) [1916] 39 Mad. 1202=26 I.C. 817=27 M.L.J. 529.

to do anything of that sort. As the District Judge noticed, the Survey Officer's decision was an erroneous decision, and although his order would be binding upon the zamindar or his representative in interest if the boundary were in dispute, seeing that he did not bring a suit within the limitation period, it could by no means bind Defendants 2 to 12 who were not parties to it; and there was no good reason for giving the plaintiffs a declaratory decree on the strength of an erroneous decision of a Survey Officer upon a matter which he had no jurisdiction to deal with. The plaintiffs are not entitled to recover melwaram from the 1st defendant, as such on the ground that he had wrongfully collected it from Defendants 2 to 12, because, as against Defendants 2 to 12. the plaintiffs are not entitled to recover melwaram unless they first establish their title to be regarded as the owners of the melwaram, i. e., as landlords. The plaintiffs could not legally be awarded mesne profits against 1st defendant, seeing that he was not in possession of the land and that the lower Courts found that the plaintiffs were not entitled to get possession of it.

Moreover, the Survey Officer's decision, Ex. XXIII was to the effect that the land was a Government service inam and, therefore, presumably one forming part of the emoluments of the village karnam. If the plaintiffs' object was to recover the rent of the land as emoluments of the Karnam's office, they should have brought their suit under Madras Act III of 1895 to recover under S. 13 the emoluments of office from any person in whose possession they might be. As such, the suit would have to be filed before the Revenue Court, as S. 21 of that Act excludes the jurisdiction of civil Courts except in respect of suits to recover the land itself. In such a suit the 1st plaintiff would have to establish as a preliminary point that he was the karnam in office entitled to those emoluments.

As the Assistant Superintendent of Survey who made the order Exs. G and XXIII had no jurisdiction to declare the 1st plaintiff to be entitled to the status of melwaramdar and as the decrees of the lower Courts for recovery of 3 years' rent from 1st defendant were based merely on an order of a Survey Officer found to be erroneous and without finality, the second appeal must be allowed and the plaintiffs' suit dismissed as against the appellant with costs throughout.

Appeal allowed.

A. I. R. 1926 Madras 1047

Full Bench

PHILLIPS, KRISHNAN AND RAMESAM, JJ

Zamindar of Kallikote and Atagada Estate—Petitioner.

v.

Mongolopur and *others*—Respondents.

Civil Revision Petitions Nos. 159 to 168 and Civil Miscellaneous Petitions No. 1346 to 1355 of 1926, Decided on 15th April 1926, from the orders of the Board of Revenue, Madras.

(a) *Madras Board of Revenue Act* (1 *of* 1894), *S.* 2—*Madras Estates Land Act* (1908), *Ss.* 171 *and* 172.

A single member of the Board of Revenue has power to decide questions under Ss. 171 and 172, Madras Estates Land Act, if the Board has declared that the questions may be disposed of by him. [P. 1047, C. 2]

(b) *Civil P. C., S.* 115—*Interlocutory orders—High Court would not interfere except for special reasons.*

It is not ordinarily the practice of the High Court to interfere with orders of an interlocutory nature unless there is some special reason for doing so. [P. 1048, C. 1]

(c) *Civil P. C., S.* 115—*Madras Estates Land Act* (1908), *Ss.* 171 *and* 172.

Quaere: Whether the High Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172. [P. 1048, C. 1]

A. Krishnaswami Aiyar and *C. Sambasiva Rao*—for Petitioner.

B. Jagannatha Doss—for Respondents.

Judgment.—These are applications to revise the orders of the Board of Revenue passed, one under S. 172 of the Estates Land Act, and the others under S. 171 of the same Act. So far as the cases under S. 171 are concerned, the only point that is raised, which relates to jurisdiction, is that a single member of the Board of Revenue has not power to decide questions under those sections. However, under S. 2 of Madras Act I of 1894, it is enacted:

It shall be lawful for the Board of Revenue to declare what portion of the business of the Board may be disposed of by a single member.

It is not suggested here that the Board has not allotted this branch of

work to a single member and, therefore, that member had complete authority to deal with the matter. No other question of jurisdiction arises in the cases disposed of by the Board under S. 171.

So far as the order passed under S. 172 is concerned it is merely a preliminary order declaring that the Board of Revenue has jurisdiction in the present case under that section, but no final order has yet been passed on the merits of the case. It is contended that on this question of jurisdiction this Court ought to interfere in revision in order to save further proceedings. It is not ordinarily the practice of this Court to interfere with orders of an interlocutory nature unless there is some special reason for doing so. Here the petitioner has come to this Court before he has any grievance and consequently we are not prepared to interfere at this stage. In this view it is unnecessary to decide the question whether this Court has jurisdiction to interfere in revision with the orders of the Board of Revenue under Ss. 171 and 172. All these petitions must be dismissed with costs.

Civil Miscellaneous Petitions Nos. 1346 to 1355 must also be dismissed.

Petitions dismissed.

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* * A. I. R. 1926 Madras 1048

Full Bench

SPENCER, KRISHNAN AND BEASLEY, JJ.

Commissioner of Income-tax, Madras — Referring Officer.

v.

Nedungadi Bank Ltd., Calicut — Assessee.

Reference No. 22 of 1925, Decided on 21st April 1926, made by the Commr., Income tax, on 20th October 1925.

* * (a) *Income-tax Act* (1922), *S.* 4 (2) *and Expln.—Bank's Head Office in British India—Branch outside—Profits of latter brought entirely in British India office by book transfer are "received or brought into" British India.*

Where the entire profits of the branch of a Bank had been actually remitted to the office in British India by book transfer and there were no materials left at the branch office for drawing up a separate profit and loss statement:

Held : that profits or gains arising outside British India are not merely taken into account in the balance sheet within Expl. to S. 4 but they are amalgamated with the net profits of the Head Office, and therefore they must be deemed to have been "received or brought into" British India, and therefore the whole of the amount shown as net profits of the Bank is liable to income-tax. [P 1048, C 2, P 1049, C 1]

* * (b) *Income-tax Act* (1922), *S.* 10 (2) (*ix*)—*Liability to pay fund created—No exemption is allowed unless the sums are actually expended.*

Where a Bank made itself liable for paying a certain proportion of the sums which were invested with itself for the benefit of its employees:

Held : that it is no "expenditure" for the purpose of the business but only a liability : *Smyth* v. *Stretton*, (1904) 90 *L. T.* 756, *Dist.* [P 1049, C 1, 2]

M. Patanjali Sastri—for Referring Officer.

T. V. Muthukrishna Aiyar—for Assessee.

Spencer, J.—The first question referred to us relates to the liability to income-tax of the profits of the Nedungadi Bank at Calicut which are asserted to have been earned in Cochin and Travancore. This Bank has these two branches outside the limits of British India. Under S. 4 (2) of the Income-tax Act the profits and gains of a business accruing or arising outside British India may be deemed to have accrued or arisen in British India, provided that they are received or brought into British India within three years or the end of the year in which they accrued. The balance sheet of this Bank for the year ending 31st December 1923 shows Rs. 1,38,460 as net profits of the Bank. No separate account has been drawn up to show what the profits in its branches amounted to. There is only one account and no separate profit and loss account of the branches. This sum of Rs. 1,38,460 is shown in the appropriation account on the credit side, and the unappropriated balance of the previous year is added to it, and on the debit side figures are given which show how these profits were distributed, e. g., Rs. 71,000 were paid out in dividends ; Rs. 20,000 as Managing Director's remuneration ; Rs. 2,869 towards Provident Fund ; and certain amounts were allotted to the Special Reserve Funds which included bad debts, pensions and gratuities ; and the balance of Rs. 24,000 is transferred to the balance sheet. There is no Reserve Fund representing the profits of the branches kept apart from this general fund.

The Assistant Commissioner, in his order, concluded that the entire profits of these branches had been actually remitted

to the office in British India by book transfer because, as he finds, the profits and expenses have been transferred by a regular book transaction from the foreign branch offices to the head office, and there are no materials left at the branch offices for drawing up a separate profit and loss statement. Therefore the profits which may be held to have remained with the branch offices so as to be available for the branches for employment for their own business are not ascertainable, and no balance is left at the end of the year in the revenue and expenditure account of the branch offices from which a profit and loss account could have been drawn up, all income received by the branches having been transferred to the Head Office account and all expenditure directly chargeable against revenue having been similarly transferred to the Head Office account. The explanation to S. 4 merely states that profits or gains arising outside British India are not necessarily to be deemed to be brought into British India by reason that they are taken into account in the balance sheet. It seems to me that in this case there has been a good deal more done to the profits arising out of the transactions in the branch banks than merely taking them into account in the balance sheet for the information of the shareholders. These sums have been amalgamated with the net profits of the Head Office and out of the amalgamated sum dividends have been paid and Directors have been remunerated, and otherwise the branch banks' profits have been appropriated. Under such circumstances I am prepared to hold that the sums which were appropriated for payments made at the Head Office must be deemed to have been "received or brought into" the Calicut office, which is in British India, and therefore that the whole of the amount shown as net profits of the Bank is liable to income-tax.

The second question is whether the Bank can exclude the amount paid as contribution to the employees' Provident Fund under the heading of "Expenditure incurred for the purpose of the business" within the meaning of S. 10, Cl. (2) (ix). It appears that the Bank makes itself liable for paying a certain proportion of the sums which are invested with itself for the benefit of its employees. Until the employee withdraws the amount standing to his credit in the Provident Fund, it is no "expenditure" for the purpose of the business but only a liability. The case quoted on behalf of the assessee, *Smyth* v. *Stretton* (1), can be distinguished on the ground that in that case the college invested £35 annually for the benefit of its assistant masters in an insurance fund. The money was actually paid out to the insurance company and was claimed as an expenditure. Upon these facts the High Court held that each master had obtained an addition to his salary on which he was liable to pay tax. The liability of Dulwich College which made those contributions was not considered at all. Even supposing that the College treated these sums as expenditure, it does not follow that the Bank in the present case can so treat these amounts which have not been actually expended. I, therefore, consider that the second question should be answered in the negative.

Krishnan, J.—This is a reference under S. 66 (2) of the Income-tax Act of 1922 by the Commissioner of Income-tax with reference to the assessment of income-tax of the Nedungadi Bank at Calicut. That Bank has branches both in British India and Travancore and Cochin. The first question submitted for our opinion is :

Whether that portion of the Bank's profits Rs. 56,567 which can be conventionally held to have been earned in Cochin and Travancore, can be said to have been brought into British India within the meaning of S. 4 (2) of the Indian Income-tax Act.

Section 4 (2) refers to profits and gains of business arising outside British India of a person resident in British India. The Nedungadi Bank has its Head Office in British India, namely, at Calicut. The question is whether the profits and gains of its business carried on in Travancore and Cochin can be said to have been brought into British India so as to be liable to income-tax. The question really turns upon the way in which these profits and gains have been treated by the Bank. The Assistant Commissioner of Income-tax, in his order has gone into the facts very fully and has come to the conclusion that the profits and gains made in Cochin and Travancore must be treated as having been brought into British India, and the Commissioner of Income-tax has

(1) [1904] 90 L. T. 755 = 53 W. R. 288 = 5 Tax. Cas. 36 = 20 T. L. R. 443.

supported that conclusion. The reasons are fully setout in the Assistant Commissioner's order where he points out the way in which the accounts were kept. All the income received by the foreign branches was transferred to the Head Office account and all expenditure directly chargeable against revenue was similarly transferred to the Head Office account in the accounts of both the Head Office and the branch offices in Cochin and Travancore. The result was that at the end of the year, after these transfers took place, there was really no balance left in the revenue and expenditure account of the branch offices, the amount being treated as having been transferred to the Head Office account. As pointed out by him, there was a frequent flow of remittances to and from the Head Office and the branch office.

Flow of money by book entries can also amount to remittances. There seems to be ample evidence which justifies the Assistant Commissioner's conclusion that the balances with the branches in Travancore and Cochin were really remitted to or brought into the Head Office at Calicut. The way in which the profit and loss appropriation account is made out certainly seems to show that the whole income of the branches and the Head Office was treated as one lump sum for the purpose of ascertaining payment of dividends. The balance is dealt with as partly special reserve funds and partly as a general reserve fund, so that the whole profits including the profits of the branches in Cochin and Travancore are dealt with in Calicut.

When moneys are remitted without any special allocation to profit or capital accounts, between the branches and the Head Office of the Bank, the contention that the profits were kept back in the branch offices and only other moneys were remitted to the Head Office cannot possibly be accepted. It is quite true that for the payment of dividends there was enough money obtained as profits and gains by the branches in British India alone. But the payment of the dividends were not restricted to those profits as shown by the way in which these accounts were kept by the Bank and its branches. This is not a case merely of reliance being placed upon the balance sheet for the purpose of holding that the profits and gains were brought into British India, which is a matter dealt with by the explanation to S. 4. Here there is very much more evidence to make it quite clear that the amounts earned as profits in the foreign branches were transmitted to the Head Office and treated as so transmitted for the Bank's purposes and for payment of dividends. We are not bound to go into questions of fact in a reference under S. 66 (2). We must take the facts as stated by the Commissioner, and, unless it can be established by the assessee that there is no evidence to support the finding of the Commissioner that the profits were brought into British India, we cannot decide the question in his favour. I am of opinion that there is sufficient evidence to justify the finding of the Income-tax authorities, and on that ground I answer the first question in the affirmative.

The second question referred to us is with regard to the employees' Provident Fund which the Bank has maintained. For every rupee paid by the employee which represents a certain proportion of his pay every month the Bank contributes the same amount and the two amounts are entered in the Bank's books to the credit of the employee in question. It is claimed that the Bank is entitled to deduct the sums contributed by the Bank towards this Provident Fund under S. 10 (2) (ix) as expenditure incurred solely for the purpose of earning profits or gains. If the money had been spent by the Bank, no doubt S. 10 (2) (ix) would apply. But in the case before us it is clear that the Bank has not yet spent the money; all that it has done is that it has made entries in its books admitting liability on its part to pay a certain sum of money to the employee when he retires or goes out of office. That cannot be treated as an expenditure by the Bank. The expenditure will take place only when it pays, and it will be time enough to claim deduction then. The deduction cannot be allowed now. I would therefore answer the second question in the negative.

Costs payable by the assessee will be Rs. 250.

Beasley, J.—I agree.

Reference answered.

* A. I. R. 1926 Madras 1051
Special Bench

COUTTS-TROTTER, C. J., KRISHNAN AND BEASLEY, JJ.

(Sheik) Abdul Kadir Marakayar & Co.—In re

Application under S. 66 of the Income-tax Act and S. 45, Specific Relief Act, Decided on 11th November 1925.

* (a) *Income-tax Act* (1922), *S.* 66 (1) *and S.* 33—*Orders under S.* 33—*Court can compel Commissioner to state a case.*

The Commissioner ought to state a case where a real point of law arises, and if he improperly declines to do so the Court may compel him to do so under the general powers of the Specific Relief Act. This principle applies also to orders under S. 33 : *A. I. R.* 1923 *P. C.* 138, (*P. C.*), *Foll.* [P 1051 C 2]

(b) *Specific Relief Act, S.* 45—*Unreasonable or unexcused delay—Court would refuse to exercise powers under S.* 45.

The jurisdiction conferred by S. 45 is discretionary and in the case of unreasonable and unexcused delay the Court would refuse to exercise it. [P 1051 C 2]

K. S. Krishnaswami Ayyangar and *N. Srinivasa Ayyangar*—for Assessee.

M. Patanjali Sastri — for Commissioner.

Judgment. — By S. 66 (1) of the Indian Income-tax Act, 1922, it is enacted.

If, in the course of any assessment under this Act, . . . a question of law arises, the Commissioner may, either on his own motion or on reference from any income-tax authority subordinate to him, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

and by sub-S. (2)

Within one month of the passing of an order under S. 31 or S. 32, the assessee, in respect of whom the order was passed, may, by application accompanied by a fee of Rs. 100 or such lesser sum as may be prescribed, require the Commissioner to refer to the High Court any question of law arising out of such order, and the Commissioner shall, within one month of the receipt of such application, draw up a statement of the case and refer it with his own opinion thereon to the High Court.

There is a proviso with which we are not concerned enabling the assessee, if the final determination of the Commissioner under S. 33 is favourable to him, to withdraw his application and get a refund of the fees that he paid. By sub-S. (3) :

If, on any application being made under sub-S. (2), the Commissioner refuses to state the case on the ground that no question of law arises, the assessee may apply to the High Court and the High Court, if it is not satisfied of the correctness of the Commissioner's decision, may require the Commissioner to state the case and refer to it and, on receipt of any such requisition, the Commissioner shall state and refer the case accordingly.

It is clear that sub-Ss. (2) and (3) of S. 66 are in terms limited to orders passed under Ss. 31 and 32. As to orders in review passed by the Commissioner under S. 33 as in the present case there is nothing to operate upon except 66 (1) and the assessee has no remedy unless we hold that the Court has power to order the Commissioner to state a case embodying any point of law that may arise in the course of proceedings under S. 33. The Privy Council has held in *Alcock Ashdown & Co., Ltd.* v. *Chief Revenue Authority of Bombay* (1) that the words of the older Act of 1918 import a mandate to the Commissioner to state a case where a real point of law arises, and has further held that if he improperly declines to do so the Court may compel him under the general powers of the Specific Relief Act. It is conceded by Mr. Patanjali Sastri that sub-Ss. (2) and (3) of S. 66 of the present Act only apply to orders under Ss. 31 and 32 ; but he asks us to draw the inference that the power of the High Court was meant to be confined to cases under these sections and was by implication taken away in the case of orders under S. 33. The result would be that the Commissioner by calling up the records under S. 33 would be in a position to burke any further enquiry whatever.

We do not think that that can have been intended and we accordingly hold that the principle of *Alcock Ashdown & Co.* v. *Chief Revenue Authority of Bombay* (1) must be applied to orders under S. 33. It follows that the statute has set a period of limitation on applications which relate to orders passed under Ss. 31 and 32 and not on those which relate to orders passed under S. 33. The answer appears to be that the jurisdiction conferred by S. 45 of the Specific Relief Act is discretionary and that in the case of unreasonable and unexcused delay the Court would refuse to exercise it.

The Court, therefore, directs the Commissioner to state a case it not being seriously contended that there is not a substantial point of law involved. Costs of this application reserved.

Application accepted.

(1) A.I.R. 1923 P.C. 138=47 Bom. 742=50 I. A. 227 (P.C.).

* A. I. R. 1926 Madras 1052

PHILLIPS AND VENKATASUBBA RAO, JJ.

Kandan Ashtamoorthi Nambudripad—Plaintiff—Appellant.

v.

Rama Mudali and *another*—Defendants—Respondents.

Second Appeal No. 277 of 1920, Decided on 3rd March 1925, from the decree of the Sub-J., South Malabar, in Original Suit No. 55 of 1917.

(*a*) *Civil P. C., O.* 6, *R.* 4—*Estoppel—Plea of, should preferably be raised and issue framed.*

Where the plea of estoppel is not raised in the pleadings and no issue is framed on the point, but there are allegations in the written statement which are such that the plea of estoppel might have been raised.

Held: that in such cases it is always advisable, if not essential, that the plea should be definitely raised and an issue framed on the point to avail of the plea. [P 1052 C 2]

(*b*) *Riparian rights—Malabar.*

In Malabar there is a presumption that the owner of the bank of a stream is entitled to the bed usque ad medium filum aquae; but this presumption is rebuttable. [P 1053 C 1]

(*c*) *Civil P. C., S.* 100—*Ownership.*

The question as to ownership is a question of fact which must be decided upon the evidence adduced. [P 1053 C 1]

* (*d*) *Evidence Act, S.* 115—*Representation qualified—It must be read with the qualifications—To create estoppel by conduct, other party must have been led away by the conduct.*

If the representation made by a person was one qualified by certain other circumstances, it must be read with those qualifications; but when there is no such qualification but merely an independent subsidiary objection to action being taken in a certain manner, such a statement cannot deprive the representation of its ordinary effect.

If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land: *Ramsden* v. *Dyson*, 14 *W. R.* 926, *Foll.* [P 1055 C 1, 2]

Per Venkatasubba Rao, J.—To create an estoppel the declaration, act or omission must be of an unequivocal and unambiguous character. The essence of estoppel is that the conduct of the other party is the cause of the action of the person invoking the estoppel; and if the act is the result of the reliance upon the representation mere forbidding the act will not prevent the estoppel. [P 1058 C 2; 1059 C 2]

(*e*) *Riparian owner—Government has permanent title to regulate water subject to limitations that its act should not amount to trespass and no damage should be caused to adjoining owners.*

In India the Government has a paramount right to regulate the waters of natural streams for purposes of irrigation, but this right is subject to limitations that (1) it will not be warranted in committing an act of trespass; and (2) by the act of the Government complained of, no sensible damage shall be caused to the owner of the adjoining lands. [P 1057 C 2]

C. V. Ananthakrishna Aiyar and *P. V. Parameswara Aiyar*—for Appellants.

Advocate-General and *T. R. Ramachandra Aiyar*—for Respondents.

Judgment.—The plaintiff is a jenmi of Malabar and brings this suit for the removal of an anicut erected by the 1st Defendant with the permission of Government, the 2nd defendant, in a thodu which the plaintiff states is his own property. He also claims damages and other reliefs.

The Subordinate Judga, who tried the suit, has found on Issue No. 1 that the plaintiff is the owner of the thodu on which the anicut is erected, but he has dismissed his suit on the ground that the plaintiff is estopped from claiming the thodu as his. The appellant, plaintiff, now objects to this finding on the ground that the plea of estoppel is not raised in the pleadings and no issue was framed on the point. This is undoubtedly true and it is possible that the plaintiff has been prejudiced by this omission. The plea has been tried and there are allegations in the 1st defendant's written statement which are such that the plea of estoppel might have been raised; but, in such cases, it is always advisable, if not essential, that the plea should be definitely raised and an issue framed on the point. We think, therefore, that in this case this issue as to estoppel should be raised and the parties allowed to adduce further evidence upon it.

Another objection is taken by the learned Advocate-General that in Government's written statement not only was the ownership of the Vandithodu claimed by Government, but also the right to control the water of the thodu for irrigation. No separate issue was framed on this latter claim, but it might be held to be covered by the general Issue No. 3, "Is plaintiff entitled to have the anicut demolished?" This issue was framed before Government was made a party to the suit, and it is possible that the Subordinate Judge considered that it would cover this plea raised by Government and consequently no definite additional issue was framed on the point. The Subordinate Judge, however, has not

considered the point in any way nor the evidence in regard to it. We, therefore, frame an issue on that point and direct the Subordinate Judge to try the following issue: If Issue No. 1 is found in favour of the plaintiff, has Government the right to control the use of the water of the thodu for irrigation?

We may also observe that, in his finding on the first issue as to ownership, the learned Subordinate Judge has treated the decision of this Court in *Neelakhandan Nambudripad* v. *Secretary of State* (1), as conclusive of the plaintiff's ownership. That decision was not between the present parties and is not, therefore, binding on them absolutely. What that case decided was that in Malabar there is a presumption that the owner of the bank of a stream is entitled to the bed usque ad medium filum aquae. The plaintiff, therefore, in this case would start with that presumption in this favour, but it would only be a piece of evidence as to his ownership. This presumption can be rebutted by other evidence. A great deal of evidence has been left in which the Subordinate Judge has not considered at all. We therefore, think it advisable that he should consider this evidence and come to a fresh finding upon the first issue. The ownership is a question of fact which must be decided upon the evidence adduced.

We may also observe that the Subordinate Judge seems to take it for granted that the plaintiff is the riparian owner of both sides of the thodu during the whole of its course over the plaint site. This is not admitted by the 1st defendant and consequently the point has to be considered in deciding Issue No. 1.

The findings must be submitted within two months from the re-opening of the Court. Objections within ten days.

[After the return of the findings the following judgment was delivered :]

Phillips, J.—The plaintiff brings this suit for the removal of a stone anicut put up by the 1st defendant with the 2nd defendant's permission in a stream called Vandithodu. Prior to 1855 this stream had a course different to the present course. It ran from the point C in the Commissioner's plan over the land marked as L series and back to the present course of the stream at the point L. In 1855 the stream was diverted into its present channel and a lease was granted in respect of the land forming the bed of the old stream and these lands have since been cultivated as paddy lands.

It is the defendants' case that, ever since 1855 or thereabouts, a temporary dam has been put up near the point C in order to divert the water of the stream into the channel CHANEL and by means of this channel the lands had been irrigated. This is found to be a fact by the lower Court and I think this finding is correct. Admittedly, ever since the 1st defendant obtained possession of some of these lands, he has been putting up a temporary dam with the permission of Government, i. e., since 1912. There is also evidence that such a dam has always been put up since the course of the stream was changed and none of the plaintiff's witnesses is prepared to deny that such temporary dams were erected.

It is suggested for the plaintiff that the channel CHANEL is a new channel; but it is proved conclusively that the drain C H which is a masonry structure is very old, that the channel from H to A is old and that the channel from E to L is also old. It is contended that the intervening portion A N E has been newly dug and this contention is based on the Commissioner's evidence, that, when he inspected the place, there were signs of new digging, the bank bed having been freshly cut.

It is, however, very difficult to believe that the channel was originally constructed at both ends and that the portion in the middle was only recently dug for that would do away with the benefit of the channel almost entirely. In fact the lower portion of the channel from E to L would be quite useless unless it was connected with the upper portion of the channel starting at the point C. On this point the evidence of the defendants' witnesses must be accepted, and if it is once held, that the channel has all along been in existence, it is extremely probable that a temporary dam would have been put up in order to divert the water of the stream along the channel for the water would not otherwise flow into the channel at seasons of low water. The probabilities being in favour of the defendant's case and there being no direct evidence to the contrary, it must be held that temporary dams were put up annually from about the year 1855.

(1) [1920] 12 L. W. 371=55 I. C. 770.

The Subordinate Judge has found that the bed of the present stream, at the point where the anicut marked T has been newly erected, belongs to the plaintiff and this finding has been arrived at both by the Subordinate Judge, who originally tried the case, and the Judge, who has submitted the findings called for. Both of them base their findings on the fact that the land on both the banks of the stream belongs to the plaintiff's mana and draw the presumption that the bed of the stream between those banks is the plaintiff's. Such a presumption was held to arise in *Neelakhandan Nambudripad* v. *Secretary of State* (1) and apparently both the Judges in the lower Court have treated it as conclusive and have not contemplated the possibility of the presumption being rebutted by other evidence. Even assuming that the lands along both the banks do belong to the plaintiff—and this is by no means admitted so far as the plot Q at the north end of the anicut is concerned—the presumption, that the bed of the stream between those banks belongs to the plaintiff, may be rebutted.

In the present case, we have evidence that since 1855 temporary dams were being put up annually with the permission of the Government, a fact which assumes Government's right to deal with the bed of the stream either as owner or as having a right of controlling irrigation.

However, when the land was surveyed, the bed of the stream was surveyed as Survey No. 45 and was classed as poramboke, i. e., as belonging to Government. No objection seems to have been taken to this classification by the plaintiff and we have also the admission by the plaintiff that the stream does belong to Government. In Ex. XXXV, the petition put in by the Kariyasthan to the plaintiff's mana, in which objection was taken to permission being given to the 1st defendant to put up a stone anicut, there is no assertion that the bed of the stream belongs to the plaintiff and the petitioner admits the right of the Government to grant such permission. Again in Ex. XXXVI, the application made on behalf of plaintiff's mana by the plaintiff's son to divert the course of the Vandithodu, there is a distinct assertion that the Vandithodu is owned by the Government and the petitioner asks that the rights of Government over the plaint thodu may be made over to him for conversion of the bed into wet lands. Again in Ex. XXXVI (a) the plaintiff's Kariyasthan admits that the thodu belongs to the Government.

This was in a deposition made on 8th August 1917, in a criminal complaint filed by him against the 1st defendant with reference to the suit anicut. When this Kariyasthan was examined as P. W. No. 7, he admitted making the statement and he also admitted that this allegation, that the thodu is the sirkar thodu, is correct. In addition it is admitted that Government possesses an anicut in the Vandithodu about 2 miles above the plaint site, and admittedly the stream does not flow exclusively through plaintiff's land. The conduct of Government, its assertion since 1855 of the right to the stream and the very clear admissions of plaintiff to the same effect, are quite sufficient to rebut any presumption that may arise from the fact that the plaintiff owns the banks of the stream. It is, however, contended that inasmuch as the present stream runs over land, which he claims as his, the presumption of ownership is very much stronger. Apart from the fact that the plaintiff owns the two banks and possibly did also own the land between them, there is no proof that the land did really belong to him and, therefore, I do not think that this fact has any particular significance. The land has been the bed of the stream since 1855 and this bed has always been claimed by Government as pointed out above. Government must, therefore, be deemed to be the owner either because it is the customary law of the district that beds of natural streams belong to Government or because Government has acquired a right by prescription.

On this evidence, I hold that the bed of the stream belongs to the Government. This would be sufficient to dispose of the appeal for Government as owner can permit the erection of an anicut on its property so long as such construction does not interfere with plaintiff's vested rights. A question might arise as to the construction at the southern end which has been found to be plaintiff's land. This portion is now covered by the water of the stream and apparently forms a portion of the bed, the alteration being due to the bank being washed away by

floods. There is no evidence to show when the bank was washed away, and consequently nothing to show that this small piece of land was not a portion of the bed which I have found to belong to Government.

The lower Court has, however, based its decree on other grounds, which I will now deal with. The lower Court has found that the plaintiff is estopped from claiming the relief sought inasmuch as he encouraged the defendants to put up the stone anicut by his conduct. The defendants applied in April 1916, for permission to put up a permanent anicut (vide Ex. R). The plaintiff objected to permission being granted in Exhibit XXXV, dated 19th June 1916. Permission was refused by the Tahsildar, but was subsequently granted by the Collector on 27th January 1917. The 1st defendant executed a kaichit in accordance with the Collector's order on the 12th March 1917, and the construction of the anicut was completed sometime in June 1917. Before the construction began, plaintiff had filed Ex. XXXVI in which he recognized the right of Government to the stream.

The question is whether the plaintiff can be said to have made a representation to the defendants whereby he intentionally caused or permitted them to believe that the thodu belonged to the Government and act upon such belief. The argument for the appellant is, that although he admitted the right of the Government to the stream, yet he, at the same time, objected to permission being granted to build the anicut, and that, therefore, the act of construction of the anicut is not one, which was done in the belief caused by plaintiff's representation. If the representation made by the plaintiff was one qualified by certain other circumstances, it must be read with those qualifications ; but when there is no such qualification but merely an independent subsidiary objection to action being taken in a certain manner, I do not think that this statement can deprive the representation of its ordinary effect. In effect plaintiff said to Government "you are the owner of the stream and have power to grant or refuse permission. Please do the latter." After that representation was made, Government acted and 1st defendant, with the permission of Government, erected the dam. Undoubtedly this representation must have had same influence on the mind of Government in granting permission and on 1st defendant in acting on that permission. It is then argued that there is no evidence to show that the plaintiff's representation did conduce to the subsequent action of the defendants. Apart from the direct oral evidence of the 1st defendant that he would not have built the dam if he had known that the stream belonged to the plaintiff, I do not think it is possible to dissociate the effect of the representation from the other circumstances, which induced the defendants to act. It is impossible that they would have acted in the same manner on their own belief that the stream belonged to Government, but undoubtedly they would be strengthened in their action by the direct assertion of the plaintiff who now claims the bed, that the stream belonged to Government.

I do not think any inference can be drawn that the plaintiff's representation had no influence on their subsequent act, merely because plaintiff took objection to such act. The representation made had reference to the ownership of the stream, and Government was expressly asked to act as if that representation was true. Even if Government believed that the stream was theirs before that representation was made, yet, if the stream really belonged to plaintiff, this representation must have strengthened the belief and have had some influence in determining Government's conduct and it cannot be said that the representation was not made intentionally, nor that plaintiff did not permit nor intend Government to act upon it in the belief that it was true.

I also think that the facts of this case bring it within the principle laid down in *Ramsden* v. *Dyson* (2) that :

> If a stranger begins to build on land supposing it to be his own, and the real owner, preceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not afterwards allow the real owner to assert his title to the land.

In that view plaintiff cannot sue for the removal of the anicut, for he allowed 1st defendant to build it upon his land and to believe that the land was not his land.

(2) [1866] 1 H.L. 129=12 Jur. (N. S.) 506=14 W.R. 926.

If such act had caused other damage to plaintiff he would be entitled to recover, but the lower Court has found that no such damage was caused, and we have been referred to no evidence which could establish that the damage complained of was caused by the erection of the anicut, for it might equally be attributed to the ordinary action of a jungle stream in flood when unobstructed by an anicut. The appeal accordingly fails and is dismissed with costs.

Venkatasubba Rao, J.—In deciding the question whether the 2nd defendant was justified in building the anicut, the first point that has to be determined is in regard to the ownership of the bed of the stream. Both the Subordinate Judges who tried this issue have come to the conclusion that the plaintiff is the owner. After a detailed examination of the documents filed in the case, the Subordinate Judge, who has submitted the finding, has held that the lands on both sides of the anicut belong to the plaintiff and that he is, therefore, the owner of the bed of the channel at that point. That the plaintiff owns the lands at both ends of the anicut does not seem to be open to much doubt. It was admitted on behalf of the defendants before us in argument that the plaintiff is the owner of the lands on the southern bank. The ownership of the plaintiff, however, of the land at the northern end of the anicut has been disputed in this Court. I do not consider it necessary to discuss in detail the documentary evidence on which the finding of the Subordinate Judge is based. While conceding that the plaintiff owns a large plot of the land on the northern bank of the stream, the 1st defendant's learned vakil tried to show that the extent marked P and a portion of Q in the Commissioner's plan belong to the 1st defendant. Reliance was placed upon Ex. 14 and it was contended that Item No. 3 in it corresponds to P and a portion of Q.

In my opinion, this contention has not been shown to be well founded. There was merely a general complaint that the Subordinate Judge's finding on this point is wrong, but no attempt was made to attack any particular fact relied on by him or any particular inference drawn. The Commissioner states in his report that before him the plaintiff was admitted to be the owner of both the banks, but though the correctness of this statement is disputed, it is significant that the 1st defendant as D. W. No. 1 admits in his cross-examination "plaintiff owns Parambas on both sides of the anicut T in Ex. M." It is impossible to construe this as referring to the plaintiff's ownership generally of the lands on the two banks. The statement that the plaintiff is the owner of the land on both sides of the anicut must mean that he is the owner of the land at both ends of it. Apart, however, from this admission, I am not satisfied that the Subordinate Judge's conclusion is wrong.

If the plaintiff then has proved his ownership of the two banks, does it follow that he is the owner of the bed? It has been held that jenmis in Malabar are proprietors of the soil. One of the incidents of riparian proprietorship is that prima facie the proprietor of each bank of a non-tidal and non-navigable stream is the proprietor of half the land covered by the stream. In other words the ownership of the bed is in the respective owners of the land on either side of the stream ad midium filum. This right on the part of Malabar jenmis is recognized by Sankaran Nair, J., in *Meenakshi Amma* v. *Secretary of State* (3) and in the more recent case decided by Spencer and Krishnan, JJ., *Neelakhandan Nambudripad* v. *Secretary of State* (1). The authorities are fully discussed in these two cases and I do not propose to go over the same ground. Following these cases I hold that the plaintiff is prima facie the owner of the portion of the bed where the anicut has been built. In regard to the wider question whether a different rule applies in ryotwari tracts I would prefer to reserve my opinion.

Has this presumption of law been rebutted? There is a circumstance which in my opinion leads to strengthen this presumption.

The original course of this channel was different and the present course was formed on or about the year 1885. It is not disputed that before the diversion, the land which forms the site of the present bed belonged to the plaintiff. If on the date of the diversion this land belonged to the plaintiff, has the ownership since been transferred to Government? The learned Advocate-General

(3) [1914] 26 M. L. J. 385=1 L. W. 307=24 I. C. 547=(1914) M. W. N. 521.

tried to contend for the first time that the Government acquired title by adverse possession. This is not the case put forward and apart from this, there is absolutely no evidence in support of it. As regards the question of ownership, some reliance is placed by the defendants upon what is said to be an admission of P. W. No. 7, the agent of the plaintiff. He filed a criminal complaint against the 1st defendant in regard to the building of the anicut and in his deposition is to be found the statement. "That thodu belongs to the Government." This deposition is marked XXXVI (a). When P. W. No. 7 was under cross-examination in this case he said that this statement in his previous deposition was true. He could hardly have meant that he conceded the ownership of the Government to the plot in question. That was the very point which he was strenuously disputing and earlier in his cross-examination he distinctly stated :

> The thodu is question belongs to the plaintiff, that is, the site where the anicut stands belongs to the plaintiff.

And in examination-in-chief he also said :

> I did not admit to him (the Tahsildar) that the site where the dam would be put up belonged in jenm to Government.

I find it very difficult in the circumstances to accept the suggestions that the plaintiff's agent admitted that the site of the anicut was the property of the Government. It will be seen that the plaintiff's agent even in Ex. XXVI, dated the 24th March 1917, claimed that only about 80 per cent. of the lands on both sides of the stream belonged to the plaintiff and if the Government was the owner of some portion of the bank, it would not be altogether wrong to say that the Government was the owner of the thodu, though this is a statement that requires qualification. Moreover, it must be remembered that so far as the ownership of the bed is a matter of legal inference, a layman may quite naturally make a mistake having regard to the fact that the proposition was disputed even in this case. I am not, therefore, prepared on the strength of this admission to reject the finding of the Subordinate Judge which, in my opinion, has been reached on a careful consideration of all the circumstances.

If the plaintiff then is the owner of the bed of the stream on which the anicut has been built, the next question that has to be determined is whether the Government can justify the act on the ground that it has a paramount right in this country to regulate the waters of natural streams for purposes of irrigation. This right is recognized in *Robert Fisher* v. *Secretary of State* (4) which, however, also lays down the limitation that for purposes of exercising this right of control, Government will not be warranted to committing an act of trespass (P. 156 of 32 Mad.). That the right of the Government is subject to this reservation, is stated in emphatic terms by both Abdur Rahim, J., and Srinivasa Ayyangar, J., in *Secretary of State* v. *Palaniyappa Pillai* (5).

In this case a portion of the site on which the anicut has been built is outside the bed of the river, and clearly belongs to the plaintiff (see the Comissioner's report). Even apart from this, in any event, the plaintiff is the owner of half the bed over which the anicut stands. On the ground that the Government has a general right of control the act of the defendant cannot, therefore, be justified.

This right of the Government to regulate the waters of a stream is also subject to another limitation, namely, that by the act complained of, no sensible damage shall be caused to the owner of the adjoining lands. In this case, no doubt, the lower Court has come to the conclusion that the plaintiff has proved no damage. The matter was dealt with somewhat summarily by the Subordinate Judge. In the first place, the plaintiff filed the suit within three months after the building of the anicut, and in the very nature of things it would be difficult to adduce proof of actual damage. But it seems to me that the Subordinate Judge has overlooked three very important Exs. O, P and Q. Though they came into existence after the institution of the suit, they contain clear admissions on the part of the Government, that the building of the anicut has greatly prejudiced the plaintiff and is likely to cause to him substantial damage. They are statements made by a responsible officer of the Government and, in my opinion,

(4) [1909] 32 Mad. 141=2 I. C. 325=19 M. L. J. 131.

(5) [1917] 6 L. W. 572=41 I. C. 24=(1917) M. W. N. 571.

on a question of this kind, are entitled to great weight. As the oral evidence on the point has received this corroboration, I am prepared to act upon it. For these reasons, I do not agree with the finding that damage has not been proved.

If the matter stood thus, I should have no difficulty in upholding the plaintiff's claim, but on the question of estoppel that has been raised in the case I am prepared to agree with my learned brother's conclusions although I do so with considerable hesitation. The 1st defendant has attempted to support this plea by referring in his evidence to two representations said to have been made by or on behalf of the plaintiff. He has deposed firstly that in 1912 the plaintiff told him that the thodu belonged to the Government and that he might obtain its permission and construct an anicut, secondly, that in 1917 when the Tahsildar asked the plaintiff's agent if he had any objection to the granting of permission, he while expressly admitting that the Government was the owner of the thodu, objected on the ground that the building of the anicut would prejudicially affect his master's land. This evidence has not been corroborated. The alleged conversation in 1912 is clearly an invention. If this incident was true, the evidence would have been fuller and less casual. In regard to the admission said to have been made in 1917 the order of the Tahsildar and the proceedings that led to it do not support this evidence. It must, moreover, be remembered that in view of the circumstances in which the issue of estoppel was tried, any oral evidence given must be received with great caution. The learned Subordinate Judge who saw the witness in the box does not accept his evidence and I agree that no reliance can be placed upon it. I have not the least doubt that the case put forward by the 1st defendant, namely, that he was misled by a definite representation of the plaintiff or his agent, is utterly, untrue. If the decision of this issue should depend upon my accepting the specific case put forward in his evidence by the 1st defendant, I should have, therefore, no difficulty in deciding the question against him.

Then, can it be said that by his conduct the plaintiff's agent led the defendants to believe that the ownership of this portion of the bed vested in the Government? When the 1st defendant applied to the Tahsildar for permission to build an anicut, the plaintiffs' agent objected on the ground that if the anicut was built damage would be caused to his lands. Can it be said that by this conduct the plaintiff's agent impliedly admitted that the Government was the owner of the thodu? Is an admission of the defendant's right to the thodu necessarily implied in this representation? The conduct of the plaintiff's agent may amount to conceding that the Government has a right to grant or withhold permission. But the recognition of the Government's ownership is not a necessary inference from his conduct.

To create an estoppel the declaration, act or omission must be of an unequivocal and unambiguous character, *Onward Building Society* v. *Smithson* (6), *Low* v. *Bouverie* (7), *In re Lewis, Lewis* v. *Lewis* (8), and *Colonial Bank* v. *Cady* (9).

But there is greater force in the next contention of the learned Advocate General, namely, that the conduct of the plaintiff's agent amounted to a representation that the Government had the right to give or withhold permission to build the anicut—it is immaterial on what footing the existence of this right was conceded. I do not think this position can be really disputed. The conduct of the plaintiff's agent as well as the language Ex. 35 (his petition to the Tahsildar) if reasonably understood, could have led the defendants to believe that the Government had the right in question.

But this part of the case is deficient in two respects. Neither of the defendants had let in evidence to show that in fact he was misled by this conduct or representation on the part of the plaintiff's agent. The defendants have not shown that they would not have acted in the way they did, but for the conduct of the person against whom the estoppel is raised. It is an element of estoppel that the party setting it up must have acted in reliance upon the conduct or

(6) [1893] 1 Ch. 1=62 L. J. Ch. 138=68 L. T. 125=41 W. R. 53=2 R. 106.
(7) [1891] 3 Ch. 82=60 L. J. Ch. 594=40 W. R. 50=65 L. T. 533.
(8) [1904] 2 Ch. 656=73 L. J. Ch. 748=53 W. R. 393=91 L. T. 242.
(9) [1890] 15 A. C. 267=60 L. J. Ch. 131=39 W. R. 17=63 L. T. 27.

the representation of the party sought to be estopped. The second defect results from the form of the issue. Although there was at first neither a plea of estoppel nor an issue in regard to it, the Subordinate Judge who originally tried the suit dismissed it on the ground that the plaintiff was estopped from asking for the removal of the anicut. The estoppel to which he made reference was that the plaintiff led the 1st defendant to believe that he was not the owner of the river-bed but that the Government was. When we heard the case on the previous occasion, the only estoppel relied upon was that the plaintiff was precluded from claiming the thodu as his. The issue framed in consequence of our order runs thus :

Is the plaintiff estopped from claiming the thodu as his ?

It will thus be seen that the matter that was put in issue was the plaintiff being estopped from claiming the bed and not from disputing the Government's right to permit the building of the anicut.

My learned brother, however, is prepared to assume that it is highly probable from the circumstances that the defendant's act was influenced by the plaintiff's conduct and in his opinion the defect in the form of the issue is not material. In view of the fact that my learned brother's decision is in agreement with the views expressed by two different Subordinate Judges, I am not prepared to dissent from him.

Granting then that the conduct of the plaintiff amounted to a representation that the Government had the right to give or withhold permission to build the anicut and that the defendants were influenced by and acted in reliance upon that representation—can it be said that estoppel does not arise because the plaintiff while making the presentation expressly prohibited the defendants from building the anicut ? There is no authority directly bearing on the question. If these three elements exist, namely, (1) there is the declaration, act or omission on the part of the person sought to be estopped ; (2) if it reasonably induces a belief that a thing is true and (3) the effect of the representation is to cause the other to act on the faith of it—if these exist it is not necessary to show further that the person making the representation really intended that the other should act upon the belief to his own prejudice. Let me take a simple example. Supposing A tells B that he intends to purchase a plot of land from C and asks him whether he claims to be the owner of it : B replies that he is not the owner but forbids A to buy the land on the ground that he himself has a desire to purchase it. A believing the representation to be true that B is not the owner buys the land from C. Can B turn round and say that he was himself the owner and that A could not set up the estoppel because B did not consent to A buying the land. I do not think such a plea would be open to B. The essence of estoppel is that the conduct of the other party is the cause of the action of the person invoking the estoppel ; and if the act is the result of the reliance upon the representation, mere forbidding the act will not prevent the estoppel.

In the result, I agree in the order proposed by my learned brother.

Appeal dismissed.

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* A. I. R. 1926 Madras 1059

JACKSON, J.

(*Tiruvallur Vangipuram*) *Krishnamacharulu*—Petitioner.

v.

Chitlur Venkata Subbiah—Respondent.

Civil Revision Petition No. 188 of 1925, Decided on 26th July 1926, from the order of the Dist. Munsif, Nandalur.

* (a) *Civil P. C., Ss.* 148 *and* 151—*Court cannot meddle with its final decrees—Civil P. C., S.* 151.

Neither S. 148 nor S. 151 authorizes a Court to meddle with its final decrees. [P. 1060, C. 1]

* (b) *Civil P. C., S.* 115—*Substantial justice done but wrong rule applied—Revision does not lie.*

Where substantial justice has been done the fact that the lower Court misapprehended the appropriate rule does not necessitate the exercise of the High Court's revisional power. [P.1060,C.1]

K. Ramamurthi and *A. Ramasamy Iyengar*—for Petitioner.

T. K. Srinivasathathachari—for Respondent.

Judgment. — Petitioner seeks to revise the order of the District Munsif of Nandalur on I. A. No. 490 of 1924

extending by six months the period allowed in the decree in O. S. No. 250 of 1922 of the Court for obtaining a succession certificate. The decree runs :

Time for succession certificate two months. The suit shall stand dismissed in default.

The counter-petitioner accordingly applied for the certificate, and finding that two months would be an insufficient period moved before its expiry for an extension.

It cannot be said that an extension was not warranted in these circumstances, and the only question is whether the District Munsif acted with jurisdiction in granting such an extension under Ss. 148 and 151, Code of Civil Procedure on the assumption that the decree was a preliminary decree. It must be held that the decree was final, and neither S. 148 nor S. 151 authorizes a Court to meddle with its final decrees. Probably the Munsif would have been better advised to act under O. 47, R. 1.

The circumstances that two months happened to be an inadequate period was a sufficient reason for applying that that period should be reviewed. But considering that substantial justice has been done the fact that the District Munsif misapprehended the appropriate rule does not necessitate the exercise of this Court's revisional power.

The petition is dismissed. There will be no costs.

Petition dismissed.

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* A. I. R. 1926 Madras 1060

SPENCER AND RAMESAM, JJ.

Krishna Aiyar—Appellant.

v.

Ponnappa Nadar and *another*—Respondents.

Appeal No. 352 of 1922, Decided on 4th May 1926, from the decree of the Sub-J., South Malabar, in O. S. No. 20 of 1921.

Transfer of Property Act, S. 59—Unimportant interpolation signed by executant but not by attestors—Deed is not invalidated.

A mortgage duly executed and attested is not invalidated by the fact that after attestation an unimportant alteration was made in the document under executant's signature and the attestors though present did not again sign as having witnessed the attestation. [P. 1061 C. 1]

C. Krishna Menon, C. V. Ananthakrishna Aiyar and *N. R. Lakshmana Aiyar*—for Appellant.

K. Kuttikrishna Menon, T. M. Krishnaswami Aiyar and *P. R. Ramakrishna Aiyar*—for Respondents.

Spencer, J.—The 1st defendant agreed on the 26th September 1919, to supply timber ; and as a pledge for the due performance of his contract, and for repayment of Rs. 5,000 advanced to him he mortgaged certain property. Ex. A is the mortgage document. It describes itself as a karar or agreement and was stamped at first with an eight annas stamp. After it was presented for registration the deficient stamp duty and a penalty was collected and it was registered as a mortgage. The plaintiff sued upon this document and got a personal decree against the 1st defendant for Rs. 649 and a mortgage decree for the balance. The second defendant who appeals is a simple mortgagee under another document which is Ex. I.

The point taken in appeal is that Ex. A regarded as a mortgage is defective as regards attestation because the attestors signed at the end of the document after the executant had signed and afterwards (apparently at the time of presentation for registration) the survey numbers of the items mortgaged (with one exception) were added. Then the executant again signed, but the attestors, though they were present, according to the evidence, and witnessed her signature, did not themselves repeat their act of signing. The document Ex. A is a peculiar one because it begins as an agreement ; it goes on as if it was an enquitable mortgage with deposit of title-deeds and it concludes as a simple mortgage in which the mortgagor and the property referred to are made liable for damages and for the balance that may be found due to the mortgagee.

It is argued that the addition of the survey numbers constituted a material alteration in the document and that, as the attestors did not affix their signatures to that alteration, the whole document is invalid. We have ascertained that one of the suruey numbers, namely 36-2 has been omitted, that being the field to which document 2827 relates. This appears from Ex. I which also covers the same property and contains a ful-

description. The question is whether the addition of these survey numbers was such a material alteration of the document as to make it something different from what it was when it was first signed and attested. In the body of the document all the property which has been charged is described as the property contained in certain documents of which numbers are given and these documents are declared to be handed over to the mortgagee. It was, therefore, possible for the mortgagee or for anyone else, who had those documents in his hand to ascertain the survey number of each of the mortgaged items. I think that this is a case in which the maxim *id certum est quod certum reddi protest* applies. The document was complete as it stood after the executant and the attesting witnesses had signed. What was added was a further definition of the properties, probably made for the purpose of registration.

Section 22 of the Registration Act (Act XVI of 1908) provides that the local Government may by a rule made under the Act require both houses in towns and lands to be described with reference to a Government map or survey. But the rules do not show that in respect of the South Malabar district it has been made compulsory for persons presenting documents for registration that they should give the survey numbers. Moreover R. 17 states that if a property is described in a document by specific reference to an instrument which has already been registered, and if that instrument contains the particulars required by R. 16, the description need not be repeated in the document. In this view of the case Ex. A is not defective on account of the omission of the attesting witnesses to sign a second time. In *Sankaran Nambiar* v. *Narayanan Tirumunpu* (1), a mortgage document which had been attested by attesting witnesses received an addition of another item so as to enable the document to be registered in a certain registration office. The learned Judges held that the interpolation which had been made in the presence of the attesting witnesses did not vitiate the document seeing that there had been no fraud on the registration law and that the attesting witnesses were present when the mortgagor signed and when he made the interpolation.

In their view, therefore, they were persons who could in the language of the Lord Chancellor in *Burdett* v. *Spilsbury* (2) quoted in *Shamu Patter* v. *Abdul Kadir Ravuthan* (3) be treated as persons who had seen the will executed and were witnesses to its execution and having subscribed to it were also attesting witnesses.

It is not necessary to go so far as the learned Judges went in *Kunhi Sankaran Nambiar* v. *Narayanan Tirumunpu* (1) to say that the document before us has been duly attested. I would, therefore, uphold the decision of the lower Court and dismiss the appeal.

As regards item 36-2, which has been omitted from the description at the end of the document, the objection to making this item liable has not been taken in the written statement or in the grounds of appeal and, therefore, it is rather difficult to assume that the appellant has been misled by the omission. Apart from this I regard the body of the document as the operative part of the document, and it cannot be said that this number has been omitted from the body of the document seeing that by reference to the documents therein described the survey number could have been ascertained. The point must, therefore, also be decided against the appellant. The appeal is dismissed with costs of the 1st respondent.

Ramesam, J.—I agree.

Appeal dismissed.

(1) [1920] 43 Mad. 405=11 L. W. 192=38 M. L. J. 251=55 I. C. 86=(1920) M. W. N. 205.

(2) [1843] 10 Cal. & F. 340.

(3 [1912] 35 Mad. 607=16 I. C. 250=39 I. A. 218 (P. C.).

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* A. I. R. 1926 Madras 1061

KRISHNAN AND VENKATASUBBA RAO, JJ.

(*Erath*) *Unikkat Tarwad Karnavan and Manager Eressa Menon*—Plaintiff—Appellant.

v.

Abdul Rahiman and *others*—Defendants—Respondents.

Appeal No. 350 of 1922, Decided on 6th April 1926, from the decree of the Sub-J., South Malabar in O. S. No. 9 of 1920.

* (a) *Limitation Act, S. 20 (2)—Possessory mortgage—Mortgaged property leased to mortgagors—Payment of Government revenue, out of rent payable to mortgagee comes within Cl. (2).*

In a case of a mortgage with possession where the possession of the property is with the mortgagor under a lease by the mortgagee, payment of Government revenue by the mortgagor out of rent payable to the mortgagee, according to the terms of the deeds of mortgage and lease, comes within S. 20 (2) and amounts to receipt of rent by the landlord as mortgagee. [P 1063, C 2]

(b) *Limitation Act, S. 20 (2)—Receipt of rent is not subject to the conditions mentioned in Sub-S. (1).*

The receipt of rent mentioned in Sub-S. 2 is not subject to the conditions mentioned in Sub-Section 1. [P 1064, C 1]

(c) *Mortgage—Possessory mortgage and lease by mortgagee to mortgagor—It is question of intention in each case whether the documents are to be read together or separately.*

In the case of a possessory mortgage and a lease by mortgagee to mortgagor it is a question of intention whether the two instruments should be read together and be held to constitute a single transaction or they should be taken separately and each regarded as a separate and independent transaction. Each case depends upon its own facts. [P 1065, C 1]

B. Sitarama Rao and *A. Vasudeva Menon*—for Appellant.

K. P. M. Menon and *P. Govinda Menon*—for Respondents.

Judgment.—The plaintiffs filed the suit out of which this appeal arises, for enforcing the terms of two deeds, a mortgage deed and a lease deed, Exs. C and D respectively. The mortgage deed, dated 24th March 1899, recites that the properties were put in the possession of the mortgagees. The effect of the lease deed which was executed on the next day was to transfer possession back to the mortgagors who agreed to hold the property as the lessees of the mortgagees. Legal possession was thus transferred to the mortgagees who thus became the lessors and the physical possession remained with the mortgagors whose possession was that of the lessees. In other words, the transaction was of the usual type—a possessory mortgage, possession being left with the mortgagors, under a rental agreement. Ex. C, however, is not a usufructuary mortgage pure and simple, for it contains a covenant on the part of the mortgagors to pay the amount, and it also enables the mortgagees, in case of default, to recover the sum by bringing the property to sale. It is this clause that enables the plaintiff to ask for a sale of the property. The learned Subordinate Judge has passed a decree for the principal amount covered by Ex. C and for arrears of rent under Ex. D for three years previous to the institution of the suit. This judgment is challenged both by the plaintiffs and the defendants, the plaintiffs (in their appeal) stating that they are entitled not only to the principal but also the interest in full under Ex. C and the defendants urging (in their memorandum of objection) that the claim is barred by limitation excepting in regard to rent for three years previous to the suit and that the decree in other respects is wrong.

We shall deal with the plaintiffs' claim to principal and interest separately. The amount under Ex. C. became payable at the expiry of a year from its date that is, in March 1900 and as the suit was filed in 1920 the claim would be prima facie barred by limitation. The plaintiff, however, relies upon S. 20 (2) of the Limitation Act and says that his claim is taken out of the statute of limitation by reason of a receipt of rent under that sub-section. The question to be decided is: Has there been a receipt of rent within the meaining of S. 20 (2)? It is necessary in this connexion to clear the ground by saying that the defendants have acquiesced in the decree for rent passed by the lower Court and this is consistent with the admission before us that the tenancy under Ex. D is subsisting. We shall presently consider what is the proper construction of Ex. D, but it is sufficient for the present purpose to observe that it is conceded that the relationship of lessor and lessee between the plaintiffs and the defendants continued at the date of suit. Ex. C directs the mortgagees to pay Government revenue, jenmi michavaram and to appropriate the balance of the income towards the interest due on the principal amount of Rs. 4,800. This arrangement pre-supposes that possession was to remain with the mortgagees.

By Ex. D a certain lump amount (in cash and paddy) was fixed as rent; the Government revenue and michavaram the mortgagors were to pay out of this rent and they were to pay the balance remaining to the mortgagee. Under Ex. C the income, less Government revenue and michavaram, was to be appropriated towards interest. The liability to pay

Government revenue and michavaram primarily thus rested on the plaintiffs, but by Ex. D the defendants were constituted the plaintiffs' agents for the purpose of making these two payments. As the property was given back to the defendants on lease, and as the income would be received by them, they were directed to pay these two amounts. The learned Subordinate Judge has held as a question of fact that the mortgagors during this period paid the Government revenue on plaintiffs' behalf. He has further held as a question of law that such a payment takes the case under S. 20 (2) out of the statute of limitation.

In our opinion, his conclusion on both these points is correct. In paragraph 6 of the plaint the plaintiffs distinctly allege that michavaram and revenue were paid by defendants 1 to 20 and their ancestors. In paragraph 7 of the additional written statement, the fact of payment by the defendants and their ancestors is not denied, but the plea taken is that the payment was not made on account of the plaintiffs. It is thus undisputed that the defendants and their predecessors paid Government revenue in respect of the suit properties. The question is : Did they make the payment on behalf of the plaintiffs. Under Ex. D they undertook to make the payment. Their position as lessees was not repudiated. To the date of suit it is conceded that their position was that of tenants. Why should it be then assumed that the defendants, in making the payment did not carry out the term which was binding upon them ? Their learned counsel suggests that the defendants should be taken to have made payments not in pursuance but in contravention of the terms of Ex. D. When the facts are consistent with the defendants having performed their obligation why should we make their act unlawful and impute to them an intention to break the contract ? We are, therefore, satisfied that the learned Judge's conclusion that the defendants throughout paid the Government revenue on behalf of the plaintiffs is correct.

We shall now proceed to consider whether by reason of this payment the claim is saved from the bar of limitation.

Section 20 of the Limitation Act runs as follows :

(1) Where interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.

(2) Where mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1).

It is first contended on behalf of the defendants that the revenue paid to the Government cannot be treated as rent. This argument is clearly untenable because under Ex. D the amount agreed to be paid as rent includes the sum payable as revenue. The fact is that an inclusive amount has been stated as rent, the mortgagor undertaking the liability to pay out of it the Government revenue. There is nothing to prevent a tenant from agreeing to pay his landlord any rent he pleases and the landlord directing him to pay out of that rent the revenue on the property. This is not unusual, and where the parties expressly agree to treat a certain sum as rent, it is not for the Court to say that that rent is not really rent, because it is liable to certain deductions.

The next contention of the defendant is that payment by them is not equivalent to a receipt by the landlord (the plaintiff). This objection again seems unsound. What does the payment by the defendants really mean ? It involves first receipt by the plaintiff who was under the agreement entitled to receive the sum, and secondly it involves the payment of the same sum by the plaintiff in his turn to the Government. The second contention must therefore be also overruled.

It is thirdly contended by the learned counsel for the defendants that receipt of rent to be effectual under the section must amount to a payment of interest or payment of principal so as to satisfy the first part of that section. In the present case the Government revenue, while being under the terms of Exs. C and D a part of the rent, is not interest. But this in our opinion, makes no difference.

We cannot accept the construction suggested that the receipt of rent mentioned in sub-S. 2 is subject to the conditions mentioned in sub-S. 1. If the argument put forward were sound, it would follow that if rent or produce received is appropriated towards the principal of the debt, the part payment must appear in the handwriting of the person making the payment. Is there a person that makes the payment at all ? Ex hypothesi there is no such person. Granting that the receipt of the rent by the mortgagee is to be treated as a payment by the mortgagor, is it reasonable to expect that such a payment should appear in the handwriting of the debtor ? The object of the section is clearly to benefit the mortgagees in possession who receive the rent or produce from the land. This object will be clearly frustrated by adopting the construction suggested. Sub-S. 1 contains four paragraphs and when in sub-S. 2 it is said that the receipt shall be deemed to be a payment for the purpose of sub-S. 1, it does not follow that the payment referred to must necessarily be that indicated in the first and second paragraphs alone of the first sub-section, We shall be giving effect to the intention of the Legislature by holding that the payment referred to is the payment mentioned in paragraph 3.

The section really refers to three things : (1) Payment of interest on a debt or legacy by the debtor or his agent ; (2) part-payment of principal of a debt by the debtor or his agent ; (3) receipt by mortgagee in possession of the rent or produce on the land. The meaning of the section is that a fresh period of limitation shall be computed from the time of such payment or receipt. This is the effect of the section, but as this idea is expressed in it in a somewhat different order, it has been found necessary to say that the receipt under sub-S. 2 shall be deemed to be payment under sub-S. 1. The section would undoubtedly have been better worded ff the receipt of rent had been mentioned immediately after the payment of interest and the part payment of principal, and if the provision then followed that fresh period of limitation shall be computed from the time of payment or receipt. The question is bare of authority, but this is the view we take of it, and the third contentiou must be accordingly overruled.

The conclusion of the Subordinate Judge that the claim to the principal is not barred is thus correct.

Now we shall deal with the plaintiffs' claim to interest. The first question that has to be determined in this connexion is, does Ex. D create a charge only in respect of one year's rent or generally of all rent that accrues ? The answer will depend upon the right reading of the document which is in Malayalam. There are certain errors in the Court translation and they have been brought to our notice in the course of the argument. It is not disputed that the defendants have continued to be tenants under Ex. D. It is not suggested that there was a cessation of tenancy at the end of the first year and there was a new tenancy under S. 116 of the Transfer of Property Act which deals with the effect of holding over. The latter part of Ex. D clearly contemplates the accruing of rent beyond the term of one year fixed. There are two sentences dealing with there being a charge on the equity of redemption. In the first sentence the first year's rent has been mentioned. In the second sentence again there is a reference to rent. The defendants ask us to treat this reference as a mere redundancy. The words "arrears," "till discharged," and "accumulated" in the context in which they occur strongly suggest that the charge that is mentioned in the second sentence refers to the arrears of rent after the first year. Though the parties started by saying in the opening portion of the document that the lease is for a fixed period of one year, they in truth intended to enter into a lease from year to year, as the latter part of the document clearly shows ; and the parties themselves, as shown, treated the transaction as such. As this is the effect of Ex. D the plaintiff will be entitled to a decree with charge on the property for rent with interest as provided in the document for a period of twelve years immediately preceding the suit.

There remains a contention urged for the plaintiff which we shall now proceed to deal with. It is urged that Exs. C and D really constitute one transaction and that the plaintiff is, on that

footing, entitled to interest for the whole period from the date of the mortgage to the date of suit. We cannot accede to this argument. It is a question of intention whether the two instruments should be read together and be held to constitute a single transaction or they should be taken separately and each regarded as a separate and independent transaction. Each case depends upon its own facts and no good purpose will be served by our citing the numerous cases to which reference has been made at the Bar. A careful consideration of the two documents in the case leads one to the conclusion that the parties intended that each should constitute a distinct and independant transaction. There is first the fact, that Ex. C while it provides for interest, does not make the mortgagors personally liable for it. Ex. D, on the other hand, contains the personal covenant. Secondly, receiving an advance of rent (mumpattam) and referring to it in the rental agreement shows that the parties intended that the relation should be that of lessor and lessee. There is thirdly the fact, that whereas Ex. C does not provide for compound interest there is a distinct stipulation in Ex. D under which interest becomes payable on arrears of rent (which in other words is compound interest). As a matter of fact the parties took particular care to stipulate that certain obligations should flow from the relationship created of landlord and tenant. Fourthly, it is significant that under Ex. D arrears of rent are charged upon the property. There would be a charge in an ordinary mortgage transaction implied in law, so far as interest is concerned. It would be superfluous to refer to such a charge but it would be necessary expressly to make the rent a charge on the property. This is what the parties really did.

On the whole we are inclined to the view that the parties intended to treat each instrument as constituting a distinct and independent transaction. It is the combined and cumulative effect of the circumstances mentioned that makes this document evidence two distinct transactions. If these elements were not found in this combination, the result might be different but we must get at the intention from all the facts and in the present instance we are satisfied that the two instruments should be considered as evidencing two distinct transactions.

The result is the appeal is allowed in part and the decree of the lower Court in modified by awarding to the plaintiff a mortgage decree for the principal amount and rent at 572 paras and 7½ nazhis or its equivalent in money at the rate fixed by the lower Court for a period of twelve years, prior to the institution of the suit, with interest on rent as provided for in Ex. D. Time for redemption six months. There will be no personal decree for rent. In the appeal, each party will bear his own costs. The memo. of objections is dismissed with costs.

Appeal partly allowed.

A. I. R. 1926 Madras 1065

DEVADOSS AND WALLER, JJ.

(Thirumulu) Suppu Chetti—Appellant.

v.

Arunachalam Chettiar and *others* — Respondents.

Appeal No. 433 of 1924 and Civil Revision Petition No. 922 of 1924, Decided on 1st September 1925, from the order of the Sub-J., Dindigul, D/- 7th August 1924, in A. S. No. 99 of 1923.

Civil P. C., S. 107—Dismissal of suit on the ground that there was no cause of action—Appellate Court setting aside dismissal and remanding on the general ground that all circumstances were not properly considered and that a particular decided case applied is not proper.

In a suit the trial Court found that the plaintiff had no cause of action and dismissed the suit. On appeal by the plaintiff the Subordinate Judge held that the principle of *Tweedle v. Atkinson* (30 *L. J. Q. B.* 265) would apply to the case and remanded it for trial by the first Court.

Held: A remand on the general ground that the trial Court had not considered all the circumstance of the case was not proper.

[P 1065 C 2, P 1066 C 1]

R. Sreenivasa Aiyangar—for Appellant.

K. Rajah Aiyar—for Respondent.

Judgment.—This is an appeal against the order of remand by the Acting Subordinate Judge of Dindigul. The District Munsif found that the plaintiff had no cause of action against the 3rd defendant and dismissed the suit so far as he was concerned. On appeal by the plaintiff the Subordinate Judge held that the

principle of *Tweedle* v. *Atkinson* (1) would apply to the case and remanded it for trial by the first Court. The questions in the suit were whether the 3rd defendant undertook to pay the plaint debt; secondly whether there was an agreement between the 3rd defendant and plaintiff to pay the debt; and thirdly if the debt mentioned in Ex. D was the debt assigned to the plaintiff would the principle of *Tweedle* v. *Atkinson* (1) apply to the facts of the case. The learned Subordinate Judge has not recorded a finding on the point whether the debt mentioned in Ex. D as having been undertaken to be paid by the 3rd defendant was the debt due to the plaintiff; he should also have recorded a finding on the question whether the 3rd defendant undertook orally to pay the plaintiff. If he fouud the point in favour of the plaintiff he would be entitled to a decree; and if he found the second point against the plaintiff and the first point in his favour, then he would have further considered the question whether on the principle *Tweedle* v. *Atkinson* (1) the plaintiff had a cause of action against the 3rd Defendant. He has not considered those points but has only remanded the suit for trial by the District Munsif on the ground that all the circumstances of the case were not considered by the trial Court. We do not consider this is a proper order of remand. We must, therefore, set aside this order and ask the Subordinate Judge to dispose of the appeal in the light of the remarks made herein. As no appeal lies against such an order of remand we dismiss the appeal, No. 433 of 1924, but without costs. We allow the Civil Revision Petition, No. 922 of 1924, and costs of C. R. P. will abide the result.

Case remanded.

(1) 30 L. J. Q. B. 265=1 B. & S. 393=8 Jur. N. S. 332=4 L. T. 468=9 W. R. 781.

A. I. R. 1926 Madras 1066

VISWANATHA SASTRI, J.

(*Kaji*) *Mahomed Ibrahim*—Appellant.

v.

Sundaram Chetti and *others*—Respondents.

Second Appeal No. 107 of 1923, Decided on 5th October 1925, from a decree of the Sub.-J., Sivaganga, in A. S. No. 66 of 1920.

Muhammadan Law—Waqf—De facto manager can get decree for possession of properties of mosque if right of mosque is conceded.

Where a de facto manager of a mosque brings a suit on behalf of the mosque for possession of properties belonging to the mosque and the right of the mosque is conceded, he is entitled to a decree: 63 *I. C.* 171; *A. I. R.* 1924 *All.* 59, *Foll.* 34 *All.* 213 *P. C.*, *Dist.* [P. 1067, C.2]

A. Krishnaswamy Iyer and *V. Ramaswamy Iyer*—for Appellants.

M. Patanjali Sastri—for Respondents.

Judgment.—Appeal by the legal representative of the deceased 1st plaintiff against the appellate decree of the Court of the Subordinate Judge of Sivaganga in Appeal Suit No. 66 of 1920. The suit was instituted by the deceased 1st plaintiff as hukdar of the Wallajah Nawab Jumma Kotwa Pallivasal at Sivaganga for delivery of possession of the site leased to the 1st defendant. The 1st defendant denied the sole right of the 1st plaintiff to the hukdarship and management of the Pallivasal and contended that the Pallivasal and its properties were being managed by the Muhammadan community of Sivaganga through persons appointed by them. He further contended that he was only in possession of the southern portion of the site as lessee from Keelaka, Perottasi, with the permission of the then managers, that he had executed a rent-deed in their favour on 14th June 1915, for a period of three years, and that he was never in possession of the northern portion. The first issue framed related to the question whether plaintiff was the sole trustee of the Pallivasal and whether he was entitled to maintain the suit. The third issue and the additional first issue related to the question whether the northern and the southern portions of the suit site had been leased by the 1st plaintiff to the 1st defendant. These issues were found in favour of the plaintiff by the District Munsif and a decree passed accordingly.

On appeal the learned Subordinate Judge held that the leases were not made out and that plaintiffs were not the sole hukdars of the plaint mosque. The latter finding was contested before me, and it was further urged on the facts found, it was clear that the 1st plaintiff was the de facto manager of the Pallivasal and that since the right of the Pallivasal site was conceded, the lower Court ought to have passed a decree for

possession on the authority of the ruling in *Benarsi* v. *Altaf Husain* (1).

That on the facts found the 1st plaintiff must be deemed to have been the de facto manager of the mosque is clear to my mind. Evidence was let in to prove: (1) that plaintiff and his ancestors have been as trustees letting the mosque shops for rent and collecting rents therefrom and paying union tax thereon; (2) that they have done the necessary repairs to the shops: (3) that they have repaired and improved the mosque building by erecting a front gate and a water cistern; (4) that they have acquired properties for the mosque and have charged or alienated the mosque properties for necessary purposes; (5) that they have sued the tenants and got decrees as trustees; and (6) that they have openly asserted their rights as trustees in various proceedings and they have been so recognized by the public. The District Munsif has carefully considered the evidence on all these points, dealing with each point, separately. Each point was found proved, and he came to the conclusion on the first issue that plaintiff was the sole trustee. The learned Subordinate Judge found that since the year 1867, plaintiff, his father, and grandfather were managing the affairs of the Pallivasal, and that they were doing the duties of Levvais in the mosque. He also found they had been taking rent-deeds with respect to properties belonging to the Pallivasal and that they were parties to the suits relating to Pallivasal properties; but he held that these circumstances did not lead to the conclusion that plaintiff was the sole trustee. This is what he says:

The documents filed in the case taken along with the oral evidence adduced on the plaintiff's side go to show that in the former times the mosque affairs were being managed by the Levvais of the mosque in conjunction with the Uravaini Murayara, that from and after 1867 or there abouts, ancestors of Plaintiffs Nos. 1 and 2 have been calling themselves hukdars and doing some acts of management including the collection of rent due from shops belonging to the mosque.

Then he goes on to say that

the evidence does not show how the hereditary right set up by plaintiff was governed, and 1st plaintiff was not willing to admit that his one younger brother or 2nd plaintiff had joint right of hukdarship.

Dealing with the evidence on defendants' side, this is what he says:

The oral evidence adduced on defendants' side was mainly directed to the appointment of managers from time to time by the Uravaini Murayars, collection of rent due to the mosque by them and their rendering accounts and to the collection of kalrimai, etc. As the said oral evidence relating to the appointment of the managers and their rendering accounts and collecting accounts is conflicting and unsatisfactory, I do not think it necessary to discuss the same. It is sufficient to say that the oral evidence adduced by defendants does not in any way support the plaintiff's case.

The facts found by the learned Subordinate Judge with respect to the evidence, oral and documentary, on the side of the plaintiff clearly establish that the 1st plaintiff was the de facto manager of the Pallivasal. Such being the case and the title of the Pallivasal to the property in the suit having been admitted and the suit being only for the recovery of the property on behalf of the Pallivasal, the ruling in *Benarsi* v. *Altaf Husain* (1) relied upon by the learned vakil for the appellant, entitled the appellant to a decree for possession. In this connexion I may also refer to a decision of the Allahabad High Court, in *Muiz-ud-din* v. *Mohammad Iklaq* (2). Both these are cases relating to de facto mutuwallis; and a similar conclusion has been come to with respect to de facto managers of properties belonging to an idol: see *Hari Mohan Modak* v. *Rameswar Das* (3).

It was urged by the vakil for the 5th respondent in the connected appeal that since plaintiff had come to Court claiming to be the sole trustee of the Pallivasal, and since in the other appeal (No. 108 of 1923 with which I shall deal separately) to which certain other persons who claimed to be trustees were parties, it was held that plaintiff was not entitled to the declaration prayed for; it was not open to the plaintiff to get a decree for possession on the ground that he was de facto trustee. It was further contended that de facto trusteeship is not recognized by Muhammadan Law and reliance was placed upon the ruling of the Privy Council in *Mata Din* v. *Ahmad Ali* (4). I am unable to agree with either contention. Considerations which apply to cases of de facto guardians of Muhammadan minors, which are based purely upon Muhammadan Law texts, cannot apply to the trusteeship of a Pallivasal.

(1) [1921] 63 I. C. 171.

(2) A. I. R. 1924 All. 59.

(3) [1920] 64 I. C. 737.

(4) [1912] 34 All. 213=13 I. C. 976=39 I. A. 49 (P. C.).

The decision in *Benarsi* v. *Altaf* (1) and *Muizuddin* v. *Md. Ikhlaq* (2) cases above referred to, are cases relating to Muhammadan mosques and no such contention was raised. With respect to the other contention, the other persons who claimed as trustees are not parties to the suit out of which this second appeal has arisen, and simply because this suit as also the suit out of which Second Appeal No. 108 has arisen, were tried together, there is no reason why a decree should not be given for plaintiff for possession, on the ground that he has established his right as de facto manager, simply because in the other suit his right as sole trustee was not established. After all plaintiff claims the property solely on behalf of the Pallivasal and the right of the Pallivasal is conceded.

I, therefore, allow the appeal, and setting aside the decree of the Subordinate Judge restore the decree of the District Munsif so far as the northern portion is concerned with costs both here and in the lower appellate Court.

Decree set aside.

A. I. R. 1926 Madras 1068

DEVADOSS AND WALLER, JJ.

Union Board, Paramakudi—Petitioner.

v.

Chellaswami Thevar and *others*—Respondents.

Criminal Revision No. 574 and Criminal Revision Petition No. 483 of 1925, Decided on 20th January 1926, from the order of the Sub-Mag., Paramakudi, in Case No. 93 of 1925.

Madras Local Boards Act (14 *of* 1920), *Ss.* 193, 207 *and* 221—*Refusal to take out license under S.* 193—*Prosecution under S.* 207 *is proper course* —*S.* 221 *does not apply.*

Where the President of a Local Board thinks that a person should take out a license under S. 193, and that person refuses to do so, and carries on his industry without a license, the proper course is to prosecute him under S. 207 and not to apply under S. 221 for the recovery of the fee for the license : *A. I. R.* 1926 *Mad.* 576, *Foll.*; *A.I.R.* 1925 *Mad* 1015, *Commented on.*[P 1068C 1]

R. Kesava Iyengar—for Petitioner.

K. V. Sesha Iyengar—for Respondents.

Waller, J.—The decision in this case must follow the decision in *Madura Municipality* v. *Muthu Balu Chetty* (1). Though the two cases spring out of the different Acts, the provisions by which they are governed are identical. I think that the Magistrate was right in holding that S. 193 of the Local Boards Act did not apply and that respondents were not bound to take out licenses annually. The Revision Petition is therefore dismissed.

I may add that the Magistrate's order can, in my opinion, be supported on another ground. It seems to me clear that S. 221 of the Act can have no application to a case like this. Where the President of a Local Board thinks that a person should take out a license under S. 193 of the Act and that person refuses to do so, and carries on his industry without a license the proper course is to prosecute him under S. 207 and not to apply under S. 221 for the recovery of the fee for the license. It was argued before the Magistrate, on the assumption that S. 221 covered the case, that he was not entitled to enter into the question of the legality of the fees sought to be recovered. A decision of my learned brothers Devadoss and Wallace, JJ. has been cited in support of the argument *Ramachandra Servai* v. *President, Union Board, Karaikudi* (2). They held that when a Local Board moved a Magistrate under S. 221 of the Madras Local Boards Act to recover a penalty imposed for an encroachment under S. 164, the defaulting party could not ventilate before the Magistrate his claim thatthere was no encroachment at all.

Assuming that their view is correct, it seems to me that a completely anomalous position might arise in applying the various provisions of S. 164. That section is divided into three subsections. The first provides for the levy of a penalty for the unauthorized occupation of land set apart for a public purpose. The second empowers the President of a Local Board to serve a notice on the occupier of such land requiring him to vacate. The third makes the occupier liable to pay compensation to the Board irrespective of the penalty already provided for, if he has caused damage by his occupation to its property. The penalty and the compensation contemplated by sub-Sections 1 and 3 are recoverable by means of a reference to a Magistrate under S. 221 of the Act. Non-compliance with a notice issued under sub-

(1) A. I. R. 1926 Mad. 576.

(2) A. I. R. 1925 Mad. 1015.

Section (2) renders the defaulter liable to prosecution under S. 207.

I do not think that it can possibly be contended that, if and when he is so prosecuted he is debarred from alleging and proving that what he has occupied is not public land. The result then is this, that while such a defence is open to him when he is proceeded against under one part of the section, he is debarred from raising it, if either of the other two parts is used against him. As I have already said, that seems to me to be an entirely anomalous position. If the supposed encroacher is called upon to pay a penalty or damages for his encroachment, the only question he can raise is as to the amount or the apportionment of the sum to be awarded against him. If on the other hand, he is prosecuted for refusing to vacate, he is entitled to prove that there was no encroachment at all, in other words, that the penalty or damages, which may already have been levied, were improperly recovered from him.

Devadoss, J.—I agree, as I am of opinion, that this firm proceeded against need not take out a license under S. 193 of the Local Boards Act, and S. 221 has no application to the present case,

Petition dismissed.

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* A. I. R. 1926 Madras 1069

SPENCER, J.

Rama Goundan and *others*—Defendants—Appellants.

v.

Velappa Goundan and *others*—Plaintiffs—Respondents.

Second Appeal No. 412 of 1923, Decided on 9th March 1926, from the decree of the 2nd Addl. Sub-J., Coimbatore, in A. S. No. 11 of 1922.

(a) *Civil P. C., O. 34, R. 5—Only one method of payment is recognized — No such payment — Court must pass final decree.*

Rule 5 recognizes only one method of payment into Court under the preliminary decree and where no such payment is made, the Court is bound on the application of the decree-holder to pass a final decree for sale : 42 *Mad.* 61, *Appl.* and 8 *C. W. N.* 102, *Dist.* [P 1071, C 1]

(b) *Civil P. C., O. 9, R. 13—Deposit in Court—Ex-parte decree set aside — Decree passed after fresh trial is to be for full amount—Credit for amount deposited is to be given only when deposit is under Civil P. C., O. 24—Procedure.*

When money is deposited under O. 9, R. 13, and the ex-parte decree is set aside, the decree which is passed after a fresh trial is always for the full amount claimed and not for the full amount claimed less the amount deposited. It is only when payment is made under O. 24 that a decree is passed after giving credit for the amount deposited. In the case of deposits under O. 9, R. 13 what is done is to add a note to the decree to the effect that it is open to the plaintiff to draw the amount in deposit and that he is to execute the decree only for the balance. [P 1071, C 1]

* (c) *Decree—Setting aside — Fraud—Deposit after preliminary decree on hypothecation bond—Revised preliminary decree after rehearing—Sale in execution of final decree on revised decree — Deposit not considered — No fraud is established justifying suit for setting aside decree.*

Where in a suit on a hypothecation bond, a preliminary decree is passed and the judgment-debtor deposited the full decree amount but the suit is reheard and a revised preliminary decree is passed subsequently which is confirmed on appeal and a final decree is obtained in execution of which the mortgaged properties are sold for an amount less than the decretal amount and decree-holder attached the deposited amount for the balance.

Held : that the conduct of the decree-holder in not taking into consideration the deposited amount while executing the decree, does not amount to legal fraud justifying a suit for setting aside the decree. [P 1069, C 2 ; 1071, C 1]

S. T. Srinivasagoplachari — for Appellant.

N. Sivaramakrishna Iyer — for Respondent.

Judgment.—Second appeal by defendants against the decree of the Court of the Additional Subordinate Judge of Coimbatore in A. S. No. 11 of 1922 (A. S. No. 44 of 1922, on the file of the District Court). The facts giving rise to this second appeal are these : The defendants instituted a suit against the plaintiffs on foot of a hypothecation bond, and obtained a preliminary decree for Rs. 1,530-2-8 on 26-7-18. The plaintiffs applied to have the decree set aside and it was set aside with the consent of the defendants on the plaintiffs depositing into Court the full decree amount inclusive of costs. The suit was reheard and a revised preliminary decree was passed on 15-3-19. Against this decree the plaintiffs appealed and the appeal was dismissed on 20-10-1919. Thereupon the defendants applied to have a final decree passed, and this was done on 25-11-1919. In pursuance of this decree the mortgaged properties were sold on

8-3-20 and realized a sum of Rs. 1,010. The amount due under the final decree was Rs. 1,634-3-4 with subsequent interest and costs and giving credit for Rs. 1,010 the defendants applied for a personal decree against the plaintiffs for the balance and attached the amount that had been deposited in Court when the first preliminary decree was set aside. The plaintiffs received notice of this application on 12-6-20 and instituted the suit from which this second appeal arises on 12-7-1920 for a declaration that the final decree and all subsequent execution proceedings were null and void and not binding on them.

The allegation on which this relief was sought are to be found in paragraphs 10, 11 and 12 of the plaint. They are to the effect :

that they (plaintiffs) were kept in the dark about the proceedings relating to the passing of the final decree, that the present defendants so contrived that no notice was personally served on them in those proceedings, that the mortgaged properties which were worth not less than Rs. 3,500 were sold for a shockingly low price of Rs. 1,010, that there was no publication at all of the sale proclamation in the village, that the valuation given in the sale proclamation as also the upset price fixed were too low ; and that the decree amount having been already deposited in Court, there was no necessity at all for further proceedings by the defendants and that the conduct of the defendants in applying for a final decree for the entire amount behind the back of the plaintiffs and ignoring the Court deposit was highly, improper and fraudulent.

The defendants traversed all the allegations in the plaint and also contended that the suit was not sustainable and that the remedy of the plaintiffs, if any was under O, 21, R. 90, Civil P.C., as also under O. 9, R. 13. No oral evidence was adduced before the District Munsif, and, on the documentary evidence placed before him he came to the conclusion that no separate suit lay for the relief claimed and that the defendants were not bound to give credit for the amount which have been deposited when the first preliminary decree was set aside. On appeal the learned Subordinate Judge held that the defendants were bound to give credit for the amount in deposit, that they have failed to do so ; and that their conduct in getting a final decree passed for the entire sum due was fraudulent ; and relying upon a decision in *Hasem Ali Khundakar* v. *Abdul Goffur Khan* (1) he reversed the decree of the first Court and passed a decree for the plaintiffs.

It was contended before me that this finding was wrong and the question to be considered therefore is, whether the defendants were bound to give credit for the sum of Rs. 1,530-2-8 which was deposited in Court by the plaintiffs on 4-9-1918 and whether they were entitled only to have a final decree passed for the balance.

The Civil Procedure Code provides for payment into Court before decree and after decree and the provisions relating to payment into Court before decree are contained in O. 24. O. 21, R. 1 provides for payment into Court after decree. In the present case the amount of Rs. 1,530-2-8 was not paid into Court under either of these provisions and the payment was made under O. 9, R. 13. It was contended that inasmuch as the payment was made and the ex-parte decree was set aside with the consent of the defendants it must be taken that they consented to the amount going in discharge of any decree that would ultimately be passed in the suit. This contention appears to me to be untenable because, had there been any such understanding the revised preliminary decree ought only to have been passed for Rs. 1,634 minus Rs. 1,530-2-8 and not for Rs. 1,634. The plaintiffs appealed against the revised preliminary decree, and no contention to this effect was taken in the grounds of appeal. The revised preliminary decree having been for the sum of Rs. 1,634 and this decree having been confirmed in appeal, the defendants applied under O. 34, R. 5, Civil P. C., for having a final decree for sale passed.

This rule enacts that if the amount declared to be due under the preliminary decree was not paid into Court, the Court was bound to pass a final decree for sale. The ruling in 8 *C. W. N.* 102 has no application because, in that case the money wss actually paid into the hands of the decree-holder outside the Court and having received the money it was incumbent upon him when applying for the final decree to give credit for the amount he had received. There was no such payment in the present case, and, as observed in *Singa Raja* v. *Pothu Raja* (2)

(1) [1904] 8 C. W. N. 102.

(2) [1918] 42 Mad. 61 = 8 L. W. 497 = 35 M. L. J. 579=48 I. C. 196=(1918) M.W.N. 809.

O. 34, R. 5, Civil P. C. recognized only one method of payment into Court under the preliminary decree and no such payment having been made, the Court was bound on the application of the decree-holder to pass a final decree for sale.

It was urged that the defendants were bound to have brought to the notice of the Court when the final decree was passed, that there was in deposit Rs. 1,530 and odd, but I fail to see how any such legal duty was cast on them. It may be stated that it was equally open to the plaintiffs after the appeal had been dismissed, to apply to the Court to have the amount they had deposited appropriated towards the sum decreed under the revised preliminary decree. In any event it does not appear to me that the conduct of the defendants amounted to a legal fraud. In my experience when money is deposited under O. 9, R. 13 and the ex-parte decree is set aside, the decree which is passed after a fresh trial is always for the full amount claimed and not for the full amount claimed less the amount deposited. It is only when payment is made under O. 24 that a decree is passed after giving credit for the amount deposited. In the case of deposits under O. 9, R. 13, what is done is to add a note to the decree to the effect that it is open to the plaintiff to draw the amount in deposit and that he is to execute the decree only for the balance.

For all these reasons it appears to me that the finding of the learned Subordinate Judge cannot be supported. This view of mine is not by itself sufficient to dispose of the appeal because, the other allegations made in paragraphs 10 and 11 of the plaint to the effect that the defendants fraudulently contrived to keep the plaintiffs in the dark with regard to the proceeding leading to the passing of the final decree and that they have caused a false endorsement of service to be made on the summons, were not gone into by the Court of first instance. The acts referred to in paragraphs 10 and 11 of the plaint may amount to legal fraud and in that case a separate suit to set aside the final decree would lie.

I, therefore, call for a finding from the lower appellate Court on the following issue :

Are the allegations made in paragraphs 10 and 11 of the plaint true and were the defendants guilty of fraud and if so was the final decree and the sale that ollowed vitiated by fraud ?

The finding will be submitted in six weeks from the date on which the records are received in the lower appellate Court, and the lower appellate Court will receive such evidence as is adduced by the parties. Ten days for objections after the receipt of finding from the lower appellate Court.

Case remanded.

A. I. R. 1926 Madras 1071

WALLER AND MADHAVAN NAIR, JJ.

(Rangaraju) Venkatachalamayya Pantulu—Appellant.

v.

Gedala Simhadri Naidu—Respondent.

Letters Patent Appeal No. 55 of 1925, Decided on 29th April 1926, from the judgment of Phillips, J., in second Appeal No. 1614 of 1923.

Transfer of Property Act, S. 116—Lease terminated—Lessee intimating landlord that he is no longer tenant—Suit for rent—S. 116 applies—Even though suit is for rent, Court can pass decree alternatively for damages for use and occupation—Practice—Reliefs.

Where a lease terminated and the lessee intimated to the landlord that he was no longer a tenant and the landlord brought a suit for rent.

Held, that the notice, though terminating the tenancy, was waived by the conduct of the lessee in remaining in possession of the leased land and the principle of S. 116 applies and that even though the suit has been framed as one for rent it is possible for the Court to pass, in the alternative, a decree for damages for use and occupation. [P 1072, C 1]

B. Jaganadha Doss—for Appellant.

B. Satyanarayana—for Respondent.

Judgment.—The facts briefly are these. The defendant had taken a lease of certain land from the plaintiff for a period of 5 years which ended at about the beginning of 1914. In 1918 the plaintiff brought a suit against the defendant. Phillips, J., describes it as being a suit for rent, but that is, we think, not a correct description, for what was asked for was not in terms rent, but damages on account of loss of profits. The trial Court found that the defendant had held over for a certain sum "either as rent or damages for use and occupation." The first appellate Court came to much the same

conclusion and dismissed the appeal. Phillips, J., in second appeal, disagreed. He found that by Exhibit II the defendant had intimated that he was no longer a tenant and there was therefore no question of holding over. Treating him as a trespasser, the suit had, he thought, not been properly framed as a suit for damages. In the result, he dismissed the suit with costs throughout.

As to Exhibit II, we cannot agree with him. If the one sentence in it on which he relies, is to be treated as a notice terminating the tenancy, the notice was waived by the conduct of the defendant in remaining in possession of the leased land. We think that this is certainly a case in which the principle of S. 116 of the Transfer of Property Act should be applied : vide *Vadapalli Narasimham* v. *Dronamraju Seetharamamurthy* (1) and that the lower Courts rightly decreed the suit.

Nor can we agree with him on the other point. Assuming that the suit had been framed as one for rent, which it really had not been, it was possible for the Court to pass, in the alternative, a decree for damages for use and occupation ; *Chengiah* v. *Raja of Kalahasti* (2). We allow the appeal with costs throughout.

Appeal allowed.

(1) [1908] 31 Mad. 163=18 M. L. J. 26.
(2) [1912] 24 M. L. J. 263=15 I. C. 445.

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* * A. I. R. 1926 Madras 1072

DEVADOSS AND WALLER, JJ.

Sivananda Mudali—Accused — Petitioner, *In re.*

Criminal Revision No. 175 of 1925 and Criminal Revision Petition No. 157 of 1925, Decided on 20th October 1925, from the judgment of the S. J., Madura Dn., in Criminal Appeal No. 1 of 1925.

* (a) *Penal Code, S. 463—Creation of false document for supporting even true or genuine title is forgery (Per Devadoss, J.).*

In order to constitute forgery the document need not be intended to support a false claim or a false title. If, in order to support a true claim or a genuine title, a false document is created, it is a forgery. Whether a document is a false document or not, does not depend upon the adjudication of the Court on the claim or title which is intended to be propped up by the false document : (1915) *M. W. N.* 278, *Dist.* [P 1074 C 1]

* * (b) *Penal Code, S. 25—Intention to cause wrongful loss is not necessary (Per Devadoss, J.).*

In order to do a thing fraudulently it is not necessary that the person doing it should intend, or the doing of it should have the necessary consequence of, causing wrongful loss to any person. It is sufficient if the doing of it is intended to defraud some one without ultimately acquiring unlawful gain or causing wrongful loss. [P 1077 C 1]

* (c) *Penal Code, S. 471—Party setting up two titles and supporting one by false document is guilty.*

If a party to a suit sets up two different titles and supports one of them with a false document he has committed an offence under S. 471 even if it be found that the other title is good. [P 1078 C 1]

(d) *Penal Code, S. 463—Using false document for giving unfair advantage is fraudulent within S. 25 (Per Waller, J.).*

If a man intends to gain an unfair advantage by deceitful means and uses a false document for that purpose, his conduct is fraudulent. (*Case Law considered*) [P 1078 C 1]

F. S. Vaz—for Petitioner.
Public Prosecutor—for the Crown.

Devadoss, J.—The petitioner has been convicted under S. 471 read with S. 467, Indian Penal Code, and sentenced to two years' rigorous imprisonment by the Assistant Sessions Judge of Madura. His appeal to the Sessions Judge of Madura has been dismissed. The finding is that the petitioner altered the Tamil numerals 27 into 32 in Ex. G a registered deed of partition between him and one Kaliyayi, dated 14th September 1889, and filed it in support of his claim in O. S. No. 165 of 1919 on the file of the District Munsif's Court of Madura taluk. On that finding the appellant has been convicted of using as genuine a forged valuable security knowing it to be forged.

The contention of Mr. Vaz for the petitioner is that the petitioner acquired title by prescription to the plot in dispute and that Ex. G was not quite necessary for the support of his title and that he could not have intended to cause wrongful loss to anybody and, therefore, the alteration of the figures in the document does not amount of forgery. I will assume for the purpose of considering this point that the learned District Judge found that the petitioner had a good title to the disputed plot by adverse possession for over the statutory period. The question is : If a person creates a bona fide claim, does he commit forgery ? Under S. 463, Indian Penal Code :

Whoever makes any false document or part of a document with intent to cause damage or injury to the public or to any person, or to support any claim or title.....commits forgery.

Section 464, Cl. (2) is in these terms :—

A person is said to make a false document who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person...

Any material alteration in a document without lawful authority dishonestly or fraudulently would constitute the making of a false document. The contention is that if a person in order to support a genuine claim, or a bona fide claim, makes a false document he does not do so dishonestly, for according to the definition of "dishonestly" there must be the intention to cause wrongful loss or wrongful gain and that a person cannot be said to cause wrongful loss or wrongful gain when he supports a genuine claim. This argument overlooks the fact that a person makes a false document if he fraudulently alters the document or a material part thereof. The word "fraudulently" has been the subject of discussion in various cases. It is defined in S. 25 as doing a thing with intent to defraud but not otherwise. The intention to defraud is sufficient to bring an alteration within S. 464. Mr. Vaz's argument is that the fraud must be to the detriment of a person. It is not necessary in order to do a thing fraudulently that the person doing it should intend to cause wrongful loss or wrongful gain of property. To induce a person to do a thing which he would not do but for the fraud, or omit to do anything which he would do but for the fraud, is to defraud that person.

If a person produces a forged certificate of character and thereby obtains employment does he defraud or not? If the contention of Mr. Vaz is correct, the person producing the certificate does not commit forgery if the person who employs the applicant is satisfied with his work and the person employed gets paid for his work, it may be that the person obtaining employment by means of the forged certificate is considered to be an acquisition by the employer. Even then the making of a false certificate is a forgery, for but the certificate the employer would not have employed him. It is not the detriment to any person that is the essential ingredient in the intention to defraud. If a person induces another to believe in a certain state of things which do not exist by the production of a document which is false in material parts, the intention to defraud is made out. The contention that the petitioner has a claim to the property and, therefore, the propping up of a true claim by an unnecessary and superfluous document which is false is not an offence is to overlook the plain terms of S. 463. According to S. 463 whoever makes a false document to support any claim or title commits a forgery. There is no warrant for saying that in order to constitute forgery the document must be intended to support a false claim or a false title. If in order to support a true claim or a genuine title a false document is created, it is a forgery.

Suppose a person who has acquired a good title to property either by succession or by adverse possession or by a grant, creates a false Will in order to make out that he devised title under the Will, can it be said that he does not commit forgery? Suppose a person who has been validly adopted in order to support his adoption makes a false document of authority to his adoptive mother; even though the adoption was made not with the authority but with the consent of the nearest sapindas and, therefore, a valid adoption irrespective of the authority, he commits a forgery. It is to prevent false documents being made for the purpose of substantiating a true or genuine claim or title to property that the framers of S. 463 advisedly use the expression "to support any claim or title.' If the argument is pushed to its logical length, it would amount to this: any person may create a false document for the purpose of supporting what he considers to be a genuine claim and if the Court finds in his favour the person making the false document is not guilty of forgery or of using as genuine a forged document. But if the Court finds that the claim is not genuine or the title is not good, then the offence of using a forged document as genuine is committed. If a person in order to resist a false claim for money makes a false receipt, does he or does he not commit forgery? Even if the Court holds that the claim is false that would not make the false receipt

any the less a forgery. Whether a document is a false document or not does not depend upon the adjudication of the Court on the claim or title which is intended to be propped up by the false document.

Mr. Vaz relies very strongly upon the judgment of Ayling, J., in *Manika Asari* v. *Emperor* (1). In that case a material alteration was made in a document. The Sessions Judge found that the material alteration did support the claim of the appellant in that case. The conviction was set aside by Ayling, J., on the ground that it was impossible to say that any wrongful result was intended or could have arisen. With very great respect to the learned Judge I am unable to follow his reasoning. Before discussing the reasons given by the Judge it is but fair to observe that some of the cases which bear on the point were not brought to his notice. The learned Judge observes:

> I have not in fact been referred to or been able to discover any case in which a man has been convicted of forgery, where his intention has been merely to secure something to which he was legally entitled or (which comes to the same thing) to which he bona fide believed himself to be entitled.

If some of the cases in which it was held that it was not necessary in order to constitute fraud within the meaning of S. 464 that anybody should be damnified had been brought to his notice, he would probably have taken a different view. He relied upon three cases in support of his position: *Queen-Empress* v. *Sheo Dayal* (2); *Queen* v. *Kishen Pershad* (3); and *Kailas Chandra Das* v. *Crown* (4). In *Queen-Empress* v. *Sheo Dayal* (2), Brodhurst, J., sitting as a single Judge observed:

> 'Dishonestly' and 'fraudulently' are defined in Ss. 24 and 25 of the Penal Code respectively, and with reference to those definitions, the accused on the findings of the Judge, as contained in the extracts above given did not commit the offence of which he has been convicted.

In that case forged receipts were fabricated in lieu of genuine receipts which had been lost. The learned Judge did not discuss the meaning of the word "fraudulently" but assumed that the facts found did not constitute fraud. In *Queen* v. *Kishen Pershad* (3) it was held that a prosecutor in order to establish that a title has been asserted with a fraudulent or dishonest intent must show that the accused had no reasonable ground for asserting the title. The learned Judges observe:

> It is also shown that he used the document, but it is not shown that he did so dishonestly or fraudulently in the sense in which those terms are used in the Indian Penal Code; that is to say with a view to cause to his father wrongful gain, or to the Government wrongful loss.

This reasoning overlooks the difference between "dishonestly" and "fraudulently". In order to do a thing dishonestly there must be intention to cause wrongful loss or wrongful gain of property, but in order to do a thing fraudulently it is not necessary that there should be the intention to cause wrongful loss or wrongful gain of property. The Legislature advisedly uses the terms "dishonestly" and fraudulently." To say that to do a thing fraudulently there must be the intention to cause wrongful loss or wrongful gain would be attributing to the Legislature redundancy. On the other hand, the words "dishonestly" and "fraudulently" are used to denote two different things. The case in *Kailas Chandra Das* v. *Crown* (4) has been dissented from by Benson and Sankaran Nair, JJ., in *In re Somasundaram Pillay* (5). Ayling, J., refers to *Emperor* v. *Ali Hasan* (6) and *Kotamraju Venkatrayudu* v. *Emperor* (7) and observes:

> It was clearly laid down that an intent to defraud implies something more than mere deceit. The object for which the deceit is practised has to be considered. The advantage intended to be secured, or the harm intended to be caused need not have relation to property or be such as is implied in the term 'dishonestly' but it must be something to which the party perpetrating the deceit is not entitled either legally or equitably.

The latter portion of his observation cannot be supported. The intention to defraud need not necessarily be to obtain something which a person is not legally or equitably entitled. It is sufficient if by means of the perpetration of the fraud somebody is defrauded. The observation of the learned Judge that it is necessary that in order to constitute fraud, the fraud must be intended to support something to which the person is not legally entitled is not the ratio decidendi of

(1) [1915] M. W. N. 278=28 I. C. 102=16 Cr. L. J. 246.
(2) [1885] 7 All. 459=(1885) A. W. N. 85.
(3) 2 N. W. P. 202.
(4) [1901] 6 C. W. N. 382,
(5) [1909] 6 M. L. T. 266=3 I. C. 736=10 Cr. L. J. 367.
(6) [1906] 28 All. 358=3 A. L. J. 149=(1906) A. W. N. 48.
(7) [1905] 28 Mad. 90 (F.B.).

Emperor v. *Ali Hasan* (6) and *Kotamraju Venkatrayudu* v. *Emperor* (7).

In *Kotamràju Venkatrayudu* v. *Emperor* (7) in order to obtain admission to the Matriculation Examination of the Madras University as a private candidate a student produced a certificate of good character in which the signature of a Head Master of a School was forged. A Full Bench of the High Court held that the student was guilty of forgery. Sir Arnold White, the learned Chief Justice. quotes the observation of Sir John Edge, C. J., in *Queen-Empress* v. *Soshi Bhushan* (8):

We can see no difference in principle between the case of a man making a false certificate in order to obtain employment and the case of a man making a false certificate in order to obtain admission to a Law class.. In each case the intention is to deceive another person, and thereby to obtain an advantage, or a privilege, which, without such deception, could not have been obtained.

Subramania Ayyar, J., who dissented from the view of the majority of the Bench was evidently considering the effect of holding that such certificates are forgery. He observes (at page 107 of 28 *Mad.*):

Apart from all this, there is the consideration that to make the words "fraudulently" or "with intent to commit fraud" cover acts such as this which have come to be spoken of as "examination malpractices" would be to subject youths guilty of such acts, while still juveniles in the strict sense of the term, to the contaminating influences of the prison fit only for hardened offenders.

This consideration ought not to weigh with a Court which has to interpret the section of the Penal Code as it finds it. In *Emperor* v. *Ali Hasan* (6) it was held by Richards, J., that it was forgery to issue orders as if signed by the District Superintendent of Police when they were not so signed. The learned Judge observes at page 364 (28 *All.*)

It would certainly be an alarming state of the law if a man could deliberately fabricate a false order for the purpose of having another person arrested under the supported authority of a District Superintendent of Polior and be guilty of no offence under the Penal Code.

I shall now consider the cases which have taken a different view from *In the matter of Dhunum Kazee* (9). A Bench of the Calcutta High Court held that:

Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent.

(8) [1893] 15 All. 210=(1893) A.W.N. 96.
(9) [1883] 9 Cal. 53=11 C.L.R. 169.

Norris, J., observed at page 60 (9 *Cal.*):

A general intention to defraud without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction. . . Let a person's title to property be ever so good, yet, if in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, such as this hiba, I am clearly of opinion that he uses it fraudulently.

In *Queen-Empress* v. *Ganesh Khande Rao* (10) a case decided by West and Nanabhai Haridas, JJ., is reported. The questions for consideration in that case were whether the certificate furnished to the accused stated his age as 23 which was subsequently altered to 20 and whether the accused was guilty of using a forged document under S. 471, Indian Penal Code. The finding was that the accused had altered his age from 23 to 20. In answer to the contention that there was no dishonesty within the meaning of S. 464, Indian Penal Code, inasmuch as if he had got the employment at all, he would have got wages for work done, the learned Judges observe:

If, however, the alteration was made fraudulently, that suffices for the purposes of S. 464, as shown by illustration (k), and that illustration shows that the use or fabrication of a false certificate of character raises the presumption of fraud. It was held by Le Blanc, J., so long as a century ago, that by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from the ill-will towards the other is immaterial.

See *Haycraft* v. *Creasy* (11).

This case was followed by the Calcutta High Court in *Lalit Mohan Sarkar* v. *Queen-Empress* (12). In that case the accused altered a challan in order to make it appear that a larger amount had been paid than was the fact. It was argued that the alteration of the document was to cover a misappropriation already committed and, therefore, the alteration of the challan did not amount to forgery. The learned Judges held that the alteration of the challan, though to cover a wrongful loss which was a thing of the past, was forgery and that the intention need not be to cause future wrongful loss or wrongful gain in order to constitute a false document. They cite with approval the case in *Queen-Empress* v. *Sabapati* (13) in which it was held by

(10) [1889] 13 Bom. 506.
(11) [1801] 2 East 92=6 R.R. 380.
(12) [1895] 22 Cal. 313.
(13) [1888] 11 Mad. 411.

Muthuswami Ayyar, J., and Wilkinson, J., that the making of a sale receipt by a postmaster in order to cover his misappropriation was forgery. In *Queen-Empress* v. *Muhammad Saeed Khan* (14) Banerji J., held that it was forgery to alter a service roll by inserting favourable remarks in favour of a person with the intent to favour chances of promotion to that person. He observes at page 115 :

Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery.

He relies upon *Queen-Empress* v. *Vithal Narayan* (15) and *Lalit Mohan Sarkar* v. *Queen-Empress* (12). In *Queen-Empress* v. *Abbas Ali* (16) it was held by a Full Bench of the Calcutta High Court that

Deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false.

Maclean, C. J., who delivered the judgment of the Full Bench observes at page 521 :

The word "fraudulently" is used in Ss. 471 and 464 together with the word "dishonestly" and presumably in a sense not covered by the latter word. If, however, it be held that fraudulently implies deprivation, either actual or intended, then apparently that word would perform no function which would not have been fully discharged by the word "dishonestly" and its use would be mere surplusage. So far as such a consideration carries any weight, it obviouly inclines in favour of the view that the word 'fraudulently' should not be confined to transactions of which deprivation of property forms a part.

Referring to S. 463 he observes :

It is clear (especially if regard be had to the context) that it is not an essential quality of the fraud mentioned in the sectfon that it should result in or aim at the deprivation of property.

In *In re Somasundram Pillay* (5) Benson, Offg. C. J., and Sankaran Nair, J., declined to follow *Kailas Chandra Das* v. *Crown* (4). It was argued in that case that the property comprised in the forged document belonged to the accused by virtue of certain documents and that the execution of Ex. A, the forged document, was intended only to confirm their title to property which already belonged to them and there was no dishonesty or fraud. The learned Judges observed with regard to that contention :

In our opinion the intention of the 3rd and 4th accused in getting Ex. A executed and registered was to confirm their alleged title to the property and enable them to deal with it, and that would certainly be to the detriment of any person dealing with them in regard to the property. The document was, in our opinion, clearly fraudulent and a forgery.

The case in *Emperor* v. *Bansi Sheikh* (17) lays down the same principle as that in *In the matter of Dhunum Kazee* (9). In the case in *Ramasami Iyer* v. *Emperor* (18) owing to a difference of opinion between Sadasiva Ayyar and Phillips, J., a reference was made to Oldfield, J. Phillips, J. observed at page 596 :

Even if accused had a bona fide claim to the lands and the moveables, I think the interpolations in the document would be fraudulent for he intended by unfair means to obtain a document containing an admission in his favour by prosecution 2nd witness and this would come within the definition of 'defraud' in S. 25 of the Indian Penal Code

and this view was concurred in by Oldfield, J. Where a person forges a document to support a genuine title, can it be said that he derives no advantage or benefit by means of the document ? The production of the document may enable the Court to find in his favour though not on the strength of the document alone; yet the document may form one of the series of documents which support the title of the person who uses it as genuine. It is unnecessary that the forged document should be the basis of the decision of the Court. It is sufficient if the document is for the purpose of supporting a title and the intention to defraud is complete when the document is made with the intention of making it appear that it is a genuine document. If the other conditions necessary to constitute a false document are present, the intention to defraud is a matter of inference. Where the document is false, the inference can be safely drawn that it was intended to defraud the Court or the party against whom it is used. The passage from Sir James Fitz, James Stephens' History of Criminal Law in England, Vol. II, page 121, is not against the view I have taken in this case :

Did the auther of the deceit derive any advantage from it which could not have been had, if the truth had been known ?

The advantage which is sought to be derived need not necessarily be the getting of the property which is already the property of the per-

(14) [1898] 21 All. 113=(1898) A.W.N. 197.
(15) [1889] 13 Bom. 515 (note).
(16) [1898] 25 Cal. 512=1 C.W.N. 255 (F.B.).
(17) A.I.R. 1924 Cal. 718=51 Cal. 469.
(18) [1917] 41 Mad. 589=43 I.C. 593=19 Cr. L.J. 177.

son making the false document. The advantage which he gains by making the document is additional proof which he tenders for the purpose of substantiating his title to the property. It cannot be said that he does not derive any advantage by putting in a false document ; for the very object of creating the document is to have an additional proof of his title. In this case, though he may have title by adverse possession yet the alteration of Ex. G would go to show that the petitioner derived title not by means of prescription but by reason of the arrangement entered into so far back as 1899. It is an advantage which begins by creating a title to which he is not entitled ; and the contention that he is found to be the owner of the property and, therefore, the alteration of the document of 1899 does not amount to forgery, cannot be upheld.

On a consideration of the cases above referred to I have no hesitation in coming to the conclusion that in order to do a thing fraudulently it is not necessary that the person doing it should intend, or the doing of it should have the necessary consequence of causing wrongful loss to any person. It is sufficient if the doing of it is intended to defraud some one without ultimately acquiring unlawful gain or causing wrongful loss.

I, therefore, decline to interfere with the conviction which I consider to be right. The petition is dimissed.

Waller, J.—The petitioner has been convicted of an offence under S. 471 of the Indian Penal Code. The charge is that in O. S. No. 165 of 1919 he produced in evidence a deed of partition in which to support his claims he had altered the figure 27 into 32. He was convicted by the Assistant Sessions Judge, Madura, and the conviction was confirmed by the Sessions Judge on appeal. He has come up to this Court on a point of law. It is this : that as the Sessions Judge has found that he had a good title to the disputed land by adverse possession his action in using a forged document to support his title did not amount to an offence under S. 471 of the Indian Penal Code. The argument, put shortly, is that if you have a good title otherwise, no intent to defraud can be inferred from such conduct. It is based on a decision reported as *Manika Asari* v. *Emperor* (1).

I am very far from being satisfied that the Sessions Judge either came or could legitimately have come to any conclusion so definite as petitioner alleges. What happened before him was this. It was asserted that in Ex. 3 Mr. Bardswell had found a title by adverse possession and the argument based on the Madras Weekly Notes decision was then developed. Dealing with this the Sessions Judge, after pointing out that Mr. Bardswell's conclusion was by no means explict, said

> there is a considerable amount of evidence that he had been so (in adverse possession for 12 years) and, for the purpose of this case (probably he meant argument). I think that evidence should be accepted as making out the claim of adverse possession.

It seems to me likely that he was assuming the facts in order to destroy the legal arguments founded on them. Looking at all the circumstances of the litigation since 1909, it is, I think, very doubtful whether the Sessions Judge could have meant to decide that petitioner had been in adverse possession for 12 years, by which must, of course, have been intended 12 years before 1900. In that year, petitioner brought a suit on a title derived from a partition in 1889. No deed of partition was produced. On the contrary petitioner swore that there was none in existance. His suit was ultimately dismissed, the result presumably being that he was found to have no title whatever. In the litigation started ten years later, he produced the deed now in question and relied on it for his title. No doubt, the suit against him was dismissed, but, as I understand Mr. Bardswell's judgment (Ex. III), the conclusion arrived at was that the third plaintiff had not proved his " exclusive " possession, and that it was quite uncertain which party was in possession. The truth appears to be that petitioner always founded his title on the partition and never put in a plea of adverse possession. Nor did any Court accept that plea till Mr. Reilly, J., did so in 1925. I do not think that he can have intended to do anything more than assume the facts for the purpose of the argument. And if he did accept the evidence, I think that he was not justified in doing so, in the face of the circumstances and of petitioner's conduct-

If the finding that petitioner had a title by adverse possession goes, with it goes the basis of his legal argument.

On the question of law the Sessions Judges's view is stated thus :

the alteration of Ex. 18, if successful, would have shown that appellant had not only a right to the land in question by adverse possession, but that he had a title to it founded on the partition and acknowledged at the partition by the complainant's predecessor. That would, undoubtedly, have been a great advantage to him in his dispute with the complainant and it would clearly have been an unfair advantage obtained by deceit.

I see no reason to dissent from this view. If a party to a suit sets up two different titles and supports one of them with a false document he has, in my opinion, committed an offence under S. 471 of the Indian Penal Code even if it be found that the other title is good. To take another instance, a man claims certain property by adoption and in the alternative relies on a Will. He is successful on the claim by adoption, but the Will is found to be a forgery. Can he escape conviction under S. 471 of the Indian Penal Code on the plea that he has proved his title by adoption ? I should say emphatically not. Section 463 of the Indian Penal Code does not say that the claim or title which is being supported must be false. Nor does the word "fraudulently" necessarily import an intention to cause wrongful loss. If a man intends to gain an unfair advantage by deceitful means and uses a false document for that purpose, his conduct is, I think, fraudulent. My learned brother has referred to all the material decisions on the point. I need say no more than that I agree in his conclusion and that I consider that the correct view has been laid in *In the matter of Dunam Kazee* (9). I would, therefore, dismiss the revision petition.

Petition dismissed.

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* A. I. R. 1926 Madras 1078

DEVADOSS, J.

Sevu Vandayan—Appellant.

v.

V. S. Narayanasami Iyer and *others*—Respondents.

Second Appeal No. 1506 of 1923, Decided on 22nd July 1926, from the decree of the Dist. J., East Tanjore, in Appeal Suit No. 142 of 1922.

* *Hindu Law—Widow—Alienation to meet marriage expenses of the nearest reversioner—Alienation is justified unless contrary is proved.*

Where a widow alienates some lands to meet the marriage expenses of the nearest reversioner, the presumption is that the circumstances justified alienation until contrary is proved by the party challenging the alienation : 20 *C. W. N.* 734, *Dist.* [P 1079 C 1]

E. Vinayaka Rao—for Appellant.

T. R. V. Sastri and *M. S. Venkatarama Iyer*—for Respondents.

Judgment.—The only point in this Second Appeal is whether the alienation under Ex. III is one which would bind the reversioners. Suppammal sold under Ex. III some lands for Rs. 150 and the amount was spent for the marriage of the plaintiff's father who was the nearest reversioner at that time. He was Suppammal's husband's father's brother's son. Ex. III was attested by the plaintiff's father. Suppammal died in 1904 and the present suit was brought on 3-9-1918.

The contention of Mr. Vinayaka Rao is that the widow was not justified in spending for the marriage expenses of the plaintiff's father. As observed by the learned District Judge we are not in possession of all the facts and all the circumstances which induced the widow to defray the expenses of the marriage of the plaintiff's father. If all the facts were before the Court it would no doubt be in a position to say whether the plaintiff's father was a member of the widow's household or not and whether she was bound to see that he was married. In the absence of such evidence it would not be proper to hold that the widow was not justified in selling her husband's property for the marriage expenses of the nearest reversioner. Ex. III has been attested by the plaintiff's father. That being so I think it is for the plaintiff to make out either the plaintiff's father was not living with the widow or that the widow went out of her way in order to defray the expenses of the plaintiff's father's marriage.

It is significant that the alienation was not challenged at all till 1908 and the answer to that is that the plaintiff was a minor but the plaintiff's father himself could have challenged the alienation if he thought that the alienation was not a proper one. It would not be right at this distance of time to allow the plaintiff to rely upon the bare fact that the plain-

tiff's father was only a reversioner and the widow met the expenses without proof of all the circumstances which existed at the time. The plaintiff himself is the issue of that marriage and it is rather startling that he should be allowed to put forward the contention that his father should not have married at the time he did or that the widow should not have met the expenses of his father's marriage. Mr. Vinayaka Rao relies upon *Narainbati* v. *Ramdhari Singh* (1). The facts of this case are quite different from the facts of that. Here, as I said above, we are not in possession of all the facts of the case and the circumstances connected with the plaintiff's marriage. Both the Courts have found that the alienation was under such circumstances as would bind the reversioners. In this connexion reference may be made to *Vinayak* v. *Govind* (2) in which Sir Lawrence Jenkins held that an alienation for the marriage expenses of the plaintiff's father who was only a bandhu was binding upon the reversioners.

Taking all these circumstances into consideration I am not prepared to differ from the finding of the Courts below that the alienation was for a purpose which would bind the reversioner.

This Second Appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1916] 20 C.W.N. 734=1 P.L.J. 81=34 I.C. 277=3 P.L.W. 377.
(2) [1901] 25 Bom. 129=2 Bom. L.R. 820.

A. I. R. 1926 Madras 1079

PHILLIPS AND ODGERS, JJ.

(*Chilakalapudi*) *Moolaswami* and *others* —Defendants 2-4—Appellants.

v.

Gurram Tatayya—2nd Plaintiff—Respondent.

Second Appeal No. 106 of 1923, Decided on 15th December 1925, from the decree of the Addl. Sub-J., Rajahmundry, in A. S. No. 88 of 1921.

Minor—Decree against, passed through negligence of guardian—Suit to set it aside is maintainable—Proper remedy is not review under Civil P. C., O. 47, R. 1.

A suit to set aside a decree passed against a minor through the gross negligence of his guardian is maintainable and review is not the appropriate remedy: *Field J.*, in 12 *Cal.* 69, *Diss. from*; *A. I. R.* 1922 *Mad.* 273, *Foll.* [P 1080 C 1]

K. Ramamurthi—for Appellants.

G. Lakshmanna—for Respondent.

Phillips, J.—This is a suit by the first plaintiff to set aside a decree in a prior suit brought by his guardian during his minority and for recovery of the suit property. The lower appellate Court has found that the earlier decree was obtained owing to the gross negligence of the 1st plaintiff's guardian and has consequently held that it is not binding on the 1st plaintiff nor upon his legal representative, the 2nd plaintiff.

Objection is taken both to the finding of fact that there was gross negligence and also to the procedure adopted by the plaintiffs. In coming to the finding that there was gross negligence, the lower appellate Court has found that the 1st plaintiff's guardian put forward a false recital in the plaint, made a false admission in the appellate Court and omitted to adduce most important evidence which was within her power. On these facts I must accept the finding that there was gross negligence.

As regards the second point, it is contended on the authority of *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) that the proper procedure was for the plaintiffs to apply for review of the decree in the first suit and not by way of a separate suit. The judgment of Field, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) does certainly seem to take this view, but his observation is purely obiter and is not supported by any very cogent arguments. He merely states that the provisions of the Code of Civil Procedure relating to review are sufficiently wide to include such a case. He does not state to which particular provision he refers, although the section relating to review contains various grounds on which review may be granted. He also appears to draw a distinction between a minor's remedy for setting aside a decree obtained by fraud or collusion and his remedy against a decree obtained by gross negligence. He does not give any authority for this distinction. This dictum was approved in *Beni Prasad* v. *Lajja Ram* (2) but in that case also it was unnecessary for the decision of the suit. In a recent case in this Court,

(1) [1885] 12 Cal. 69.
(2) [1916] 38 All. 452=35 I.C. 63=14 A.L.J. 438

Punnayya v. *Viranna* (3), the view of the Calcutta Court was dissented from and it was held that the plaintiff could maintain a suit if the guardian ad litem had seriously neglected his interests. With all respect, I agree with the view taken in that case and accordingly dismiss the appeal with costs.

Odgers, J.—I agree. I do not think that any good ground has been shown for distinguishing a case of gross negligence on the part of the guardian of the minor from that of fraud and collusion. The case cited in support of the distinction is *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) where Field, J., observes that

> if an infant desires to have a decree set aside on the ground that his next friend had neglected his interests and had not put forward on his behalf good grounds of defence which were available, the proper procedure would be to apply for review;

and in the opinion of the learned Judge the provisions of the Civil Procedure Code were sufficiently wide to include such a case. He does not, however, explain within what particular clause of what is now O. 47, R. 1, the matter would fall and it is to be noted that this is an opinion expressed obiter in the course of his judgment which does not seem to have been concurred in by the other Judge. The suit was dismissed on the ground that the plaintiff failed to establish any case of fraud and no decision has been cited to us where a suit has been dismissed on the ground that the proper remedy in such a case was to come by way of review and not by suit.

The judgment in *Beni Prasad* v. *Lajja Ram* (2) adopts the Calcutta decision but it is also noteworthy that there the learned Judges held that even if they were to hold that a minor could avoid a decree solely on the ground of gross negligence, they did not think that in the case before them, gross negligence had baen established. Reference was also made to *Gregory* v. *Molesworth* (4), in which it was held that a minor could come by what was then called a bill of review. This seems to have given some ground to the appellant in this case for supposing that the word "review" is the same in the old equity practice as it is in the Code of Civil Procedure. This, I think, would be an exceedingly dangerous analogy to proceed upon. We know that in the Chancery, proceedings were commenced by a bill, whereas on common-law side they were commenced by a writ. I therefore agree with the decision of Spencer and Ramesam, JJ., in *Punnayya* v. *Viranna* (3), where they dissent from the opinion expressed by Field, J., in *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (1) and hold that the plaintiff was entitled to maintain a suit, if the Court was satisfied that his guardian ad litem had seriously neglected his interests.

On the question of fact I have nothing to add and I agree with Phillips, J., that the appeal must be dismissed with costs.

Appeal dismissed.

(3) A. I. R. 1922 Mad. 273=45 Mad. 425.
(4) [1748] 3 Atk. 627.

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* A. I. R. 1926 Madras 1080

PHILLIPS AND MADHAVAN NAIR, JJ.

Ammasi Goundan—Appellant.

v.

P. L. V. V. R. Subramania Chettiar and *another*—Respondents.

Appeal No 149 of 1924, Decided on 18th March 1926, from the order of the Dist. J., Coimbatore, in I. A. No. 134 of 1923.

* (a) *Provincial Insolvency Act* (1920), *S.* 59, —*Sale by Receiver—Receiver cannot set aside.*

The Official Receiver has no power to set aside a sale held by him of the insolvent's property. [P 1080 C 2]

* (b) *Provincial Insolvency Act* (1920), *S.* 59—*Sale by Receiver—Fraudulent misrepresentation by creditor is no ground for setting aside.*

Fraudulent misrepresentation by one of the creditors is not a ground for setting aside a sale. The principle of caveat emptor applies in such a case. [P 1081 C 1]

K. V. Krishnaswamy Iyer—for Appellant.

T. M. Krishnawami Iyer—for Respondents.

Judgment.—In this case the Official Receiver sold certain property belonging to an insolvent and the appellant was the purchaser. On the appellant's representation that he had bid under a misapprehension the Official Receiver set aside the sale. One of the creditors then applied to the District Court to cancel this order and confirm the sale; and this has been done. The District Judge held that the Official Receiver had no power to set aside the sale and he held also on the merits that there was no good ground for setting aside that sale.

So far as the Official Receiver's power to set aside the sale is concerned, we think the District Judge was right. The auction ended in a contract with the purchaser, which he was bound to perform, and which might have been enforced by him if the conditions had been different. It was then represented to the District Court that the Official Receiver's order should be treated as a reference to the Court and that the Court should dispose of the reference on its merits. Although the District Judge remarks that it is impossible to treat this order as a reference, he has found that there is no sufficient ground for setting aside the sale.

We are now asked to direct the Court to treat the application as a reference by the Official Receiver and dispose of it on the merits. As the District Judge has already expressed his opinion on the merits, it would be useless to send it back for trial. The only ground alleged for setting aside the sale is the misapprehension of the purchaser as to the value of the property. It is not suggested that he was misled either by the Official Receiver or by any officer of Court. He merely alleges fraudulent misrepresentation by one of the creditors and that is not a ground for setting aside a sale. The principle of caveat emptor certainly applies in this case. There are no sufficient grounds for setting aside the sale.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1081

ODGERS, J.

(Yepuri) Venkamma—Appellant.

v.

Pabbisetti Parthasarathi & Brothers—Respondents.

Second Appeal No. 1242 of 1923, Decided on 16th April 1926, from the decree of the Sub-J., Kistna, D/- 19th February 1923, in A. S. No. 319 of 1922.

(a) *Civil P. C., S. 47—Benamidar.*

A benamidar is neither a party nor the representative of a party under S. 47. [P. 1081, C. 2]

(b) *Limitation Act, S. 14—S. 14 should be liberally construed—Dismissal of suit for declaration on the ground that possession is not prayed for—Time taken for prosecuting the suit can be deducted.*

The interpretation of S. 14 should be a wide one. Where, in a prior suit for declaration of title, possession was not prayed for and the suit was dismissed as not maintainable on that ground:

Held: that the defect was of a nature similar to a defect of jurisdiction and that time taken for prosecuting that suit can be deducted under S. 14. [P. 1082. C. 1]

K. Kameswara Rao—for Appellant.

V. Suryanarayana—for Respondents.

Judgment.—In this appeal the questions of law are short though the facts are complicated. The suit was to declare that a decree in O. S. No. 1154 of 1925 brought by the 2nd defendant against three persons, viz., 1st defendant, K. Rangayya and S. Kannayya, was obtained by fraud and does not bind the plaintiff in the present suit. He also asks for possession. The defences set up are S. 47, Civil P. C., limitation and lis pendens. Both the Courts have now held that Defendants 2 and 3 are the benamidars of S. Kannayya, the father of the 1st defendant, and the original owner of the house in question. This question which was the subject of Issues 1 and 2 was strenuously fought in both the lower Courts, and being a question of fact cannot be raised in second appeal. But the learned vakil for the appellant (3rd defendant) now wants to take advantage of that finding and say that a benamidar is either a party or the representative of a party under S. 47, Civil P. C. He has referred to *Guar Narayan* v. *Sheolal Singh* (1) for the explanation of the position of a benamidar by the Privy Council. But their Lordships nowhere say that he is either such a party or representative under the section and no authority for that proposition has been produced before me. It perhaps should be mentioned in this connexion that it was contended that the plaintiff who obtained a decree in S. C. S. No. 18417 of 1915 in the Madras Small Cause Court against the original owner of the house should be confined to execution proceedings on that decree and was prevented by the section from bringing another suit. The point fails.

The second question is one of limitation, namely, the time that has elapsed since O. S. No. 163 of 1917 which the plaintiff brought for a declaration of his title when he was obstructed by certain persons, two of whom seem to have been Defendants 2 and 3. The suit was held

(1) [1918] 46 Cal. 566=49 I. C. 1=23 C. W. N. 521 (P. C.).

not to be maintainable because it contained no prayer for possession. The question is whether the time taken in prosecuting this suit by the plaintiff can be deducted in his favour under S. 14 of the Limitation Act. The District Munsif held that it could. This was also the opinion of the Subordinate Judge who, however, thought that Art. 138 of the Limitation Act which allows 12 years was preferable. If this applies there is no question of limitation, but it is contended that S. 14 cannot be applied because O. S. No. 163 of 1917 was entirely misconceived. The proviso to S. 42 of the Specific Relief Act states that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so. The learnad District Munsif was of the opinion that this was a defect of a nature similar to the defect of jurisdiction. It seems that by the proviso to S. 42 of the Specific Relief Act, the Court is deprived of the discretion of granting a declaratory decree in such cases. It, therefore, seems to me to be rightly said to be of the nature of a defect in jurisdiction. It has been held that the interpretation of S. 14 should be a wide one and there is no doubt on the findings in the present case that the plaintiff was bona fide litigating for his rights in O. S. No. 163 of 1917 transposed as O. S. No. 24 of 1920: See *Kunhikutti Ali* v. *Kunhammad* (2).

It must be observed that the appellant here claimed an independent title and that the 2nd defendant having put in a claim petition which was disallowed, Ex. C, on 11th July 1916, and having brought no suit under O. 21, R. 63, cannot now be heard to say that the sale to the 1st plaintiff is not binding upon him (2nd defendant) and his vendee, the 3rd defendant: See also *Surnamoyi Dasi* v. *Ashutosh Goswami* (3). It must be observed that the 2nd defendant claimed title to the property independently by virtue of transactions that took place long before the attachment made by the plaintiff in execution of the decree. I fail to see with the Subordinate Judge how the question of lis pendens comes in. Second defendant had no title to the property. Consequently the question whether the plaintiff's purchase was affected does not arise. It seems to me that on all these grounds the judgment of the Subordinate Judge was right and the second appeal must be dismissed with costs of 1st plaintiff.

Appeal dismissed.

(2) A. I. R. 1923 Mad. 247.
(3) [1900] 27 Cal. 714.

A. I. R. 1926 Madras 1082

PHILLIPS AND ODGERS, JJ.

Appana Prakasa Rao—Appellant.

v.

Yelamarti Ramanna and *others*—Respondents.

Second Appeal No. 872 of 1923, Decided on 16th December 1925, from the decree of the Sub.-J., Rajahmundry, in A. S. No. 69 of 1922.

Transfer of Property Act, S. 100—Discharge of incumbrance by private purchaser after attachment in execution—Such purchaser has a charge for the amount of incumbrance, but the sale is void under Civil P. C., S. 64.

Where the plaintiff took a sale of the suit property after it had been attached by the defendant and then discharged the encumbrance on the property which was subsequently sold and purchased by the defendant,

Held: that inasmuch as the plaintiff's sale was after the attachment it is void as against the defendant's interests under S. 64, Civil P. C., but that the plaintiff was entitled to have a charge upon the property for the amount of incumbrance discharged by him: 29 *Cal.* 154, *Appr.* [P 1083, C 1]

G. Lakshmanna and *P. Panini Rao*—for Appellant.

P. Bapirazu, *K. Ramamurthi* and *K. Kameswara Rao*—for Respondents.

Phillips, J.—The first objection taken by the appellant (1st defendant) is to the Subordinate Judge's finding that the plaintiff paid Rs. 2,000 in discharge of the mortgage, Ex. B, on the ground that the mode of payment proved is at variance with the mode set out in the plaint. It is alleged that the plaintiff put forward the case of cash payment and that the proof was "by adjustment of a debt." There is nothing in the plaint, nor in the sale deed obtained by the plaintiff to justify the statement that cash payment and cash payment only was intended. The finding therefore must be accepted.

Accepting the finding, it is then argued that the plaintiff is not entitled to be subrogated to the rights of the mortgagee paid off by him. A long argu-

ment has been addressed to us as to the rights of a mortgagee and the assignee of a mortgagee to discharge an encumbrance or keep it alive, but in the present case it is unnecessary to enter into that question for the present case is concluded by authority. The facts of this case are very similar to those in *Dinobhandhu Shaw Chowdhury* v. *Jogmaya Dasi* (1). In the present case the plaintiff took a sale of the suit property after it had been attached by the 1st defendant. He then discharged the encumbrance on the property. The property was subsequently sold and purchased by the 1st defendant. Inasmuch as the plaintiff's sale was after the attachment it is void as against the 1st defendant's interests under S. 64, Civil P. C., and the plaintiff now only seeks to enforce the mortgage right of Rs. 2,000 which he discharged. In the case in *Dinobhandu Shaw Chowdhury* v. *Jogmaya Dasi* (1), the facts are almost the same except that in that case the owner of the property had executed a second mortgage after the attachment and the consideration for the second mortgage, or a part of the consideration was the discharge of two earlier mortgages. It was held by their Lordships of the Privy Council that a mortgagee was entitled to be subrogated to the rights of the mortgagees who had been paid off. The principle is laid down as follows :

> When the owner of an estate pays charges on the estate, which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. The intention may be found in the circumstances attending the transaction or may be presumed from a consideration of the fact whether it is or is not for his benefit that the charge should be kept on foot.

Here, undoubtedly it is for the plaintiff's benefit that the charge should be kept on foot, and consequently this decision of the Privy Council is applicable to the present case. I may also mention that that case has been extended to the case of a sale by the Allahabad High Court in *Jamilunnissa* v. *Pitambar Das* (2). The principle has also been followed by this Court in several other cases *Chamaswami* v. *Padala Anandu* (3); *Syamalarayudu* v. *Subbarayudu* (4), etc. The Subordinate Judge was therefore quite right in giving the plaintiff a charge on the property.

It is next contended that the charge should have been given not only on the suit property but on the other property also which was included in the mortgage, Ex. B. The question was not raised in either of the lower Courts and it is a question which cannot be determined here without further trial. When the plaintiff's lien is enforced against the property in the hands of the 1st defendant it would then be open to the latter to put forward any claims to which he is entitled to for contribution from any other parties.

In the result the appeal is dismissed with costs two sets (plaintiff and 7th Respondent).

Odgers, J.—I agree that the matter is concluded by the decision in *Dinobhandu Shaw Chowdhury* v. *Jogmaya Dasi* (1) and *Jamilunnissa* v. *Pitambar Das* (2).

Appeal dismissed.

(1) [1901] 29 Cal. 154=29 I. A. 9=6 C. W. N. 209 (P. C.).
(2) [1913] 18 I. C. 704.
(3) [1908] 31 Mad. 439=18 M. L. J. 306.
(4) [1897] 21 Mad. 143.

A. I. R. 1926 Madras 1083

RAMESAM, J.

(*Thommil Pudia Malikkal*) *Kathyumma*—Petitioner.

v.

Thommil Pudia Malikkal Muhammad Kutty and *others*—Respondents.

Civil Revision No. 677 of 1924, Decided on 16th March 1926, from the order of the Dist. J., South Malabar Dn., in C. M. A. No. 69 of 1923.

(a) *Civil P. C., O. 47, R. 2—Accidental Slip—Review can be entertained by successor.*

A review petition on the ground of an accidental slip is entertainable before the successor of the Judge who disposed of the case.

[P. 1084, C. 1]

(b) *Civil P. C., S. 115—Revision does not lie from an order on the ground of accidental slip under O. 47, R. 2.*

The order of the the trial Judge who purports to act on the ground of "accidental slip" does not contravene the provisions of O. 47. R. 2, and therefore the order is not revisable on that ground.

[P. 1084, C. 1]

K. Krishna Menon—for Petitioner.

S. Ranganadha Aiyar — for Respondents.

Ramesam, J.—I think the order of the District Judge is not sustainable. The District Munsif passed an order directing the review of the original judgment in the case on the ground that there was "an accidental slip" in the decree. A review petition on the ground of an accidental slip is entertainable before the successor of the Judge who disposed of the case (O. 47, R. 2). Only if the ground is other than accidental slip or discovery of fresh evidence such petition cannot be entertained by a successor. Hence, in this case, the order of the District Munsif who purports to act on the ground of "accidental slip" does not contravene the provisions of O. 47, R. 2 and, therefore, the District Judge cannot revise the order of the District Munsif on this ground : (see *Meduru Brahmayya* v. *Vedula Yellamma* (1). The correctness of the Munsif's conclusion that there was an accidental slip is not a point that can be considered by the appellate Court. The District Judge has acted without jurisdiction in allowing the appeal on this ground. Mr. Ranganadha Aiyar for the respondents points out that there are other grounds in his appeal memorandum, e. g., ground No. 5 which may be considered by the District Judge (O. 47, R. 7, Cl. (c). The order of the District Judge is reversed and the case remanded for disposal in accordance with the above observations. The respondents will pay the costs in this Court. Other costs will abide the result.

Case remanded.

(1) [1916] 4 L. W. 408=31 M. L. J. 509=36 I. C. 437=(1916) 2 M. W. N. 278.

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* A. I. R. 1926 Madras 1084

SPENCER AND RAMESAM, JJ.

Secretary of State—Defendant—Appellant.

v.

Garapati Somayya — Plaintiff—Respondent.

Appeal No. 102 of 1923, Decided on 30th April 1926, from the decree of the Sub-J., Kistna, in O. S. No. 91 of 1921.

* (a) *Tort—Master and servant—Secretary of State—Wrong order passed by District Magistrate under Motor Vehicle Rules—Secretary of State is not liable.*

Where a District Magistrate, who was authorized under Madras Motor Vehicles Rules to issue or cancel permits to motor busses outside Madras City, cancelled plaintiff's permit and it was contended that the cancellation was improper.

Held : that even assuming that he committed an error of judgment in cancelling the license, the Government is not on that account liable for damages, as, in issuing the license and in cancelling it the District Magistrate was acting in pursuance of a statutory authority vested in him : 28 *Bom.* 314 and 39 *Mad.* 781, *Foll.* 40 *Bom.* 200 ; 28 *Mad.* 213 ; 7 *Mad.* 466 (*F.B.*) and 40 *Cal.* 452, *Dist.* [P. 1085. C. 1]

(b) *Civil P. C., S. 35—Suit against wrong party hence dismissed—Defendant must get his costs.*

When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued and the suit fails, the defendant should get his costs. [P. 1086 C. 1]

(c) *Madras Motor Vehicles Rules—Rules ought to be clear as to the place of inspection and the officer in charge of inspection. (Per Ramesam, J.)*

It is desirable to make the Madras Motor Vehicles rules clear that there is some officer who is bound to inspect the car. The rules should also be made clear whether the owner of the car should take the car to the place which is his headquarters, or whether the officer may fix a place for the inspection, or whether the owner of the car should go in search of the officer.

It is very inconvenient to have a rule which requires a man to have his car inspected by a certain person, but there is nobody bound to inspect the car. [P. 1086 C. 2]

C. V. Ananthakrishna Aiyar—for Appellant.

K. Kameswara Rao—for Respondent.

Spencer, J.—The plaintiff in this suit was the owner of two motor-busses called "The Republic" and "The Albion" which plied between Ellore and Chintalpudi. He instituted this suit against the Secretary of State for India represented by the Collector of Kistna for unliquidated damages caused to him by the improper cancellation of his license. Under the Madras Motor Vehicles Rules, which have the force of law, the District Magistrate is vested by R. 30 with the power of issuing permits in Form G for motor vehicles which are intended to be let or applied for hire outside the city of Madras. One of the conditions in Form G is that the owner of the vehicle, if it be a motor bus, shall arrange for its examination once in every six months by a person approved by the District Magistrate. It appears that the District Magistrate cancelled the license for the bus "Republic" because it was not examined by the District Board Engineer as required by the permit.

It was found by the Judge in the lower Court that the District Board

Engineer was a little negligent in not inspecting the car when it was produced for inspection. Assuming, however, that the District Magistrate committed an error of judgment in cancelling the license and that the blame for the bus not being examined as required by the conditions of the permit lay more with the Engineer than with the plaintiff, the question for our decision is whether the Government is on that account liable for damages. The District Magistrate, both in issuing the license and in cancelling it, was acting in pursuance of a statutory authority vested in him. In such a case it was held in *Shivabhajan* v. *Secretary of State* (1) and *Ross* v. *Secretary of State* (2), that the Government was not liable for the conduct of it servants. Sadasiva Aiyar, J., in the latter decision pointed out that the Crown could not be made liable for the action of a Government servant purporting to act under a statutory power conferred upon him, because his action when he purports to exercise a statutory power is not as agent of the Crown and he quotes the leading case of *Tobin* v. *The Queen* (3).

In *Shivabajan* v. *Secretary of State* (1) a Chief Constable seized goods in pursuance of a statutory power vested in him under S. 550 of the Criminal Procedure Code. The goods being perishable were not forthcoming when the plaintiff demanded them. The learned Judges referred to the liability under Statute 21 and 22 Vict. Ch. 106 which now are represented by the Government of India Act, S. 32. In that case, as in the present case, it could not be contended that the act of the Chief Constable was in any sense productive of benefit to the revenue of the Government, nor was it a transaction out of which profit could be derived, and the Government had not ratified or adopted the act. In the present case the Government derived no profit by the cancellation of the license. This case does not resemble the case in *Wasappa Timmappa Sonagar* v. *Secretary of State* (4) where the Government retained the proceeds of the sale of property which rightfully belonged to the plaintiff. Nor is it like the case in *Mothi Rungaya Chetty* v. *Secretary of State* (5) where the Post Office were held liable as carriers of value payable parcels when they delivered a parcel without obtaining payment from the consignee and remitting the value to the sender. *Vijaya Ragava* v. *Secretary of State* (6) was an instance where the Government removed a Municipal Commissioner for misconduct. The act which the Judges treated a tort was an act of the Government itself and not of one of its servants. The soundness of the decision has been doubted.

Kailash Chandra Nag v. *Secretary of State* (7) was a case where the plaintiff sued to recover money illegally collected by a Deputy Collector when the Act only authorized the District Magistrate to apportion the tax due on account of a punitive police force. That was an instance where the Government servant concerned was not acting in pursuance of a statutory authority. I am, therefore, of opinion that the learned Subordinate Judge was right in holding that the Government was not responsible for the act of the District Magistrate in cancelling the permit, assuming that the District Magistrate acted in error in so doing. That concludes the case as regards the bus "Republic."

The permit for the bus "Albion" appears to have never been issued to the plaintiff though it was signed by the District Magistrate, and the failure to issue it was due to the plaintiff's delay in producing the registration certificate which he was required to have under R. 2 of his license, which declares that

> No motor Vehicle shall be used or allowed to be used in a public place unless it has been registered in accordance with these rules or any other rules under the Act having application to the Madras Presidency.

The result is that the memorandum of objections fails and is dismissed with costs.

The Government have preferred an appeal on the question of costs in the lower Court which were disallowed. The ground that appears in the Subordinate Judge's judgment for disallowing the costs is that the plaintiff had sunk a

(1) [1904] 28 Bom. 314=6 Bom. L.R. 65.
(2) [1916] 39 Mad. 781=31 I.C. 224=29 M. L. J. 280.
(3) [1864] 16 C. B. (N.S.) 310=33 L. J. C. P. 199=10 Jur. (N.S.) 1029=10 L.T. 762=12 W.R. 838.
(4) [1916] 40 Bom. 200=31 I.C. 498=17 Bom. L. R. 979.
(5) [1905] 28 Mad. 213=15 M.L.J. 226.
(6) [1884] 7 Mad. 466 (F.B.).
(7) [1913] 40 Cal. 452=17 C.L.J. 216=18 I.C. 112=17 C.W.N. 315.

large amount of capital in motor-bus service and was put to an immense loss for no fault of his. This reason for disallowing costs would be a good one if the suit had been instituted against the right defendant. When the plaintiff institutes a suit against a party who shows that he is in no way liable to be sued and the suit fails, the defendant should get his costs. The appeal must, therefore, be allowed and the suit is dismissed with costs here and in the lower Court.

Ramesam, J.—I agree; but I wish to add a few words. I do not think that the cancellation of the permit in the case of "Republic" by the District Magistrate on account of a breach of the conditions in the permit can be described either as a breach of contract, or a tort, the District Magistrate being an officer on whom the duty of issuing permits was imposed by statutory rules. The case of a contract such as *Mothi Rungaya Chetty* v. *Secretary of State* (5), in which the Post Office undertakes to carry insured parcels, or the case relating to a tort, cannot, therefore, apply. Nor is this a case where the Government has received money belonging to the plaintiff wrongfully collected as in *Kailash Chandra Nag* v. *Secretary of State* (7). I think, therefore, the suit is rightly dismissed as against the Secretary of State for India.

On the merits, I wish to make one observation. So far as the "Albion" was concerned no permit was issued to the plaintiff. What was done was only the passing of a conditional order for the issue of a permit and the plaintiff must thank himself for not producing the registration certificate which ended in the cancellation. As to the "Republic" it appears that the District Board Engineer wrote to the plaintiff saying that he would go to Ellore on the 7th of July and asking him to keep the car ready for inspection. The plaintiff had the car ready for inspection; but the Engineer did not go there. Afterwards the plaintiff sent letters to the District Magistrate on the 22nd and 23rd of August and a telegram on the 20th of September. This is alleged in paragraph 7 of the plaint, and this fact is not denied in the written statement. It may be that the plaintiff thought that the District Board Engineer was a subordinate of the District Magistrate. We know that the District Board Engineer is a subordinate only of the President, District Board, and not of the District Magistrate though the same individual may fill both offices. But the plaintiff seems to have thought that it is the business of the District Magistrate to have the car inspected through the Engineer who was his subordinate. In doing so, no doubt he fell into a mistake. Still it looks as if the plaintiff, who was ready to have his car inspected could get nobody to inspect it and, therefore, the permit was cancelled.

It may be that the District Magistrate is technicelly right in cancelling the permit because no certificate was produced. The District Board Engineer, in his examination, says that it was not obligatory on him to inspect the car though he also adds that he never declined. As the facts of this case are somewhat obscure and, at any rate, it does not appear that reminders were sent to the District Board Engineer, I do not want to make it appear that my further remarks apply to this case. I think it is desirable to make the rules clear that there is some officer who is bound to inspect the car. The rules should also be made clear whether the owner of the car should take the car to the place which is his headquarters, or whether the officer may fix a place for the inspection, or whether the owner of the car should go in search of the officer. Unless these things are made clear, I think the vagueness of the rules will make it possible to so manoeuvre the situation as to catch a man technically and deprive him of the renewal of his permit. I do not think it ought to be possible for anybody to say that it is not obligatory on him to inspect. It is very inconvenient to have a rule which requires a man to have his car inspected by a certain person, but there is nobody bound to inspect the car. I do not mean that these remarks do apply to this case. I say that the rules should not be in an indefinite form.

I agree with my learned brother's order both as regards the appeal and the memorandum of objections.

Appeal allowed.

* A. I. R. 1926 Madras 1087

DEVADOSS, J.

Rao Bahadur Ottur Vasava Menon (died) and *others*—Appellants.

v.

Valia Konikkilidathil Tavazshi Karnavan Kelu Achan—Respondent.

Second Appeal No. 1360 of 1923, Decided on 30th April 1926, from the decree of the Sub-J., South Malabar, in Appeal Suit No. 127 of 1920.

* (a) *Transfer of Property Act, S. 83—Mortgagor doubtful as to which of the co-mortgagees is entitled to mortgage money—He can request Court to determine the proper payee—In such case deposit is valid.*

If there is a dispute among the co-mortgagees as to who was entitled to receive the money and give valid discharge and the dispute is of such a nature that it could not be determined by a layman as to who the real person entitled was the mortgagor can deposit the money in Court to decide and pay the amount to the person who may be entitled. But, where there is no such dispute, it is not open to the mortgagor to deposit the money in Court and ask the Court to determine who should receive it. In such a case the mortgagors only invite trouble on themselves if the deposit is not found to conform to the requirements of S. 83, and they must bear the loss occasioned by the procedure by way of interest, after the date of deposit.

[P 1087 C 2, P 1088 C 1]

(b) *Malabar Law—Tarwad—Karnavan effectively represents whole family unless his powers are curtailed by special arrangement.*

The karnavan of a Malabar tarwad stands in an exceptional position. He is the only person entitled to represent the family and demise the property belonging to the family and to give a discharge in respect of outstandings due to the family. No doubt his powers could be curtailed by an arrangement entered into among the members of the family. But such an arrangement affects the members of the family only and not strangers unless strangers are also parties thereto. [P 1088 C 1]

T. Ramachandra Iyer—for Appellant.
K. P. M. Menon—for Respondent.

Judgment.—The only question in this Second Appeal is whether the appellants who are the mortgagors should pay interest to the mortgagees subsequent to the date of Exhibit E, a petition presented by the appellants under S. 83 of the Transfer of Property Act. The learned Subordinate Judge held that the appellants were bound to pay interest subsequent to the date of Exhibit E as they did not deposit the money under S. 83 so as to enable the persons entitled to the money, i. e., the mortgagee's representatives, to draw it from Court.

The appellants mortgaged the properties to the tarwad of Defendants 1 and 2. At the time of the execution of the mortgage deed the karnavan was one Pangi Achan. Some time after, he was removed from the position of karnavan and the 1st defendant was appointed karnavan. Under an arrangement entered into between the appellants and the mortgagees it was arranged that the appellants should be in possession of the mortgaged property and should pay pattom in lieu of interest. Under an arrangement among the members of the mortgagee's tarwad, Exhibit 1 in 1894, it was arranged that the pattom money should be collected by the 2nd defendant. When the appellants wanted to redeem the property, they deposited the mortgage amount in Court and stated that Defendants 1 and 2 were entitled to receive the money and that they should be asked to receive the amount and return the documents of title. The Court dismissed the petition under S. 83 as the 2nd defendant was not entitled to the money and as the deposit did not satisfy the terms of S. 83. Thereupon the appellants brought a suit for redemption. The Subordinate Judge held that in as much as the deposit under S. 83 was not a proper deposit as the 2nd defendant also was included in the petition, the appellants must pay interest subsequent to the date of Exhibit E.

The first point urged is that there was a dispute between Defendants 1 and 2, the de jure Karnavan and anandravan who was asked to manage some of the properties, and that the appellants were justified in depositing the money in Court. No doubt, if there was a dispute among the members of the defendants' family as to who was entitled to receive the money and give a valid discharge, or if there was any dispute at the time, which could not be determined by a layman as to who the real person entitled was, the plaintiffs could deposit the money in Court and ask the Court to decide and pay the amount to the person who may be entitled. But where there is no such dispute among the members of the mortgagees' family, it is not open to the mortgagors to deposit the money in Court and ask the Court to determine who should receive it. In such a case the mortgagors only invite trouble on themselves if the deposit is not found to

conform to the requirements of S. 83, and they must bear the loss occasioned by the procedure which they have adopted. In this view of the case, I do not think the decisions in *Subba Rao* v. *Pakkiammal Nadathi* (1) and *Nagathal* v. *Arumugam Pillai* (2), to one of which I was a party, apply.

The next contention put forward is that there was a karar among the members of the defendants' family and under that karar the 2nd defendant was entitled to receive the money and inasmuch as the pattom hod been paid for over 20 years to the 2nd defendant, the mortgagors (plaintiffs) had reason to believe that the 2nd defendant was entitled to receive the mortgage amount. The plaintiffs were not parties to the karar and they had no business to concern themselves with the terms of a document to which they were not parties. Any arrangement inter se between the members of the mortgagee's family is not binding on the mortgagors, unless they were parties to the arrangement or unless they consented to abide by it. Granting for argument's sake that the karar is a document on which the plaintiffs can rely there is nothing in the document to show that the 2nd defendant was entitled to receive the mortgage amount. Under Exhibit I it was arranged that certain amounts should be collected by the 2nd defendant, the senior anandravan, and that he should meet certain expenditure and be accountable to the first defendant de jure karnavan. There is nothing in the document to show that the power of the karnavan as such was taken away by any of the recitals. The karnavan of a Malabar tarwad stands in an exceptional position. He is the only person entitled to represent the family and demise the property belonging to the family and to give a discharge in respect of outstandings due to the family. No doubt his powers could be curtailed by an arrangement entered into among the members of the family, but the karar in this case does not at all curtail the powers which he possesses as the karnavan to give a discharge in respect of outstandings due to the family. The mortgage amount was paid by the tarwad and it was money belonging to the tarwad and the only person who could give the discharge in respect of that outstanding was the 1st defendant. That being so, it was not open to the appellants to rely upon the karar as substantiating the position that the 2nd defendant was entitled to the money. In this view, it is unnecessary to consider in detail the cases quoted by Mr. Menon for the respondents. I shall only refer to them to show the position taken up by the respondents. In *Cheria Pangi Achan* v. *Unnalachan* (3) this karar was construed and it was held by a Bench of this Court that the karnavan's powers as such were not taken away by the karar and the 2nd defendant, the senior anandravan, was only to manage certain matters connected with the tarwad. In *Karunakara Menon* v. *Kutti Krishna Menon* (4) it was held that the powers of a karnavan, unless expressly taken away by any document or by any arrangemeut entered into among the members of the family, his powers would subsist. I may also in this connexion refer to *Madhavi Amma* v. *Kunhi Pathumma* (5) which supports the contention of the respondent.

I, therefore, hold that the karar does not deprive the karnavan of the ordinary powers, which he has to give a discharge in respect of outstandings due to the family and therefore the 1st defendant is the only person who could have given proper discharge to the appellants for the amount due to the family and the appellants were not therefore justified in including the name of the 2nd defendant in their petition, Exhibit E, which they presented to the Court with the deposit of the money under S. 83. As already observed, the plaintiffs ought not to have taken into consideration Exhibit I to which they were not parties, and as they have relied upon that document they have only to thank themselves if the basis of their contention gives way.

In the result, the appeal fails and is dismissed with costs.

Appenl dismissed.

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(1) A. I. R. 1924 Mad. 453.
(2) A. I. R. 1923 Mad. 354.
(3) [1917] 32 M. L. J. 323=(1917) M. W. N. 185=38 I. C. 513=5 L. W. 392.
(4) [1917] 5 L.W. 511=38 I. C. 666=(1917) M. W. N. 342.
(5) [1900] 23 Mad. 510.

A. I. R. 1926 Madras 1089

SPENCER AND ODGERS, JJ.

(*Gopisetti*) *Veeraswami* and *others*—Defendants 1 and 3 to 13—Appellants.

v.

Sagiraju Seetharama Kantayya—Plaintiff—Respondent.

Second Appeals Nos. 1099 to 1103 of 1921, 1186 of 1922, and 1442 of 1923, Decided on 22nd January 1926, from the decrees of the Sub-J., Kistna, in A. S. Nos. 95, 97, 94, 92 and 122 of 1920 and 3 of 1922, and the decree of the Sub-J., Narsapur, in A. S. No. 128 of 1922.

(*a*) *Practice—Jurisdiction.*

No Court can confer jurisdiction on itself by wrongly deciding facts necessary to be proved to determine a question of jurisdiction.

[P 1089 C 2

(*b*) *Madras Estates Land Act, Ss.* 3 (2) (*e*) *and* 189—*Suits by Mokhasadars to eject their tenants—Mokhasas included in computing assets of zamindari in which they were situated at Permanent Settlement—Mokhasas are permanent under-tenure of the zamindari and hence estates—Civil Courts have no jurisdiction.*

Certain Mokhasadars filed suits to eject their tenants. The mokhasas in question were situated in a zamindari and were not excluded at the time of the Permanent Settlement from consideration in computing the assets of the zamindari in which they were situated.

Held; they were still held on a permanent under-tenure of the zamindari and were estate within the meaning of S. 3 (2) (e), and therefore suits by the Mokhasadar to eject their tenants were excluded from the jurisdiction of the civil Courts: 38 *Mad.* 620, *Rel. on.* [P 1091 C2]

(*c*) *Madras Estates Land Act, S.* 4—*Service land.*

Section 4 does not include service land at all.

[P 1093 C 1]

(*d*) *Evidence Act, S.* 35—*Taylor's report on resumability of mokhasas in Madras Presidency*

Mr. Taylor's report about the resumability of mokhasas in the Madras Presidency and the Government order thereon are entitled to great weight: *A. I. R.* 1924 *Mad.* 589, *Rel. on.*

[P 1092 C 2]

A. Krishnaswami Aiyar and *P. Bapiraju*—for Appellants.

V. Ramadoss and *K. Venkataramana Raju*—for Respondent.

Spencer, J. — These suits were brought by certain mokhasadars in the Kistna District to eject their tenants; and the first question that came up for decision at the trial was whether the villages in question were portions of an estate within the definition of the Madras Estates Land Act. Under S. 3 of that Act an "estate" means consisting of one or more villages of any of the estates specified in Cl. (a) which is held on a permanent under-tenure.

The three villages concerned in this suit, Goteru, Surampudi and Komaravaram are admittedly situated within the ambit of the zamindari of Nuzvid. They were in existence before the Permanent Settlement of 1802. The District Munsif was of opinion that they were even more ancient than the zamindari in which they are situated. The question whether they are held on a permanent under-tenure from the zamindar must depend on whether the revenue from these mokhasas was taken into consideration in computing the assets of the zamindari at the time of the Permanent Settlement. As the question of the civil Court's jurisdiction over these suits has been raised, we have no alternative but to decide it in these proceedings even though the question whether the land was or was not excluded from the assets of the zamindari may resemble a question of fact. No Court can confer jurisdiction on itself by wrongly deciding facts necessary to be proved to determine a question of jurisdiction.

A similar question came up for decision in *Lakshminarasimham* v. *Veerabhadrudu* (1), and it was decided therein that certain other mokhasas situated in the same zamindari of Nuzvid were part of an estate as defined in S. 3 (e) of the Madras Estates Land Act and that a suit by a landholder mokhasadar against his tenants would lie only in a revenue Court. We are informed that that decision is at present under appeal to His Majesty in Council. In any case the question has to be freshly decided in these appeals upon the records available and on the evidence taken at the trial.

I may first refer to the Fifth Report from the Select Committee on the Affairs of the East India Company which in Appendix No.18 contains the instructions issued in 1799 to Collectors in the Presidency of Fort St. George for the Permanent Settlement which was carried out in 1802. The Government set out the object of making the settlement as constituting the zamindars proprietors of their respective zamindaries as estates, fixing the jumma or land tax in perpetuity, abolishing all uncertainty of the amount

(1) A. I. R. 1924 Mad. 589.

and all disorder and confusion in the collections, removing opportunities for exaction and collusion and simplifying intricacies in the details of the revenue business. The Government state in para. 17 that they have resolved to adopt statements of the Circuit Committee as the general standard and in other paragraphs they announce their intention of fixing the assessment, exclusive and independent of all duties and taxes and other collections known as "Sayer," including Abkari or tax on the sale of intoxicating liquor, and excluding the salt revenue and independently of all existing alienated lands, whether exempt from the payment of public revenue, with or without due authority (the village maniams, or land held by public and private servants in lieu of wages, excepted). Then in para. 16 they state :

All allowances of cauzees and Government revenue officers (curnums excepted) heretofore paid by landholders, are to be added to the amount of jumma, and to be provided for by Government, under prescribed regulations.

In para. 25 they state :

All private lands at present appropriated by the zamindars and other landholders to the subsistence of themselves and families, as well as all lands held by private servants and dependents will be considered as forming part of the Sircar land, and therewith responsible for the public jumma.

It may be seen from this that the only allowances of revenue officers excepted were those of karnams. In Reg. 25 of 1802, which introduced the Madras Permanent Settlement, Karnams were specially provided for. Under S. 11 they could only be removed from their offices by a Court of Judicature ; and Reg. 29 of 1802, which was enacted simultaneously, contained a similar provision in S. 5. The object of the Government in so providing for the village karnams apparently was that the services of these village officials were necessary after the introduction of the Permanent Settlement for Government purposes as well as for those of the zamindar, and they had a duty to render to both masters in keeping correct accounts of the cultivation and the payment of assessment.

The three villages of Goteru, Surampudi and Komaravaram were held as Deshmuks or Deshpandya mokhasas. These Deshmuks or Deshpandyas were originally collectors of revenue under the zamindarse. After the Permanent Settlement the Government would naturally look only to the zamindar for the realization of the revenue due to them and would have no necessity to retain any officials to collect the revenue for them from the cultivators of the land. In 1860 the Government entered into an enquiry whether the mokhasa villages in the Masulipatam division of the Kistna district were resumable, and in this connexion Mr. Taylor, the Inam Commissioner, sent a report filed as Ex. III. He reported that

these mokhasas, 208-1/2 in number, were grants made by the ancient zamindars to their relations, dependants or caste men and peons.

He added :

Some mokhasas are likewise held by Mazumdars and Deshpandies, the former revenue servants of the zamindars, who have long ceased to perform any service.

His report goes on to refer to the statements prepared by the Circuit Committee, the Special Commissioner's report on the Permanent Settlement of the Nuzvid and Charamahal zamindaries and the statement accompanying it ; and he comes finally to the conclusion that the contention of the zamindar that the revenues of these villages were included in the assets of the zemindari was correct. He observed that there was no ground for classing these mokhasas with lakhiraj lands excluded by the sanad. The Board of Revenue and the Government agreed with Mr. Taylor, and the question of claiming reversionary right to the villages was dropped.

Now Ex. YYYY, referred to in Mr. Taylor's report, shows these three villages of Goteru, Surampudi and Komaravaram with their average revenue. The total average revenue of all these villages for eight years comes to pagodas 22,101, fanams 20 and cash 12-3/8. This figure appears again in the abstract Ex. 21 (b) under the head of the Nidadavole Phargana and the foot-note states :

The mokhasa villages and grants being immediately under the zamindar and given or resumed when he pleases are included in Government collections.

Exhibits YYYY (1) is a statement of receipts of revenue for four years from Fasli 1205 to 1208, corresponding to 1794 to 1798. This shows that the average receipt perannum was 909 Madras pagodas, and 15 fanams from which a deduction of 834 Madras pagodas and 12 fanams is made as payment made by the Mirasidars to the Sircar leaving seventy five Madras

pagodas and 3 fanams as net receipt by the Mirasidars per annum. The learned District Munsif was of opinion that Mr. Taylor made a mistake in thinking that the full value of the mokhasas was included in the Government collections. He thinks that the fact that the mokhasadars retained 75 pagodas as remuneration for their offices makes all the difference. There is no doubt that these 75 pagodas formed the average perquisites of Deshmuks or Deshpandyas and that they were service-holders in that respect. But there is nothing on record to show what was done with these 75 pagodas. If this sum represented their remuneration for collecting revenue, the instructions of the Collectors were not to exclude it from the assets because it represented the allowances hitherto paid by the landholders and in future to be provided for by Government. In *Rajah Nilmoni Singh Deo* v. *Government* (2) Sir Barnes Peacock, C. J., of Bengal, observes that Government, would not have allowed any portion of their revenue in consideration of private services to be rendered to the Zemindar, and this observation was repeated in the judgment of the Judicial Committee in *Rajah Nilmoni Singh* v. *Bikranath Singh* (3).

The lower Courts referring to S. 4 of Regulation 25 of 1802 have endeavoured to class these mokhasas under the head of lakhiraj lands or other lands paying only quit rent. Mr. Ramadoss argued that the amount of quit rent would include anything less than the full assessment and that the amount might vary according to the grant. He referred us to *Veerabhadrayya* v. *Sonti Venkanna* (4), which was a case of an inam excluded from the zemindari assets at the time of the Permanent Settlement which was consequently not an estate within the meaning of S. 3 of the Madras Estates Land Act. This is begging the question which has to be decided. There is no doubt that if an agraharam or mokhasa is excluded from the assets of the zamindari it is not an under-tenure; but from the documents already referred to it is clear that these mokhasas continued to be part of the zemindari estate after the Permanent Settlement was brought into force. In *Venkata Narasimha Appa Rao Bahadur* v. *Sobhanadri Appa Row Bahadur* (5) the Judicial Committee observe that the records of the Circuit Committee could not affect the rights as between the mokhasadars and the Zemindar, but they, however, agreed with the High Court in thinking that they might be good evidence with reference to the system upon which the Government claimed to deal with the Zemindar's property, and it is that question that has fallen to be decided in the present cases. As there appears to be no doubt that the mokhasas in question owned by the plaintiffs in these suits were not excluded at the time of the Permanent Settlement from consideration in computing the assets of the zemindari, it follows that they are still held on a permanent under-tenure of the Nuzvid zemindari and, therefore, these suits are by S. 189 of the Madras Act I of 1908 excluded from the jurisdiction of the civil Courts. It may follow incidentally that under S. 6 of that Act the persons in occupation of ryoti land have acquired permanent occupancy, but this is not for us to decide in the present appeals. Nor is it necessary in these proceedings to make any pronouncement whether the Zemindar has a subsisting right to resume these mokhasas seeing that the Zemindar is not a party and the point does not directly arise.

The appeals are allowed and the decrees of the District Munsif and the Subordinate Judge are reversed and the District Munsif will be directed to return the plaints to the plaintiffs for presentation in a Court having jurisdiction to try the suits. The appellants will get their costs from the respondents throughout.

Odgers, J.—The same question arises in all these appeals. I agree with the judgment just pronounced by my learned brother, but as we are differing from both the lower Courts, I will add a few observations of my own. The learned District Munsif proceeded on the assumption that Mr. Taylor overlooked the fact that the amount retained by the mokhasadars as remuneration for their office

(2) [1866] 16 W. R. 121.
(3) [1883] 9 Cal. 187=9 I. A. 104=4 Sar. 335 (P. C.).
(4) [1913] 24 M. L. J. 659=20 I. C. 769=(1913) M. W. N. 782.
(5) [1905] 29 Mad. 52=33 I. A. 46=16 M. L. J. 1=8 Sar. 397 (P. C.).

was excluded from the computation [e. g., Ex. YYYY (1)] and it was that that made all the difference. The learned Subordinate Judge agreed with this view, namely, that only the jodi payable to the Zamindars was taken into account in fixing the peishcush. Both the Courts seem to have proceeded on the view that, because these mokhasa villages were probably earlier in date than the existence of the zemindari in which they are admittedly situated, therefore they must necessarily be excluded from the zemindari and are therefore not estates within the meaning of the Madras Estates Land Act. It seems to me equally probable that, although these villages may not strictly be grants by a zamindar to their relations or dependants and all we have to go by is the recital in Ex. YYYY (1) that these villages have been in existence for 400 years when the zamindari came into existence these villages were adopted so to speak by the zemindar as undertenures from him and almost certainly with the duty of service attached to them on the part of the mokhasadars. There is evidence in this case that the services required from these mokhasdars were Deshmukh. The villages were so described in Ex. YYYY (1) and the mokhasadars are described as Deshpandyas or collectors of revenue under the zamindar.

It seems to me, therefore, that we have a case of mokhasa villages practically in the position of grants of inams for personal service, and if that is so, *Sri Raja Parthasarathi Appa Rao Bahadur* v. *Secretary of State* (6) is authority for the position that prima facie these villages form part of the estate of the zamindari and are resumable by the zamindar and not by Government. This is the opinion of Mr. Taylor in the proceedings of the Madras Government, 1860, Ex. III, and it seems to me that we ought not lightly to put aside this opinion which was adopted by Government, Ex. IV, following as it did the conclusions of the Circuit Committee. The argument on the other side depends on the table in Ex. YYYY (1) which shows that the total average receipts from these three villages were 909 Madras pagodas per annum, of which 834 was the amount paid by the mokhasadars to the sircar and the balance 75 pagodas is classed under the heading of "Net Receipts by the Mirasidars per annum." It is contended by Mr. Ramadoss for the respondents in accordance with the judgments of the lower Courts that we must take 834 pagodas as a favourable rent and, therefore, as outside the operation of S. 3 (*e*) of the Madras Estates Land Act. It seems to me to be equally arguable that of the total collection of 909 Madras pagodas 834 was the rent actually payable in cash and 75 was the rent received by or payable to the zamindar in kind; that is to say, that 75 pagodas was allowed off the rents in respect of the services rendered by the mokhasadars. The Circuit Committee says that services are not to be excluded. See Fifth Report by Firminger, page 174, paragraph 16, which are instructions issued by the Madras Government in October, 1799, when undertaking the Permanent Settlement, and in paragraph 17 it is stated that it had been resolved to accept the statement of the Committee of Circuit as the general standard. Reference is made to the footnote to Ex. XXI (*b*), an abstract of the revenue collections taken by the Circuit Committee, namely, that the mokhasa villages and grants being immediately under the zamindar and given or resumed when he pleases are included in Government (therefore zamindar's) collections. The revenue retained by the present mokhasadars after payment of the usual proportion is 8,362 Madras pagodas, 17 F. 65 C. That is dealt with by Mr. Taylor in paragraph 4 of Ex. III and he adds:

> This is also borne but by the villagevar accounts of the Circuit Committee.

There seems to us, therefore, to be no good reason why Mr. Taylor's Report and the Government Order thereon which have been frequently referred to and relied on by Courts in this Presidency see for latest example *Lakshminarasimham* v. *Veerabhadrudu* (1), should not be adopted. The investigation of the Circuit Committee took place about 1780, or 150 years ago. Mr. Taylor's report was 65 years ago. These investigators and especially the Circuit Committee were a great deal nearer the origin of these zamindaris than we are to-day and no doubt information avail-

(6) [1913] 38 Mad. 620 = 26 M. L. J. 39 = 21 I. C. 871=(1913) M. W. N. 959.

able to them is no longer available to-day. In my opinion, therefore, the greatest weight ought to be given to these reports and opinions, and it seems to me impossible to say that from the fact that 75 Madras pagodas is shown as a receipt by the mirasidars, that the balance must be taken as favourable rent and that the former sum cannot be considered to be a service rent. S. 4 of the Madras Estates Land Act does not include service land at all. For these reasons, I am of opinion that the decisions of both the lower Courts were wrong and the appeals must be allowed. I agree with the order proposed in this behalf by my learned brother.

Appeals allowed.

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* A. I. R. 1926 Madras 1093

DEVADOSS AND WALLER, JJ.

(Renumasta) Subbaraju — Plaintiff—Appellant.

v.

Indukuri Narayanaraju and *others*—Defendants—Respondents.

Letters Patent Appeal No. 111 of 1924, Decided on 3rd March 1926, from the judgment of Madhavan Nair, J., reported in *A. I. R.* 1925 *Mad.* 321.

(a) *Family settlement entered into in the interests of members—Strong evidence is necessary to set it aside.*

When a family arrangement is brought about in the interests of the members of a family, it would require very strong grounds to set it aside at the instance of any one of the parties to the arrangement. [P 1094 C 2]

* (b) *Hindu Law—Adoption—Inducements by offering sufficient for maintenance of adoptor and adoptee does not render the adoption invalid.*

The adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. If a person is asked to adopt a boy by the promise of sufficient means to maintain himself and the boy, the adoption induced by such promise will not militate against the rules of Hindu Law governing adoptions. [P 1094 C 2]

* (c) *Hindu Law — Adoption — Collateral arrangement between adoptor and adoptee's natural father does not make the adoption invalid.*

A proper act when properly done should not be declared invalid or set aside by reasons of anything which took place not between the contracting parties but between third persons interested in the contracting parties.

An adoption cannot be declared invalid by reason of any collateral arrangement of contract entered into between the adoptor and the adoptee's natural father, for it would do incalculable harm to the adopted boy if the adoption is to be declared invalid by reason of any arrangement between persons over whom he had no control (*Case law referred to.*) [P 1095 C 2 P 1096 C 2]

(d) *Contract Act, S. 23—Compromise in suit stating that one of the parties should take in adoption a particular boy—Compromise is valid—Family settlement—Clause is not penal with in S. 74.*

The plaintiff's father living in the family of of his father-in-law and looking after the cultivation of his properties was given a fourth share by the three sons of his father-in-law in a partition after their father's death. The sons of one of the three sons instituted a suit against the plaintiff for the recovery of a portion of land on the ground that the granting of a share to the plaintiff by their father was not binding on them, with the other members of the family as parties. According to the terms of a compromise in suit, effected between the parties, plaintiff was to adopt the son of one of the defendants within two months from the date of compromise and if he did so he was to enjoy the entire property which fell to his father's share but on failure to take the boy in adoption he was to retain only one-half of the property. The plaintiff failed to take the boy in adoption and consequently was dispossessed of half the properties in execution of the compromise decree. In a suit for the recovery of these properties on the ground that the compromise is not binding on him.

Held : that the compromise was a bona fide family settlement and not opposed to public policy and that the clause in the compromise that the plaintiff should retain one-half of the properties and give back the other half on failure to adopt the boy was not a penal clause. [P 1093 C 2 P 1094 C 1]

T. M. Krishnaswami Aiyar and *K. Venkatrama Raju*—for Appellant.

S. Varadachari, P. Somasundaram and *V. Suryanarayana*—for Respondents.

Devadoss, J.—The appellant's father Appalaraju was taken into the family of his father-in-law and he lived with him as a member of the family. Appalaraju and his three brothers-in-law effected a division of the family properties and Appalaraju was given one-fourth share in them. In 1911 Defendants 1 and 2 herein instituted a suit against the appellant for the recovery of 9 acres of land on the ground that the granting of a share of the joint family property by their father was not binding upon them as Appalaraju was not a member of the joint family. To that suit the other members of the family were parties. The suit was compromised and a razinama decree was passed on 22nd January 1922. According to the terms of the razinama, the plaintiff should adopt Thimmaraju, the second son of the plaintiff (1st plaintiff in the previous suit) within two

months from the date of the razinama and if he did so he should enjoy the entire property which fell to his father Appalaraju's share and if he should fail to take the boy in adoption he should retain only one-half of the 27 and odd acres and and the other half should go to the plaintiffs. The appellant failed to take the boy in adoption and he now sues for the recovery of half of the 27 and odd acres on the ground that the razinama is not binding on him as it was brought about by fraud. The question of fraud is found against and the only point that is now urged for setting aside the razinama is that it is opposed to public policy and, therefore, the appellant is entitled to get back the 14 acres of which he was dispossessed in execution of the razinama decree. Madhavan Nair, J., held that the razinama was a bona fide family settlement and it could not be impeached by the appellant.

The main contention urged on behalf of the appellant is that the term as regards taking the boy in adoption is opposed to public policy as no one can be compelled to make an adoption and any consideration paid for taking a boy in adoption is illegal and opposed to the Hindu Law. The admitted facts are, the appellant's father Appalaraju was the son-in-law of Subbaraju. He belonged to a different family and on his marrying the daughter of Subbaraju he was asked to live in the family and look after the cultivation. It is immaterial to consider now whether Appalaraju brought the properties of his own family and made them part of his joint family property. After the death of Subbaraju the three sons effected a division of the family property and gave Appalaraju a fourth share. The grandson by one of the three sons of Subbaraju attacked the arrangement on the ground that their father had no right to give away a portion of the family property to a stranger of the family and the other members of the family supported the contention of the plaintiffs. In order to bring about peace in the family and in order to prevent further litigation and loss, arbitrators settled the disputes between the parties in a way which was considered satisfactory to all of them.

If the suit went against the present plaintiff (the 1st defendant in the suit of 1911) he would have lost not only the 9 acres claimed by the plaintiffs in their suit but the 18 and odd acres which represented the share of the two brothers-in-law of Appalaraju. The appellant was allowed to retain all the properties that were given to his father by his maternal uncles on condition that he should adopt the second son of the 1st plaintiff within two months and if he did so all the property which fell to the share of Appalaraju should be enjoyed as joint family property of the plaintiff and his adopted son and that if he failed to do so half of the property in his possession should be delivered to the plaintiffs. When an arrangement of this kind is brought about in the interest of the members of a family, it would require very strong grounds to set it aside at the instance of any one of the parties to the arrangement.

The appellant was childless at the time. His wife is a daughter of one of the sons of Subbaraju. As he was childless he would have naturally liked to adopt some boy and Defendants 2 to 7 wished that the appellant should adopt one of the sons of the family so that the appellant might remin in the family and that his line should be perpetuated without in any way disturbing the peace of family. Can it be said in those circumstances that the arrangement was illegal and one that was opposed to public policy? It is argued by Mr. T. M. Krishnaswami Aiyar for the appellant that an adoption should be a voluntary act, that no person should be forced or coerced into making an adoption, and that no inducement should be held out for making an adoption. The adoption of a boy is a religious act and is one which is necessary for the salvation of the soul. If a person is induced to do what is necessary for his salvation and the salvation of his ancestors, could his act be considered illegal? If a person is asked to adopt a boy by the promise of sufficient means to maintain himself and the boy, I do not think that the adoption induced by such promise would be invalid, or would militate against the rules of Hindu Law governing adoptions. If an inducement is made to a man to adopt a boy whom he could not adopt or whose adoption would be of no avail to him the matter would be different. But where the boy suggested is a proper person to be adopted, any proper inducement to him would not invalidate the

adoption. It is well settled that if a person promises to settle some property or give a sum of money on condition or in case that the other person marries the promisor's daughter or any girl in whom he is interested not only would the marriage be valid but the promisee would be entitled to enforce against the promisor the promise whereby he was induced to marry the girl. This principle is stated by Lord Chancellor Lyndhurst in *Hammersley* v. *De Biel* (1).

The principle of law, at least of equity, is this—that if a party holds ont an inducement to another to celebrate a marriage and holds them out deliberately and plainly, and the other party consents, and celebrates the marriage in consequence of them, if he had good reason to expect that it was intended that he should have the benefit of the proposal which was so held out, a Court of Equity will take care that he is not disappointed, and will give effect to the proposal.

The promise to settle some property or to give a certain sum of money on the promisee marrying a particular individual is enforceable in law both in England and in India. It is difficult to see why an adoption which takes place by reason of a promise to pay a certain sum of money or settle some property on the adoper is opposed to public policy. As observed by Chandavarkar, J., in *Shri Sitaram Pandit* v. *Shri Harihar Pandit* (2).

A boy is adopted by a sonless Hindu for perpetuating his line; paying off his dues to his ancestors, keeping up his name, and securing for him and his ancestors a place in heaven. These are sacred purposes according to the Hindu Shastras.

That being the object of an adoption, an inducement to a man to adopt a proper boy is not an improper or an illegal act, and an adoption taking place under an inducement is not invalid.

What is urged before us is that it restrains the plaintiff-appellant from adopting whomsoever he liked and such a restraint is improper. There was no restraint on the appellant's adopting anybody before the razinama was entered into. It was only for the sake of the peace of the family and for the benefit of the appellant that he was asked to take the second son of the 1st plaintiff in adoption. It was open to him to have refused to consent to such a condition in which case the plaintiffs in that suit might have succeeded in getting a decree in their favour. It cannot, therefore, be said that the appellant's discretion was fettered by any arrangement as that evidenced in the razinama.

Great reliance is placed upon *Eshan Kishar Acharjee* v. *Harish Chandr. Chowdhry* (3) for the position that no consideration should be given for taking a boy in adoption and that taking a boy in adoption for a consideration paid to the father would make the adoption invalid. In that case it was held that:

An adoption of a son after payment of price is not recognized in the present, the Kali Yuga. The only adoption now recognized is that of the dattaka son, or son given. A contract to give a son in adoption, in consideration of an annual allowance to the natural parents is void under S. 23 of Act IX of 1872, inasmuch as the contract, if carried out, would involve an injury to the person and property of the adopted son, and would defeat the provisions of the Hindu Law.

The plaintiffs therein wanted to enforce a contract which was entered into at the time when the boy was given in adoption. The adoption itself was not declared invalid, but it was held that the plaintiffs could not sue on the contract. An adoption cannot be declared invalid by reason of any collateral arrangement of contract entered into between the adoptor and the adoptee's natural father, for it would do incalculabla harm to the adopted boy if the adoption is to be declared invalid by reason of any arrangement between persons over whom he had no control. By adoption the adopted boy loses his rights in the natural family and if the adoption is declared invalid he could not acquire any rights in the adoptive family, and it would not be proper to visit on the adopted boy the sins of the natural father and the adoptive father, for the adoptee in the dattaka form is a minor and is not in a position to have a say in the matter of the arrangement between them. It is upon this principle that a boy who is taken in adoption under an agreement which is unenforceable in law is held good and the arrangement is considered to be collateral. If the adoption is otherwise good, that is to say, if the adoptor could make a valid adoption, if the adopted boy was a proper person and if the ceremony of adoption was properly performed, it is

(1) [1845] 12 Cl. & F. 45.
(2) [1910] 35 Bom. 169=8 I. C. 625=12 Bom. L. R. 910.
(3) [1874] 13 B. L. R. App. 42.

opposed to natural justice that the doption should be set aside for anything which preceded the adoption.

In *Murugappa Chetty* v. *Nagappa Chetty* (4) it was held that the receipt of money by the natural father in consideration of giving his son and the payment of such by the adoptive father though illegal and opposed to public policy, do not make the adoption invalid, as the gift and acceptance of the boy is a distinct transaction clearly separable from the illegal agreement and payment. Such payment has not the effect of converting the adoption into an "affiliation by sale, a form now obsolete." Mr. Justice Subramania Aiyar, who delivered the judgment in that case, referred to the practice which prevailed among a certain class of people of taking money consideration for giving a boy in adoption. In every case of adoption the natural father expects some benefit for himself or for his son and nobody would think of giving a boy in adoption to a pauper. Mercenary consideration enters into most transactions like adoption and marriage, and the adoption or marriage is not rendered invalid merely because persons other than the contracting parties or persons interested in them have a mercenary motive. What the law refuses to recognize is the contract or agreement whereby third persons who are not parties to the transaction try to acquire monetary benefit by promoting it.

Even the adoption of an only son has now been held to be valid, however reprehensible that may be, according to the strict mentions of Hindu jurists. The Court always try to give effect to an arrangement which is irrevocable and are very reluctant to set aside such an arrangement, unless the arrangement itself is illegal or opposed to public policy. In *Venkata Krishnayya* v. *Lakshmi Narayana* (5) it was held that, although a marriage when performed in the Asura form is valid, an agreement to pay to the father any consideration for such marriage is not valid and the money cannot be recovered by a suit. If the money had been paid and the marriage solemnized, the money could not be recovered. In *Devarayan* v. *Muthuraman* (6) it was held an arrangement between *A* and *B* that *B's* daughter shall marry *A's* son and that, if she fails to do so, *B* shall pay a sum of money to *A*, is opposed to public policy and void under S. 23, Indian Contract Act. These cases illustrate the principle that a proper act when properly done should not be declared invalid or set aside by reason of anything which took place not between the contracting parties, but between third persons interested in the contracting parties.

The next contention urged is that the clause in the razinama is a penal clause and, therefore, should be relieved against. The clause is :

> If for any reason if the 1st defendant should fail to make an adoption in the said manner, the 1st defendant should enjoy as rightful owner only one-half out of the entire property mentioned in the plaint schedule, that is, acres 27-79-1/2 and the house according to good and bad qualities, that the 1st defendant should deliver possession of the remaining half of the property to the plaintiffs for being enjoyed by them.

The appallant if he failed in the suit of 1911, would have lost the whole of his property. By the agreement he was allowed to retain the whole of the property if he adopted the boy. By adopting the boy the appellant's share would be one-half of 27 odd acres as the adoptive son would be entitled to an equal-share and by not adopting the boy his share is not taken away. It is to his advantage to make an adoption and if he adopted the particular boy he would get for the boy half the suit property. Whether he makes an adoption or not the share to which he would be entitled would be the same. It is, therefore, not easy to conceive how the clause could be said to be a penal clause.

It is next urged that the plaintiff if he succeeded would be only entitled to one third of 29–79 acres and his share being one-half nearly 14 acres if the adoption did not take place the clause should be considered a penal clause. As already pointed out it was a family arrangement and it must have been considered an equitable arrangment at the time. It is suggested that for costs and other reliefs 5 acres more were arranged to be given to the plaintiffs in case the adoption did not take place, and as we have no materials before us as to why 5

(4) [1905] 29 Mad. 161=16 M. L. J. 22.
(5) [1908] 32 Mad. 185=3 I. C. 554=18 M. L. J. 403 (F. B.).
(6) [1912] 37 Mad. 393=24 M. L. J. 310=18 I. C. 515=(1913) M. W. N. 200.

more acres were to go to tha plaintiffs in the suit in case the adoption did not take place, we cannot consider the contention and family arrangement such as this should not be lightly upset. We concur in the reasoning of the learned Judge and the conclusion he arrives at, namely, that this is an equitable arrangement. There was no conflict between duty and interest in this case. On the other hand, the appellant of his own free will consented to make the adoption and in order to benefit the boy to be taken in adoption the plaintiffs agreed to allow him to retain the property in the suit and if he did not make the adoption he was to lose the advantage which was promised to him.

In the result the appeal fails and is dismissed with costs of Respondents 1 and 2.

Waller, J.—There is, to my mind, nothing that is contrary to public policy in the agreement which was intended to settle a family dispute. It cannot be said that the appellant was either induced or forced by it to make an adoption. If he adopted he took half the property and the adopted son took the other half. If he failed to adopt, he still took half the property. Whichever course he followed, the result was, as far as he was concerned, the same. He gained no more by adopting than he did by refusing to adopt. There was, therefore, no improper inducement to adopt. He lost nothing by not adopting. There was therefore, no penalty for his failure to do so. I agree that the appeal must be dismissed with costs of Respondents 1 and 2.

Appeal dismissed.

A. I. R. 1926 Madras 1097

DEVADOSS AND WALLER, JJ.

(Lammaboyina) Ramadas—Accused—Petitioner, *In re.*

Criminal Revision No. 536 and Criminal Revision Petition No. 450 of 1925, Decided on 1st February 1925, from the judgment of the Sub-Divl. Mag., Narasaraopet, in C. C. No. 12 of 1925.

Madras Forest Act (1882), *S.* 21 *(d)*—*"Permits cattle to trespass"—Owner of cattle is not guilty merely because his cattle trespassed—Absence of reasonable cause on his part to prevent cattle trespassing must be proved—When absence of reasonable care is proved, onus is on owner to prove that he took reasonable care.*

A person certainly cannot be said to permit cattle to trespass into a reserve forest, unless he knows that such trespass is likely to be committed and neglects, with such knowledge, to take measures to prevent it. The essence of the offence consists either in misfeasance, as in the case of one wilfully pasturing cattle, or in a malfeasance as in his neglecting to take proper measures to prevent the cattle trespassing in circumstances from which it may reasonably be inferred that such trespass might have been foreseen or known as the probable consequences of his negligence. The owner of the cattle cannot be found guilty merely because his cattle were found in the reserve forest. But it is not necessary that there should be an overt act on his part to make him guilty.

The onus of proving that he did not "permit" his cattle is not upon the owner. In every case it is for the Magistrate who tries the case to find on the evidence whether the accused by some act or omission or by negligence allowed or permitted the trespass, and if from the prosecution evidence he could presume that the owner failed to take such care as a prudent owner is expected to take, then the onus of proof that he took all reasonable care to prevent cattle trespassing, or that the trespass was in spite of his care, or against his orders, would be on the owner. [P. 1098, C. 1, 2, P. 1099, C. 1]

B. Jagannathadoss—for Petitioner.

Adams—for the Crown.

Order.—The petitioner was convicted under S. 21 (d) of the Forest Act 5 of 1882 and sentenced to pay a fine of Rs. 200. His appeal to the Sessions Judge of Guntur was rejected on the ground that no appeal lay against the conviction in a summary trial, when the fine did not exceed Rs. 200. The petitioner has preferred this revision petition.

The contention on behalf of the petitioner is that the Deputy Magistrate has not correctly applied the law to the facts of the case and that the mere finding of the petitioner's flock of goats grazing within the forest reserve would not by itself make the owners of the goats punishable under S. 21 (d). Under that section "any person who pastures cattle or permits cattle to trespass" is punishable with imprisonment for six months or with fine which may extend to Rs. 500 or with both. The statement of the law in paragraph 4 of the Deputy Magistrate's judgment,

I hold that, as the rightful owner of the flock, the accused is responsible for its action and that his paid servants or agents cannot be solely taken to task. The word 'permit' used in the section has to be interpreted in its broadest sense and includes all the acts which, though

done without his explicit orders, are such as to be guarded against

is not correct. The expression "permits his cattle to trespass" means something more than the cattle trespassing within the forest reserve. In order to make the owner liable, there must be something more than the mere finding of his cattle within the forest reserve. If the owner, knowing that the cattle would trespass into the forest reserve, neglects to take proper care of his cattle, or knowing that his servants would take the cattle to the reserved forest, does not forbid them from doing it, or knowing that his servants might take his cattle to the reserved forest connives at it, then he might be said to permit the cattle to trespass; but where without his knowledge, or against his orders, his servants allow cattle to trespass into the forest reserve, he cannot be held to be guilty. In this case it is a question of fact whether from the circumstances the Magistrate as a judge of fact, can come to the conclusion that the accused by his act or by his negligence permitted or allowed his cattle to trespass into the forest reserve.

If the law is as stated by the Magistrate, then the owner of cattle would be liable even if his enemy, without his knowledge, or his servant, in spite of his orders, drives his cattle into the forest reserve. The law has been correctly stated by Muthuswami Iyer, and Brandit, JJ., in *In re Uthanlevara Vathiar* (1) as follows:

A person certainly cannot be said to permit cattle to trespass into a reserve forest, unless he knows that such trespass is likely to be committed and neglects, with such knowledge, to take measures to prevent it. The essence of the offence consists either in a misfeasance, as in the case of one wilfully pasturing cattle, or in a malfeasance as in his neglecting to take proper measures to prevent the cattle trespassing in circumstances from which it may reasonably be inferred that such trespass might have been foreseen or known as the probable consequences of his negligence.

In *Queen-Empress* v. *Krishnayyan* (2) all that the prosecution proved was that the defendant's cattle were found in a reserve. It was held that the accused was not liable. The decision, therefore, is correct, but, with great respect, we are unable to agree with the observation of the learned Judge that "the owner cannot be held liable unless some overt act of his be proved." It is not necessary that there should be any overt act. Omission to take reasonable precaution against trespass, knowing or having reason to believe that cattle would trespass into the forest reserve, would amount to permitting cattle to trespass within the meaning of S. 21 (d).

The learned Public Prosecutor relies upon *Rex* v. *Almon* (3), and contends that it is for the accused to show that there was no negligence on his part or that his servants acted contrary to his orders and that in the absence of such evidence the master is liable criminally for the acts of his servants and in that case the defendant was convicted for publishing a libel (Junius's Letters), in one of the magazines called "The London Museum" which was bought at his shop and even professed to be printed for him. Lord Mansfield stated the law thus:

That proof of a public exposing to sale and selling, at his shop by his servant, was prima facie sufficient; and must stand till contradicted or explained, or exculpated by some other evidence; and if not contradicted, explained, or exculpated, would be in point of evidence sufficient or tantamount to conclusive. Mr. Mackworth's doubt seemed to be "whether the evidence was sufficient to convict the defendant, in case he believed it to be true." And in this sense I answered it. Prima facie it is good, and remains so till answered. If it is believed and remains unanswered, it becomes conclusive. If it be sufficient in point of law and the juryman believes it, he is bound in conscience to give his verdict according to it.

This case has no application to the present. There the libellous publication was sold in the defendant's shop and purported to have been printed for him. It was open to him to prove that the sale was without his knowledge and that the printing was done either contrary to his orders or without his knowledge. The Libel Act of 1843, 6 and 7 Vic. Ch. 96, S. 7, has made it clear that

it should be competent to such a defendan to prove that such a publication was made witiout his authority, consent, or knowledge, andthat the said publication did not arise from wait of due care or caution on his part.

In the case of cattle trespassing within the forest reserve, the owner may be miles away from the reserve, and it cannot be said that the onus is upon hm to prove that it was done without his authority or knowledge. In ever case it is for the Magistrate who tries the case to find on the evidence whether the accused by some act or omission or by

(1) 1 Weir 762.
(2) [1892] 15 Mad. 156.
(3) [1770] 5 Bur. 2686.

negligence allowed or permitted the trespass. If from the evidence on the side of the prosecution, the Court could presume that the defendant, by his omission to take such reasonable care as the owner of cattle should take, allowed his cattle to trespass or knowing that the cattle would trespass failed to take such care as every prudent owner of cattle is expected to take, a prima facie case would be made out. Then the onus of proof that he took all reasonable care to prevent cattle trespassing, or that the trespass was in spite of his care or against his orders, would be upon him. If he fails to make out that, he should be held to be guilty. But the prosecution cannot succeed, by merely showing that a man's cattle was found within the forest reserve.

In this case, inasmuch as the Magistrate erred with regard to the statement of the law and convicted the accused without recording a finding that he either wilfully or negligently permitted the trespass or failed to take such care as would be necessary to prevent cattle trespassing into the forest reserve, the conviction cannot stand. We, therefore, set aside the conviction and direct that the accused be re-tried and the case disposed of according to law. The fine, if paid, will be refunded to the petitioner.

Re-trial ordered.

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* A. I. R. 1926 Madras 1099

SPENCER AND RAMESAM, JJ.

Ponnaia and *others*—Plaintiffs—Appellants.

v.

Secretary of State—Defendant—Respondent.

Appeal No. 165 of 1923, Decided on 16th April 1926, from the decree of the Sub-J., Sivaganga, in O. S. No. 64 of 1922.

(a) *Land Acquisition Act* (1894), *S.* 6—*Public purpose—Declaration under Cl.* (3) *is conclusive.*

The construction of a public road is prima facie a public purpose. Under S. (6), Cl. (3) the declaration in the Gazette is conclusive evidence of the fact that the road is required for a public purpose, and after such a declaration it is not open to the owner to contend in any Court that the land was not needed for a public purpose: *Wijevesekara* v. *Festing*, 1919 *A. C.* 646, *Foll.*

[P. 1100, C. 1]

* (b) *Land Acquisition Act* (1894), *S.* 6 (1), *Proviso—Payment of a particle only from public revenues is not sufficient compliance—Contributions from private individuals through public bodies may became part of public revenue—Money paid by private individual into public treasury for being paid as compensation money does not become public revenue.*

The Legislature, when they provided that a part of the compensation should be paid from public revenues, did not mean that this condition would be satisfied by payment of a particle. e.g., one anna in Rs. 5,985: *Chatterton* v. *Cave*, (1878) 3 *A. C.* 483, *Rel. on.*

Government, or a Local Body like the District Board, might receive contributions from private individuals and might spend the same upon public purposes, and such gratuitous contributions may be included in and become part of the public revenues under S. 6. But when money is paid into a Government Treasury by the hand of one private individual for the purpose of being used as compensation to be paid for the acquisition of land and after passing intact through the Treasury is paid out into the hand of another private individual it cannot with any accuracy be described as becoming part of the public revenues. Government has no absolute disposing power over it. Such money is not revenue due to Government on any land, nor is it any cess, tax, duty, custom or other due recoverable under Act 2 of 1864.

[P. 1100, C 1 2, P. 1103, C. 2]

* (c) *Land Acquisition Act* (1894), *S.* 6—*Proceedings not bona fide for public purpose—Provisions not complied with strictly—Proceedings do not create valid title to the land acquired.*

If the provisions, of the Land Acquisition Act are not strictly complied with, but are made a cloak for attempting to obtain a transfer of an indefeasible title under the guise of a public purpose, the proceedings do not operate towards the creation of a valid title to the land in Government: 18 *Cal.* 99 (*P. C.*), *Foll.*

[P. 1103, C. 2, P. 1104, C. 1]

S. Srinivasa Aiyangar and *V. Ramaswami Aiyar*—for Appellants.

Govt. Pleader—for Respondent.

Order.—This suit was brought against Government to obtain a declaration that the acquisition of the plaintiff's lands for the ostensible purpose of making a new road between Kallal and Managiri in the Ramnad district was illegal, void and not binding on the plaintiffs. It is contended on behalf of the plaintiff who are appellants before us, that the land acquisition proceedings were not valid and bona fide, but were undertaken at the instigation of one Karuppan Chetty, with whom the plaintiffs had a dispute at law as to the ownership of the land in question, in order, by indirect means, to deprive them

of the lands; that there was no necessity for diverting the course of the existing road instead of repairing it; and that the contribution from provincial revenues of one anna out of the total sum of Rs. 5,985 required for the acquisition was an indication of the illusory character of the object for which the provisions of the Act have been made use of.

Mr. S. Srinivasa Aiyangar conceded that the construction of a public road was prima facie a public purpose, but he he argued that the provision S. 6 of Act I of 1894, that the compensation should be paid wholly or purely out of public revenues, was intended to be a test of the good faith of Government and that a payment of about 1/90,000 part of the amount was not a real and bona fide compliance with the terms of the section. He could not contend that the land was not needed for a public purpose because S. 6, Cl. (3) enacts that the declaration in the Gazette is conclusive evidence of the fact, and it was held by the Privy Council in *Wijevesekara* v. *Festing* (1) that, after such a declaration, it was not open to the owner to contend in any Court that the land was not needed for a public purpose. The amending Act 38 of 1923, passed after the institution of this suit, contains an additional safeguard that any person interested in any land which has been notified may present an objection in writing to the Collector, upon which an enquiry has to be made and the case reported to the Local Government, whose decision upon the objection shall be final. The Subordinate Judge, who tried the suit, held upon the first issue that the Act did not require that a substantial part of the compensation should come out of public revenues and that, no matter how small the contribution might be, the requirements of S. 6 would be satisfied. We are unable to accept this as a correct view of the law. We consider that the Legislature, when they provided that a part of the compensation should be paid from public revenues, did not mean that this condition would be satisfied by payment of a particle. In *Chatterton* v. *Cave* (2) (a copyright case) the House of Lords were averse to putting such an interpretation on the words "or part thereof occurring in the Dramatic Copyright Act, 3 and 4 of William IV, as would make a part to mean a particle. Their Lordships observed that the words in the statute must receive a reasonable construction and were to be treated as implying some part that was substantial and material. We think that the Legislature, when they passed the Land Acquisition Act, did not intend that owners should be deprived of their ownership by a mere device of private persons employing the Act for private ends or for the gratification of private spite or malice.

The Government Pleader informed us that the defendant was prepared to prove that a substantial contribution was made towards the cost of the new road and that it was paid into the public Treasury for that purpose. He referred us to Ex. 1, which is a proceeding of the Collector directing the Tahsildar to collect the full amount of melwaram compensation from the Chetty, which may or may not be evidence that the sum that represented the reduction of peishkush due by the Sivaganga Estate to Government was collected from a private person and paid into the public revenues. Mr. Srinivasa Aiyangar was not prepared to deny that Government or a Local Body, like the District Board, might receive contributions from private individuals and might spend the same upon public purposes such as hospitals, schools or roads. Such gratuitous contributions may be included in and become part of the public revenues. S. 6 itself makes mention of funds controlled or managed by a local authority. In *Veeraragavachariar* v. *Secretary of State* (3) in which the legality of certain land acquisition proceedings was questioned in second appeal before Devadoss, J., there was a finding of fact that the cost of acquiring a site for Panchamas' houses was met out of public revenues. In the present case, no Government official has been examined as a witness to prove from what source the costs of acquisition was met, and whether any money was collected from private sources and paid into the treasury, and, if so, upon what terms the money was made over to Government, and whether it became the money of Government under their complete control to be expended as

(1) [1919] A. C. 646=88 L. J. P. C. 52=121 L. T. 1.

(2) [1878] 3 A. C. 483=47 L. J. C. P. 545 =38 L. T. 397=26 W. R. 498.

(3) A. I. R. 1925 Mad. 837.

they might deem fit on a public purpose such as that of improving a public communication by making a fresh alignment of an existing road.

As the lower Court dismissed the plaintiffs' suit upon a technical point which did not completely answer their contention that the acquisition was illegal, the Subordinate Judge will be directed to take such fresh evidence as either side may adduce to prove that the compensation paid in this case came wholly or partly out of public revenues, the allegation of the plaintiffs being that the Chetties kept the money required for the cost of acquisition with themselves, and the allegation of the defendant being that a fund was raised for a public purpose, which became part of the public revenues and was under the control either of the District Collector or the District Board. The Subordinate Judge will return his finding upon this point together with the evidence recorded by him within one month after the re-opening of this Court after the summer vacation; and the parties will be at liberty to file objections to the said finding within ten days after notice of the return of the same shall have been posted up in this Court.

In compliance with the order contained in the above judgment the Subordinate Judge of Sivaganga submitted the following:

Finding.—The issue on which a finding has been ordered by the High Court to be submitted is:

Whether the compensation paid in this case came wholly or partly out of public revenues.

The precise points to be determined have been indicated in the order of their Lordships and the respective case of the parties have also been stated in it. As regards the former, they have been indicated in the following sentences. (Here the relevant portions from their Lordship's judgment were quoted and then, after stating the facts the lower Court continued.) It has been argued on behalf of the plaintiffs that the defendant's case at the time of the original trial of this suit was only that the contribution of one anna ordered by the Government to be made from the provincial funds was a sufficient compliance with the proviso in S. 6 of the Land Acquisition Act, and that the present case that the amount paid by Karuppan Chetty into the treasury for the purpose of being paid as compensation for the lands acquired was a contribution received by Government for a public purpose, and was under their control, is an afterthought. The learned vakil for the defendant has referred to para. 4 of the defendant's written statement and urged that the present case was put forward in that paragraph, but was not availed of because my learned predecessor who disposed of the suit, was of opinion that the contribution of one anna was sufficient. Whether it was originally the defendant's case or not, the present contention of the defendant, that the amount paid by Karuppan Chetty into the treasury was a contribution made by him and received by Government for a public purpose and was under their control, has been allowed by their Lordships of the High Court to be raised, and I have been asked to try whether it is true. Therefore it is unnecessary for me to consider whether it formed part of the defendant's case as put forward originally in this Court.

Going now to the question to be decided, it is seen from Ex. II-B that the amount of compensation payable to the owners of the kudivaram in the lands to be acquired for the road in question was paid by Karuppan Chetty into the Tiruppatur Sub-Treasury on 14th November 1921, before the notification was published in the Gazette, and from Exs. II-E and II-F that the amount payable to the Sivaganga Zemindari as compensation for the melvaram was paid by him into the same treasury on 10th April 1922 and 2nd June 1922. From all these documents themselves, it may be held that the allegation of the plaintiffs, that the Chetties kept the money required for the cost of acquisition themselves, is not true, and that the cost of acquisition was met with the amounts paid into the treasury by Karuppan Chetty. The learned vakil for the plaintiffs has, however, maintained that the issue cannot be dedicated against them and in favour of defendant on those facts alone and argued that the petition of Karuppan Chetty, Ex. B, itself saying that he has bound himself to the Court of Wards to construct the road at his cost and had given an agreement in writing that he would pay the full value of the lands plus 15 per cent. to

the owners and agreed to abide by the valuation arrived at by the Estate Collector and the letter of the Estate Collector, Ex. VI, stating that subscriptions had been collected to the extent of nearly two lakhs of rupees from Karuppan Chetty and those resident in and round Kallal for constructing the road extending from Paganeri to Kallal and Managiri and that the fund of two lakhs of rupees not having been even alleged to have been paid into the treasury and placed at the absolute disposal of the Government by Karuppan Chetty, it should be held that the fund raised for the purpose of the acquisition in question was in fact kept by Karuppan Chetty himself and not placed under the disposal of the Government, and that the circumstances that he paid the amount into the treasury for being paid out to the owners of the kudivaram would not justify the conclusion that it was a contribution made by him for the purpose of the acquisition and was placed at the absolute control of the Government.

The learned vakil for the defendant has answered that the receipts, Exs. II-B, II-E and II-F, clearly show that the amount was paid by Karuppan Chetty into the treasury unconditionally, though specifying the object for which it was paid, and that plaintiffs not having adduced any evidence that he attached any conditions to the payment, it should be found that the amount was a voluntary contribution received by Government for a public purpose. The fund of two lakhs of rupees which the Estate Collector has stated in Ex. VI, as having been collected by way of subscriptions, was for the purpose of the entire cost of the construction of the road Paganeri-Kallal-Managiri. The amount in question is only that which was paid as compensation for the lands acquired for the Kallal-Managiri road. That amount was made over to Government by Karuppan Chetty for being paid as compensation for those lands without imposing any terms or conditions. The only conclusion to be arrived at from the documents is, in my opinion, that the amount became the money of the Government under their complete control, though paid by Karuppan Chetty with the object specified and the issue should be found in the affirmative.

If the question of the bona fides of the Government is one for consideration in deciding this issue, reference has to be made to Exs. A, A-1 and A-2 and B on plaintiffs' side and to Ex. VI on the defendant's side. On Exs. A to A-2 and B the learned vakil for the plaintiffs has asked me to come to the conclusion that the acquisition proceedings were started by Government, not bona fide, but at the instigation of Karuppan Chetty, and that he instigated the Government to take those proceedings because plaintiffs had filed the suit mentioned above and obtained a provisional injunction restraining him from proceeding with the works of construction of the road through their lands. The learned vakil for the defendant has urged that it should not be held, even Karuppan Chetty was influenced by any sinister motive of merely depriving the plaintiffs of their lands under the pretence of making a road and much less that the Government started the acquisition proceedings not bona fide, but at his instigation and to help in the accomplishment of his evil design, because it is seen from Ex. IV that the road in question formed part of a large programme proposed by Mr. Shield and approved by the Court of Wards, and that Karuppan Chetty representing himself and residents of the neighbouring places had agreed to construct the road in question at his own cost and actually constructed a portion of it before plaintiffs filed their suit. Ex. VI clearly shows that Karuppan Chetty did not commence the work of construction of the road in question merely to spite the present plaintiffs, and it is seen from the evidence of the Revenue Inspector who has been examined as defendant's witness that the length of the road is about seven miles and the plaintiffs' lands cover only four or 4½ furlongs out of that length. Ex. A itself says that Karuppan Chetty had constructed a portion of the road. It cannot in my judgment be held that the Government did not start the acquisition proceedings bona fide, or even that Karuppan Chetty did not commence the construction of the road bona fide. I agree with the learned vakil for the defendant that the Government cannot be held to have been instigated by Karuppan Chetty to start the land acquisition proceedings, but only moved by

him to take action and hold further that though he moved Government just on the date of Ex. B because plaintiffs had filed their suit he did not do so merely to deprive plaintiffs of their lands. For the above reasons I find the issue in the affirmative.

After the return of the above finding from the lower Court, the Court delivered the following judgment:

Spencer, J.—Before calling for a finding as to the facts connected with the payment of compensation for the property concerned in this appeal, I stated my reason for considering that a payment by Government of one anna out of a sum of Rs. 3,352-5-0 was a mere evasion of the law which requires that before a declaration can be legally made that any particular land is needed for a public purpose, the compensation to be awarded must either be paid by company or wholly or partly out of public revenues or some fund controlled or managed by a local authority. In a case where land has to be acquired for a company the Act permits the whole of the cost of acquisition being met out of the funds of the company, and all that is required by S. 40 of Act I of 1894 is that the Local Government should be satisfied upon an enquiry made by an officer appointed by them that the acquisition is needed for the construction of some work which is likely to prove useful to the public. The present acquisition was not made at the instance of any company. It now transpires that there was here no fund controlled or managed by a local authority out of which cost of acquisition was to be met, if we understand the words "local authority" as defined in S. 3, Cl. 28 of the General Clauses Act, to denote a Municipal Committee, District Board or other authority entrusted by the Government with the management of a Municipal or Local Fund.

It is of no consequence for deciding the question before us that under S. 60 of the Madras Local Boards Act (XIV of 1920) all public roads in the Ramnad District Board or the Taluq Board, and that after the new road is formed, the cost of its upkeep will come out of local funds. The defendant admitted in his written statement that the President of the District Board informed the plaintiffs that neither the District Board of Ramnad nor the Taluq Board of Devakottah proposed to construct the road in question. The only witness examined after the remand did not state that any road fund, to which private contributions were invited, was started and managed by the District or Taluq Board. The Government Pleader does not contend that the present case falls under the last part of the proviso to S. 6 (1) of Act I of 1894, but he maintains that when Karuppan Chetty paid the whole of the sum required for compensating the tenant in occupation of the land into the Treasury before the notification by Government, and when he paid the whole of the amount awarded as compensation to owner of the melvaram of landlord's interest, represented in this case by the Estate Collector of the Sivaganga Zamindari estate, after the notification, minus one anna contributed by Government, those amounts became merged in the general revenues, and that thus the compensation became payable out of public revenues, as required by the first part of the proviso to S. 6 (1) of the Act. He also relies on the circumstance that the money so contributed was deposited in Court under S. 31, as the persons interested refused the compensation tendered to them; and he points out that, if the amount awarded is increased by the District Court, Government will have to make good the difference and Karuppan Chetty would likewise possess no right to any portion of the amount which happened to be left unspent or unclaimed.

In my opinion, when money is paid into a Government Treasury by the hand of one private individual, and after passing intact through the Treasury is paid out into the hand of another private individual, it cannot with any accuracy be described as becoming part of the public revenues. Government had no absolute disposing power over it and could not without a gross breach of trust make any other use of it than by utilizing it for the purpose for which the contributor intended it to be used, namely, as compensation for the surrender of the lands acquired. This money was not revenue due to Government on any land, nor was it any cess, tax, duty, custom or other due recoverable under Act II of 1864. It appears clear to my mind that if the provisions of the Land Acquisition Act are not

strictly complied with, but are made a cloak for attempting to obtain a transfer of an indefeasible title under the guise of a public purpose, the proceedings do not operate towards the creation of a valid title to the land in Government as it was held by the Privy Council in *Luchmeswar Singh* v. *Chairman, Darbhanga Municipality* (4).

I would, therefore, allow the appeal and give the plaintiff a decree as prayed for with costs here and in the lower Court. Under S. 82, Civil P. C., Government will have two months' time for satisfying the decree.

Ramesam, J.—I agree.

Appeal allowed.

(4) [1890] 18 Cal. 99=17 I. A. 90=5 Sar. 564 (P. C.).

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* A. I. R. 1926 Madras 1104

WALLACE, J.

Ramanatha Chettiar—Appellant.

v.

Karuppayya Nadar—Respondent.

Appeal No. 104 of 1924, Decided on 23rd April 1926, from the appellate order of the Sub-J., Dindigul, D/- 8th July 1924, in Appeal Suit No. 51 of 1923.

*(a) *Civil P. C., S. 47—Money deposited by judgment-debtor to satisfy A's decree—B applying for the money to be paid towards his decree—Order to pay money towards B's decree is not one under S. 47.*

Where money is deposited in Court by the judgment-debtor to satisfy the decree of A and B, another decree-holder of the same judgment-debtor applies to the Court to satisfy his decree out of the deposit and the Court orders, as between A and B alone, that the money should be paid to B, the order is not one under S. 47: 9 *L. W.* 32 *Dist.*; *A. I. R.* 1922 *Mad.* 99, *Rel. on.* [P. 1105, C. 1]

*(b) *Civil P. C., O. 38, R. 10—Money deposited to satisfy A's decree—B attaching money before judgment and getting decree—B must apply for execution of his decree and transfer of money in his own suit—He cannot apply to Court holding money for payment to him towards his decree.*

Where the judgment-debtor deposits certain amount in Court to satisfy the decree of one decree-holder, and another creditor of the same judgment-debtor attaches the money before judgment and obtains a decree, latter's remedy to obtain the money in satisfaction of his own decree is to apply for execution of his own decree and ask for transfer of the amount to his own suit and for payment to him. He has no right to apply for execution in the suit of the first decree-holder and claim the money towards his own decree. [P. 1105, C. 2]

K. S. Ramabhadra Iyer—for Appellant.

V. Ramaswami Iyer for *K. Rajah Iyer*—for Respondent.

Judgment.—This appeal is against the order of the Subordinate Judge of Dindigul in the following circumstances:

The appellant had in execution of a decree attached certain moveables belonging to his judgment-debtor (Defendant No. 2) in his suit O. S. No. 962 of 1920. The Defendant No. 2 in order to recover the moveables deposited in the executing Court Rs. 80 on 22nd November 1921 and again Rs. 120 three days later, and the money remained in Court to the credit of the appellant's suit. An application by the judgment-debtor, that the decree was otherwise satisfied, was pending. This application ended in favour of the judgment-debtor on 26th January 1922. The appellant appealed against that order, but failed to obtain a stay of further proceedings pending the decision of the appeal. On 11th November 1922 the appeal ended in appellant's favour and the application was remanded for further enquiry as to whether the decree was really satisfied. The respondent holds a decree against the Defendant No. 2 in O. S. No. 272 of 1922. On 13th February 1922 he obtained an attachment before judgment of the moneys of the Defendant No. 2, which were in Court, to the credit of the appellant's suit. The respondent got his decree on 15th March 1922. On 12th June 1922 he applied by an execution in the application in the appellant's suit to the executing Court to pay out this decree. This was opposed by the appellant and the executing Court dismissed the application. The respondent applied and succeeded in the lower appellate Court and appellant has now come up here.

The appellant has raised two preliminary points of jurisdiction. One is that no appeal lay to the lower appellate Court at all, as the order of the executing Court does not come under S. 47. The other point is that the respondent had no locus standi to apply at all, as he has not put in any execution petition in his own suit. The third question for decision is on the merits, viz., whether the decision of the executing Court, that the appellants's decree was fully satisfied

availed to put the money standing to the credit of the appellant's suit at the disposal of the respondent for the satisfaction of his decree.

As to the first point it seems to me valid, although it has been taken only for the first time in this Court. It is obvious that the contest is not between a decree-holder and his judgment-debtor but between rival decree-holders. It is argued that the respondent must be taken to be the representative of the judgment-debtor for the purposes of this sum at issue, but I cannot see how that can be. As noted above the respondent has not put in any execution petition, nor did he even make the judgment-debtor a party to his execution application in the appellant's suit. He could not in any circumstances claim to be representing the judgment-debtor's interests in this matter unless the judgment-debtor admits that he is still the judgment-debtor of the respondent i, e., that the respondent's decree is not satisfied. But of that I know nothing, since the respondent has not chosen to make the judgment-bebtor a party. Obviously, if the judgment debtor has otherwise satisfied the respondent's decree then the respondent's claim is adverse to the judgment-debtor's claim and the respondent cannot be his representative. It is impossible therefore on the materials before me to hold that the respondent is in any sense the representative of the judgment-debtor. The matter clearly is not one relating to the execution. discharge or satisfaction of the appellant's decree as between himself and his judgment-debtor; and the respondent is in no sense bound by the appellant's decree. The finding of the executing Court is that the money was the money of the judgment-debtor, and the order that as between appellant and respondent that money should be paid out to the respondent does not appear to me in any sense to be an order under S. 47.

The case in *Kuppuswami Iyer* v. *K. Kuppuswami Iyer* (1) relied on by the respondent does not help, because the decision in the case depended on the wording of O. 21, R. 53 (3), which declares that an attaching decree-holder shall be the representative of the holder of the attached decree. The present case is not a case of an attaching decree-holder at all. A decision more to the point, though not exactly on it is *Ramaswami* v. *Venkataratnam* (2), where it was held that a contest between rival decree-holders for rateable distribution does not come under S. 47. It appears to me therefore that no appeal lay to the Subordinate Judge and that his order is without jurisdiction and void.

As to the second point, it is difficult to see how the application is maintainable at all. The respondent had not applied for execution of his decree and no execution petition by him was pending. He had no locus standi in the appellant's suit and no right to put in any execution application in that suit. His proper course was to have put in an execution petition in his own suit asking for the transfer to his suit of the amount at the credit of the appellant's suit and then for the payment of this amount to him. In *Nachiyappu Chetiar* v. *Subbier* (3) this Court has discussed generally the proper procedure in cases of several attachments before judgment which is necessary to make the judgment-debtor's money lying in Court available for payment out to successful decree-holders. Apart from this, it was essential that the respondent should have given notice to the judgment-debtor. It is not a case where notice could be dispensed with because execution was being taken out within one year of the decree because as pointed out, the respondent did not take out any execution petition at all. He was evidently endeavouring to get hold of the money without the knowledge of the judgment-debtor.

As to the third point, it is not necessary to go into it fully. The decision on it rests on the manner in which I interpret the nature of the "security," for which purpose the maney was deposited into the executing Court. I think it was clearly security for the satisfaction of the appellant's decree. If the judgment-debtor's petition to record satisfaction had failed before the District Munsif, there can be no doubt that the appellant would have the first claim on the money deposited as security for his decree: (see *Ramiah Iyer* v. *Gopala*

(1) [1919] 9 L. W. 32=48 I. C. 109=(1918) M. W. N. 874.

(2) A. I. R. 1922 Mad. 99.

(3) A. I. R. 1923 Mad. 505=46 Mad. 506 (F. B.).

Iyer (4). But as it happened the District Munsif held that the decree for which the money was security has been satisfied otherwise, and the respondent's contention is that this order had the effect of destroying for ever any lien the appellant had on the money. Whether if the respondent's application for the money had been in proper form and had been disposed by the executing Court after it declared that the appellant's decree was fully satisfied and before the lower appellate Court reversed that order, the executing Court would have been justified in paying out the money to the respondent need not be decided here. But I should be inclined to hold if necessary, that when the lower appellate Court reversed the order of the executing Court and the security, money was still in the custody of the executing Court that money resumed again the character which it had when it was paid in, viz., security for the satisfaction of the appellant's decree, and that it bore that character when the respondent's application for payment to him was disposed of by the executing Court, i. e., that on 3-3-1923, when that order was passed, the security had again resumed its original character and was at the credit of the appellant's suit for the satisfaction of his decree. As a matter of fact after the remand the executing Court held on 14-4-23 that the appellant's decree was not satisfied and that order has not been appealed against and is final. However, in view of my findings on the preliminary points raised, it is unnecessary to go further into this question.

I must, therefore, hold that the order of the lower appellate Court was without jurisdiction. I reverse it and restore the order of the District Munsiff with costs here and in the lower appellate Court.

Appeal allowed.

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(4) [1918] 41 Mad. 1053=49 I. C. 20=35 M. L. J. 355.

* A. I. R. 1926 Madras 1106

COUTTS-TROTTER, C. J. AND RAMESAM, J.

M. V. Maya Nadan and Brothers—Appellants.

v.

Arunachalam Chettiar and *others*—Respondents.

Appeal No. 190 of 1923, Decided on 25th March 1926, from the decree of the Addl. Sub-J., Tinnevelly, in O. S. No. 51 of 1922.

* (a) *Presidency Towns Insolvency Act, S. 45 (4)—Joint Hindu family—Discharge of father—Son's liability also ceases in the absence of any decree against the father or the son prior to insolvency.*

When the father is discharged and his obligation is ended, that of the sons also goes with it. But it would be different if a decree had been obtained against the son or even against the father prior to the insolvency in which case it may be possible for the creditor to seize the joint family property in the hands of the son in execution proceedings : *A. I. R.* 1924 *P. C.*, 50, *Rel. on.* [P. 1108, C. 1]

(b) *Promissory note—Nattukotai Chettis—Signature of agent of a firm without any qualification—Signature should be deemed to be "for" the firm.*

Among Nattukottai Chettis it is the practice that generally promissory notes are executed by agents on behalf of the firms without adding any qualifying words such as " for, " " per pro " or " agent " to their signatures. [P. 1107, C. 1]

* (c) *Hindu Law—Joint family—Father's debt in respect of partnership business which is not ancestral—Pious duty of sons can be enforced only if it is shown that they derived any benefit from the partnership.*

Where sons are sought to be made liable for the debt of their father in respect of a partnership which is not ancestral it must be shown that the business resulted in some benefit to the family and that the other members participated in such benefit : *A. I. R.* 1922 *P. C.* 237 (*F. C.*), *Rel. on.*

Unless it is shown that other members were admitted to the benefits of the partnership they are not liable for the debts of the firm. [P. 1108, C. 2]

S. T. Srinivasa Gopalachariar—for Appellants.

S. Varadachari and *N. N. Prasad*—for Respondent.

Judgment.—Whatever difficulty there may be in this case arises, in my opinion, not from any doubt or uncertainty as to the legal principles applicable to it but in the application of those principles to so complicated a thing as the type of signature in vogue among Nattukottai Chettis or indeed at times among Nattukottai Chetty individuals.

The suit is brought on a promissory note dated 20th February 1918. The liability of the 1st defendant is sought to be enforced on two grounds; (1) That the signature to the note is on the face of it an unqualified assumption by him of personal liability; (2) That in any event, if the signature be held to be merely that of a firm, he was in fact a partner in that firm or alternatively held himself out as being such. The 1st defendant's name is Arunachellam Chetty and he is the son of a man called, A. Ponsivalai Chetty. There is no doubt that A. Ponsivalai Chetty entered into partnership with a firm trading under the vilasam of "V. M. A. C. and Sons" and that partnership unquestionably traded under the style of "V. M. A. C. and Sons and A. P."—See for example, Exhibit 1.

There is also no doubt that the partnership gave a power of attorney to Arunachellam to act as agent for the partnership—Exhibit 6. If, therefore, he signed the promissory note with the partnership signature and merely added his own name, the inference would be irresistible that the operative signature was that of the firm and that he merely added his own name as agent. It is true that he added no qualificatory words such as "agent" or 'by' or 'per pro', but documents in that form are executed by Nattukottai agents every day and are universally understood to be the firm's signature merely vouched as such by the agent who adds his own name. The learned Judge took that view and held that the signature should read as if it were written, "V. M. A. C. and Sons and A. P." (firm's signature) Arunachellam Chetty (Agents' signature). The appellant's case is that the signature should be read entirely differently thus:

V. M. A. C. & Sons (one signature) and A. P. Arunachellam Chetty (another signature).

In plain English, does the A. P. attach itself to what precedes or what follows? To my mind, the "and" (which is not written in Tamil, but in the ordinary English abbreviation "&" clearly links up the A. P. with what precedes, and I therefore agree with the learned Judge that the signature on the face of it makes the partnership firm of "V. M. A. C. and Sons and A. P." liable, and excluded the personal liability of Arunachellam.

I am not sure how far I am entitled to look outside the signature itself to construe it, but as both sides have invited us to do so, I will briefly state what conclusions I would be prepared to draw from the only two sources that appear to me to be in any conceivable way relevant. The first is the words used in the body of the note itself sued upon. It is unfortunate that the Tamil has clearly been mistranslated, but that does not really affect the present question, because the note contains the clearest possible recital that the debtors are the firm trading under the style of "V. M. A. Chinnappa Chetty and Sons and A. Ponsivalai Chetty". If I am at liberty to look at Exhibit B the result is the same. That is dated the 11th February 1918 and was the formal application for the very loan in respect of which the suit promissory note was executed. It is signed in practically the same way: "V. M. A. C. and A. P. Arunachellam Chetty". But the heading is unequivocal, "V. M. A. Chinnappa Chettiar. A. Ponsivalai Chetty, writes"—"a clear intimation that the application for the loan was for a loan to the firm of "V. M. A. C. and Sons and A. P."

The whole difficulty has arisen from the fact that Arunachellam at times put his fathers' initials in front of his own name when he undoubtedly meant to be signing for himself and nobody else. See for example, his affidavit in the subsequent insolvency proceedings, Exhibit IV. That, it seems to me, would at best found an estoppel against him, and in order to found that estoppel, it would have to be shown that such a signature existed which was (a) prior in date to the suit promissory note and (b) brought to the notice of the appellants. If I am right in my construction of Exhibit B, there is no document on the record which fulfils the first of these requirements, let alone the second.

The next point taken was that the 1st defendant was a partner in fact or by estoppel. That he was not a partner in fact is conclusively shown by this. Whereas he was at first adjudicated an insolvent along with the other members of the firm of "V. M. A. C. and Sons and A. P.", on the true facts being brought to the knowledge of the High Court, his adjudication was annulled, and the decision was not appealed from. Indeed

it never rested on anything more solid than the mere statement of the appellants. The estoppel can only be based on the very documents which we have held not to reveal him as other than an agent. A fresh point was taken in appeal, seeking to rest the liability of all the defendants on the pious obligation of the sons to pay the father's debt. The remedies available against the father which for this purpose must mean A. Ponsivalai Chetty have been pursued against him and a considerable dividend realized and he has obtained his discharge. When the obligation of the father is ended, that of the sons goes with it.

In the result the appeal is dismissed with it.

Ramesam, J. —I agree with my Lord's judgment just delivered but on the second point raised I wish to add a few words. In the first place it is contended that S. 45 (4) of the Presidency Insolvency Act applies and, therefore, the order of discharge does not release the 1st defendant who continues to be liable. It is conceded that the 1st defendant is not a partner or a co trustee with Ponsivalai Chetty nor was he jointly bound nor had he made any joint contract with him. It is also conceded he was not a surety but it is said that he was in the nature of a surety for Ponsivalai Chetty. On this point the decision in *Narayan* v. *Veerappa* (1) is against the appellant. It was held that in that case that where the father is discharged under the Straits Settlements Bankrupts Ordinance by the Supreme Court at Singapore the extinguishment of the debt operated as discharge everywhere and the creditor had no right to sue in India the debtor and his undivided sons for the balance of the debt as if it was still subsisting. I do not see any reason to differ from that decision. It would have been different if a decree had been obtained against the son or even against the father prior to the insolvency, in which case it may be possible for the creditor to seize the joint family property in the hands of the son in execution proceedings. (see : *Brij Narain* v. *Mangal Prasad* (2).

But apart from this there seem to be other difficulties in the way of the plaintiff. The plaint does not allege that the 1st defendant is liable on the ground that though the debt was contracted by the firm of " V.M.A.C. & Sons., and A.P." the 1st defendant being the undivided son of Ponsivalai Chetty and being in possession of the joint family property is liable for the suit debt. Paragraph 9 of the plaint merely refers to the liability of Defendants 2 to 6 as the undivided sons of the 1st defendant on the ground that Defendant 1 and his sons 2 to 6 form an undivided family of which the 1st defendant is the manager. It has nothing to do with the liability of the 1st defendant on the ground of the larger joint family of which Ponsivalai Chetty is the manager. If the liability of the defendant is based on the ground that he is the son of Ponsivalai Chetty and the debt is not illegal and immoral and that he is liable along with his father even during his lifetime, [*Brij Narain* v. *Mangal Prasad* (2)], the reply is that when the father is discharged the son cannot continue to be liable, the son's liability depending for its existence on that of the father: (see Mayne's Hindu Law, page 399, 9th Edn.).

When this was pointed out Mr. Srinivasagopalachari abandoned his contention and was content to rely on the special ground that the 1st defendant is under a pious duty to discharge his father's debts but on the ground that he is a member of the joint family who had the benefit of the partnership like other members such as the brothers of Ponsivalai Chetty. But if it is rested on this ground the whole plaint has to be recast. There are no allegations that the business carried on by Ponsivalai Chetty was an ancestral business and is therefore prima facie binding on all other members of the family. If it is not ancestral it must be shown that the business resulted in some benefit to the family and that the other members participa ed in such benefit: (see *Sanyasi Charan Mandal* v. *Krishnadhan Banerji* (3). Unless it is shown that other members were admitted to the benefits of the partnership they are not liable for the debts of the firm. The share of the other members of the family who were

(1) [1916] 40 Mad. 581 = 4 L. W. 422 = 31 M. L. J. 386 = 35 I. C. 918 = (1916) 2 M. W. N. 271.

(2) A. I. R. 1924 P. C. 50 = 46 All. 95 = 51 I.A. 129 (P. C.).

(3) A. I. R. 1922 P. C. 237 = 49 Cal. 560 = 49 I. A. 108.

not directly partners is merely the right to participate in the property of the firm after the obligations have been discharged. There being no allegations in the plaint on these matters, to allow it to be amended at this stage will be to alter its character entirely and start a fresh trial de novo. We see no reason to allow this. The result is the appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1109

KUMARASWAMI SASTRI, O. C. J., AND CURGENVEN, J.

(*Nalam*) *Lakshmikanthan* and *another* —Appellants.

v.

V. T. Narayanaswami Iyer and *another*—Respondents.

Original Side Appeal No. 9 of 1925, Decided on 28th July 1926, from the decree of Waller, J., D/- 31st October 1924, in Civil Suit No. 956 of 1919.

Damages — Breach of contract — Suit for damages—Performance of contract to be simultaneous—Each party must show his readiness and willingness to perform his part of the contract.

In all these cases where the performance of a contract is to be simultaneous and a suit is brought for damages for breach of contract, each party must show that he was ready to perform his part of the contract. For example, in a suit for damages for breach of a contract to sell and purchase, seller must show that he was able and willing to perform his part of the contract and the buyer must show that he was ready and willing to pay the price. [P. 1110, C. 1]

V. Radhakrishnayya —for Appellants.

C. Narasimhachari and *G. N. Thirumalachari*—for Respondents.

Judgment.— This is a suit by the plaintiff to recover from the defendant damages which he assessed at Rs. 6,250 in addition to the payment of Rs. 3,081–4–6 which he says represents the excess amount paid to the defendants in advance for goods which were not delivered. He also claims the value of 3,000 gunnies which were given to the defendants for the purpose of enabling them to supply the goods. The contract between the plaintiff and the defendants is evidenced by Ex. A dated the 7th June 1919, and the contract is that the defendants should supply to the plaintiff 500 tons or 6000 bags of oil-cake at the price and on the terms specified in the contract.

We are not concerned with the quality of packing because the suit is only for goods not delivered. The only question here is as regards the time of payment for and delivery of the goods. By Cl. 3 of the contract the defendant says:

> I agree to give the goods on board the steamer at Cuddalore as and when the steamer calls at Cuddalore during June-July;

and there is also the agreement to hand over "a clean bill-of-lading" The 4th clause is

> Delivery to be completed by you within one week from the date of acceptance and value paid for fully.

The 5th clause fixes the price of one ton of oil-cake at Rs. 110 f. o. c.—Cuddalore. The contract was to supply 500 tons or 6,000 bags. It is admitted that the defendants supplied 236½ tons of goods but failed to deliver the balance of 263½ tons. The plaintiff paid Rs. 28,500 in two instalments of Rs. 15,000 and Rs. 13,500, and it is said that the value of the goods delivered was less than the sum advanced by Rs. 3,081–4–6, which would ordinarily have been carried over in the accounts and adjusted towards the subsequent supply of goods. In this case what happened was that the defendants had with them this amount of Rs. 3,081-4-6 and also the 3000 empty gunny bags in which presumably the remaining goods yet to be supplied might have been delivered. Then each party charged the other with breach of contract.

As regards the claim for Rs 3,081–4–6 and the value of the gunny bags, the learned trial Judge passed a decree in plaintiff's favour, and we are not concerned with these items here; but he dismissed the plaintiff's suit as regards damages on the ground that the plaintiff was not in a position to pay for the goods and that therefore he, having broken the contract, was not entitled to damages. He was of opinion that the plaintiff had not shown that the defendant was not in a position to deliver the goods and that the plaintiff was ready and willing to pay the balance. The terms of Ex. A show clearly that it is a contract the performance of which was reciprocal. The plaintiff had to go to the defendant with the money and the defendant had to deliver the goods to the plaintiff. As regards the balance of goods to be delivered the plaintiff would have to pay Rs. 26,500

The plaintiff's 1st witness Sriramuliah admits that he was sent to Cuddalore to take delivery of the remaining goods with instructions that he should arrange with the Imperial Bank to get 75 per cent. upon these goods and with that money pay the defendants. The Bank would naturally demand possession of the goods before it lent any money. In this case the Bank refused to pay anything more than 60 per cent. of the value of the goods.

There is no evidence on the plaintiff's side to show that when the Bank refused to pay over 60 per cent. the balance was sent from Madras, so that the plaintiff would be in a position to perform his part simultaneously with the delivery which he demanded from the defendants. One would have excepted evidence on the plaintiff's side as to any instructions given to the agent from Madras as regards the payment of the balance for the goods yet to be delivered. Nor is there any evidence on the plaintiff's side to show that the plaintiff's firm had any cash in Madras which it could have transmitted to the agent to make him cover up the deficiency of the amount between 60 and 70 per cent and any further deficiency that may arise when the goods were actually delivered.

The main argument of Mr. Radhakrishniah is that the defendants had not in their possession the remaining quantity of bags to be delivered and that they not having been in a position to deliver the remaining bags it did not matter whether the plaintiff had money with him or not, the breach being on their part. I think that in all these cases where the performance is to be simultaneous each party must show that he was ready to perform his part of the contract. The defendants, if they claim anything from plaintiff, must show that they had the 6000 bags in their custody which would enable them to give delivery the moment the money was paid. Supposing the defendant has not got in his possession the goods, but they are under some pledge, then the plaintiff would very well be entitled to say that he would not part with his money before the defendaat was in a position to deliver the goods free from the pledge. Similarly, if the plaintiff went to the defendant without the money, the defendant can very well say:

'I am not going to part with even a single bag unless yon are ready to pay for the goeds and take delivery of the same.'

There is no evidence in this case to show that if the money had been tendered to the defendants they could not have bought the goods elsewhere and delivered them over. There is no necessity for them to have all the goods in their own possession if they could get them elsewhere and make delivery. It seems, therefore, on the findings of the learned trial Judge that if it is not shown that the defendants could not have performed their contract the plaintiff would not be entitled to any damages for breach of the contract seeing that he must do everything to show his readiness and willingness to perform his part of the contract.

In these circumstances we think that the decision of the learned trial Judge is correct and the ground on which the plaintiff relied to show his readiness and willingness to perform his part of the contract not having been made out, we have to conclude that he was responsible for the breach of it and as such he is not entitled to any damages. The appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1110

SRINIVASA AIYANGAR, J.

Mahomed Bi Bi—Plaintiff.

v.

N. P. Sulaiman Ahmed and *others*—Defendants.

Civil Suit No. 573 of 1922, Decided on 17th August 1925.

(a) *Mahomedan Law—Gift in trust — Donor making himself trustee for donee need not divest himself of actual possession of gifted property—Trusts Act, S. 5.*

In order to complete a gift by way of trust it is sufficient to give possession to the trustee, but a Mahomedan trustee can, in such a case by making himself a trustee or agent of the donee of expressing an intention to treat his own possession as the donee's, unequivocally, transfer legally effectual possession to the donee while himself remaining in actual possession: 2 *L. W.* 1018, *Foll.* [P. 1112, C. 2]

(b) *Mussalman waqf Validating Act* (6 *of* 1913), *S.* 3—*Proviso.*

The proviso to S. 3 covers both the clauses (a and (b) of S. 3. [P. 1113, C. 2

(c) *Mussalman Waqf Validating Act (6 of 1913), S 3—Use of word "waqf" in a deed does not by itself indicate bequest to the poor.*

It cannot have been the intention of the legislature that by the use merely of the word "waqf" in a deed, a bequest for the poor or any other purpose such as is indicated in the proviso could be inferred. [P 1114 C 2]

(d) *Mussalman Waqf Validating Act, S. 3—Proviso.*

The benefits to the poor or other purposes mentioned in the proviso are such purposes as are, apart from any usages of any sects of Mussalmans, generally in Mahomedan Law recognized as charitable purposes. [P 1114 C 2]

(e) *Mussalman Waqf Validating Act, S. 3—Proviso—Gift for maintenance of one's children is not "of permanent character."*

The words "of a permanent character" in the proviso must be regarded as indicating only those general purposes which are called religious, pious or charitable under all systems of Mahomedan Law. A gift for the maintenance of one's children, family or descendants cannot by any means be regarded as permanent. [P 1115 C 1, 2]

(f) *Mussalman Waqf Validating Act (6 of 1913)—Intention is to do away with effects of decisions deciding that bequests should not be illusory.*

The true intention and object of the legislature in passing the Act was merely to do away with the effects of the decisions which said that the bequests for charity should not be illusory or unsubstantial. [P 1115 C 2]

(g) *Civil P. C., O. 1, R. 1 — Administration suit—Debtors to estate are not necessary parties.*

In an administration action of the property of the deceased the debtors to the estate are not necessary parties. [P 1117 C 1]

N. Rajagopalan and *P. V. Sudarsana Raju*—for Plaintiff.

Md. Ibrahim Sahib, S. Doraiswami Aiyar, A. Rama Rao, B. Venkatasubbaramiah, P. Venkataramana Rao, C. Srinivasachari, K. P. Ramakrishna Aiyar and *G. Ramakrishna Aiyar*—for Defendants.

Judgment.—This is a suit by the daughter of a deceased Mahomedan for the administration of his estate and for a partition of the properties pertaining to his estate amongst the sharers and heirs under the Mahomedan Law.

Incidentally a number of difficult and doubtful questions are raised with regard to certain instruments executed by the deceased. For the present purpose the documents which are sought to be set aside as invalid and not binding on the heirs and sharers of the deceased are a registered wakfnama dated the 1st January 1921, and a number of deeds of settlement of property in trust for charities. It would be convenient to deal with the latter at once.

The deeds are admitted by the plaintiff, but it has been argued that, though these deeds were duly executed and registered, they were not acted upon by the deceased and, therefore, they ought not to be recognized or given effect to. Such a plea I construe merely as meaning that these were sham deeds which the executant did not intend to have any legal effect whatsoever. The first thing in such cases would be to see whether there was any sufficient motive on the part of the deceased to take all the trouble and put himself to all the expenses of bringing such documents into existence, if they were indeed intended to be merely shams. The plaintiff sought to make out her plea that these were sham deeds by proving that even subsequent to their execution they were not acted upon by the deceased himself and that he continued even thereafter to regard and deal with the properties as if they were his own. This, however, has not been made out. On the other hand, it has been sufficiently established by the admission made by the first and only witness called for the plaintiff in this case that far from these deeds not being given effect to they were acted upon, that the deceased opened a separate account in respect of all the houses set apart by him for charity under these deeds of settlement and that in that account were credited from time to time the rents that were collected and that debits were also made of various sums in that account expended by the deceased in respect of varieus charities.

If there is a valid dedication in law of properties for the purpose of certain charities, there is no further question unless, of course, it is satisfactorily established, as was sought to be done by the plaintiff that the deeds were shams and never intended to be acted upon. That plea failing, there is no legal obstacle whatever to these documents being given their legal effect. It is abundantly established that the deceased himself recognized all these houses as houses set apart for and dedicated to charity and in the face of such evidence it is impossible to come to any conclusion other than that he not only executed these deeds but gave effect to them for the rest of his life. One argument that was relied upon very strongly by the learned counssl for the plaintiff may here be referred to and disposed of. That is this. He said that

the rentals accruing from these properties set apart for charity were very large and that from the accounts it appeared that only small sums of money at a time were expended by him for the purpose of the charity.

I have not gone into the accounts and been able to realise the proportion of the actual moneys expended by him for the charity to the total income. But assuming for a moment that that was so and assuming also that he misappropriated to himself the balance, that would go to show not that there was no completed dedication of these properties to charity but that he, as Mutavali or trustee, committed breach of trust and misappropriated trust moneys. I must, therefore, hold that so far at least as the properties set out in Schedule B are concerned, namely, the properties set apart for charities, they were properties legally so set apart and the dedication was valid and binding on all the heirs and legal representatives of the deceased Pylvan Sahib. Those properties, therefore, are not available for partition.

But the more difficult question really is with regard to the properties set out in Schedule A to the plaint. These are the properties, the subject-matter of the waqf-deed of the 1st January 1921, already referred to by me. It is a very curious document. I am satisfied that the deceased Pylvan Sahib must have come to execute it on the suggestion and at the instigation of a character at one time very familiar in these Courts, a person called Gulam Dastagir Sahib. I have no doubt he suggested to the deceased the possibility of tying up a considerable portion of the property acquired by him to the members of the family in such a manner as to make the same inalienable for generations so that the members of his family may contiuue to enjoy the properties and live upon the income thereof without the properties being available to them for being wasted or alienated or available to the creditors for being proceeded against. With regard to this document, the case for the plaintiff was that there was not and could not have been any valid wakf created in respect of the properties.

The first ground on which this document was sought to be impeached was that it was not given effect to by the deceased himself, a plea similar to the one with respect to the deeds of settlement already referred to by me. If what is called "being given effect to by the deceased" was according to any provision of law, Mahomedan or English, a requisite condition precedent to the validity of the wakf, I should certainly feel constrained to consider the argument advanced on behalf of the plaintiff. But, in my judgment, it can be looked at only in one of two ways. If it was a valid wakf, no delivery of possession is necessary and nothing further is required to constitute a valid wakf but the declaration and, so far as the declaration is concerned, it is contained in the document. If it is not a wakf, then other questions might arise. It may be either a trust or a gift in favour of the donees. It seems to me that, having regard to the language of the document itself and the other provisions in the document, it cannot be regarded as a deed of direct gift. It is in the nature of a gift in trust. Even if it be a gift in the nature of a trust, possession would under the Mahomedan Law be necessary to be given, if not to the donee, to the trustee and it has been argued on behalf of the plaintiff that in this case no possession was given to the donees or has been shown to have been given to any persons on their behalf.

But it is clear that under the Mahomedan Law in order to complete a gift by way of trust it is sufficient to give possession to the trustee. No doubt, if the maker of the trust had appointed third parties as trustees and failed and neglected to deliver possession of the properties to them, there might be considerable force in the argument of the plaintiff. But in this case the maker of the trust appointed himself in the first instance as the trustee and he was in possession. In the case of *Mahammad Sulfalla Sahib* v. *Vajihuddin Sahib* (1), Sadasiva Aiyar and Napier, JJ., held and distinctly laid down that a Mahomedan trustee could by making himself a trustee or agent of the donee or as his guardian, if the donee was a minor, or expressing an intention to treat his own possession as the donee's unequivocally transfer legally effectual possession to the donee while himself remaining in actual possession. I take it that the general principle of the law relating

(1) [1915] 2 L.W. 1018=31 I.C. 281=(1915) M. W.N. 876.

to delivery of possession in Mahomedan Law is that, so far as the donor is concerned, he must be shown to have completed all that he was bound to do for the purpose of giving effect to the arrangement made by him. That is to say, if his intention was that the donees should get the property, he must deliver over possession to them. If his intention was that third parties should hold the property for the benefit of the donees, then delivery must be effected to such third parties. But in cases where it is clear that what was intended was that he should himself hold possession on behalf of the donees it seems to me that it should be sufficient, if he declared the trust thereby treating his own possession as will be presumed in law into possession by himself in his capacity as trustee.

In this connexion I might refer to the provisions of S. 6 of the Indian Trusts Act. It applies to Mahomedans also and it provides that, subject to the provisions of S. 5, a trust is created when the author of the trust indicates with a reasonable certainty by any words or acts an intention on his part to create thereby a trust, the purpose of the trust, the beneficiary and the trust property and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust property to the trustee. The transfer of the trust property to the trustee is under the provisions of this section required only when the author of the trust has not constituted himself to be the trustee. But the case before me is a case in which the author has constituted himself as the sole trustee. Therefore, no question arises of failure to deliver over possession of the property to any person who was at the time entitled to such possession under the terms of the instrument. Having come to the conclusion that there was a valid trust created in favour of the various donees and there being no other objection to the validity of such a trust, I do not consider it necessary to discuss the question whether, if it was deemed to be a direct gift, possession was necessary to be given to the various donees.

The question before me really resolves itself into this whether after the passing of Act VI of 1913, the Mussalman Wakf Validating Act, such a document as Ex. A in this case would be held to have validly created a wakf for the purposes and objects therein set forth. On behalf of some of the defendants Mr. Venkatramana Rao contended that it could and did. He has, however, frankly recognized that the chief obstacle in the way of his argument was the proviso in S. 3 of the Act and he has tried his best to get rid of this proviso in a number of ways.

His first argument was that this proviso was a proviso not to the whole of the section, that is, all that precedes the proviso in the section but only to Clause (b). I have seen all the printed copies of this Act available and in none of them did I see this proviso reproduced in such a manner as to seem that it is a proviso only to Clause (b) of the section; but I believe that that the manner in which the printer chooses to print cannot be made the basis of any proper construction. If Clause (b) of the section was a complete sentence in itself, I agree, that there would be considerable force in the contention of Mr. Venkataramana Rao that a proviso must be taken in the first instance as a proviso only to the last completed clause in the section. The complete sentence in this section covers not only the first part of the section but both Clauses (a) and (b). The use of the plural "in such cases" in the proviso seems also, to my mind, to indicate that the Legislature intended the proviso to refer to and comprehend both Clauses (a) and (b). Further, if it was intended that the proviso should have reference only to Clause (b), I should have expected that it would have been indicated by the Legislature in some suitable manner or some apt words would have been used to indicate such intention on the part of the Legislature. Taking the context into consideration, I cannot help thinking that the proviso was intended to cover both Clauses (a) and (b).

Then if the proviso should be taken to refer to both the clauses the next argument advanced by Mr. Venkataramana Rao was that the mere use of the expression "wakf" in the deed before me was sufficient to constitute a bequest for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character. His argument is that the mere use of the word "wakf" without more in the document constitutes such a

reservation of the ultimate benefit for the purpose indicated in the proviso as to take the document out of the proviso. It is necessary for this purpose to refer to the definition of "wakf" contained in the Act. I have in construing this enactment nothing whatever to do with the meaning or significance of "wakf" as it was understood by Mahomedan jurists. The word is used in an enactment of the Legislature and is defined by it. The definition is contained in S. 2, Cl. (1) and is as follows: "Wakf" means

the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognised by the Mussalman law as religious, pious or charitable.'

But it is curious and significant that the words which we find in the proviso, namely, "religious pious, or charitable purpose of a permanent character" are not reproduced in the definition of "wakf" Having regard, therefore, to this difference between the definition of a "wakf" in S. 2 and the introduction of the words "of a permanent character" in the proviso, I cannot help thinking that the Legislature intended to draw a clear distinction between the two. Further, if it was the intention of the Legislature that by the use of the word "wakf" a dedication to any such pnrpose may be inferred, then it seems to me that it is absolutely unnecessary to introduce such a proviso at all. The proviso in such a a case would be redundant. If it be said that the proviso was necessary for the purpose of making it clear that it is only with respect to a class or sect of Mahomedans amongst whom bequests for the maintenanee of their family and children would be considered religious or pious, then the answer will be that the first part of S. 3 already contains such a provision because it is required by that part of the section that a "wakf" should in all other respects be in accordance with the provisions of the Mussalman Law.

I shall hereafter advert to another argument of the learned vakil based on the construction of the proviso itself but I may here state for the purpose of the present argument that the wording of the proviso would seem clearly to indicate that the benefits contemplated by Clauses (a) and (b) of S. 3, are benefits of a different kind from the "ultimate benefit" contemplated by the proviso. The contradistinction and contrast between the two kinds of benefit are brought out clearly by the use of the expression "ultimate benefit" following so closely upon Clauses (a) and (b). This, to my mind, also clearly indicates that it could not have been the intention of the Legislature that by the use merely of the word "wakf" it could be contended that a bequest for the poor or any other purpose such as is indicated in the proviso could be inferred.

The third contention of the learned vakil was that on a proper construction of the proviso a benefit created for the maintenance and support of the family, children or descendants was such a purpose as is indicated in the proviso. This contention requires careful examination. I have already referred to the words "ultimate benefit." The word "ultimate" clearly refers to the benefits already referred to in the section, the immediate and the mediate benefits, the immediate benefit to the wakf referred to in Cl. (b) and the mediate benefit referred to in Cl. (a). The word "ultimate," therefore, is used in contradistinction to both these benefits and it is, to my mind, a clear legislative indication that the benefit which the proviso requires is of a diffe- kind and nature to the benefits referred to in Cls. (a) and (b). In the face, therefore, of the expression "ultimate benefit" as contradistinguished from the benefit to oneself or family, children and descendants, I cannot help concluding that the benefits to the poor or other purpose must be such purposes as are, apart from any usages of any sects of Mussalmans, generally in Mahomedan law recognized as charitable purposes.

The expression "in such cases" in the proviso refers clearly to Cls. (a) and (b). If the proviso is really meant to refer to the maintenance of the family, children and descendants it would be meaningless to refer to "ultimate benefit" in such cases. The expression therefore, "in such cases" would seem also clearly to indicate that, though the immediate and mediate benefits as in Cls. (a) and (b) may be in favour of persons or classes indicated in those clauses still the proviso requires that the ultimate benefit should be for the persons or objects thereafter indicated. Again, the further expression "reserved' in "expressly or impliedly reserved" would also show

that the requirement in the proviso is different from the requirements already set out. The reservation is required to be either express or implied—implied it may be from what is expressed or from the circumstances. Anyhow, the reservation has got to be there. If on a proper construction of the proviso it could be held that a bequest merely for the maintenance of one's family and descendants would be within it, then it was unnecessary to use the words "for the poor or for any other purpose" etc. It would have been sufficient for the legislature to say "for any purpose recognized by the Mussalman Law as religious" etc.

When the Legislature advisedly uses the words "for the poor or any other purpose" I cannot but construe the expression ejusdem generis with the poor and, therefore, to refer only to those objects of charity such as are generally in all systems of Mahomedan Law recognized. Again, it is not sufficient that the objects should be recognized by the Mussalman Law as religious, pious or charitable, but they are also required to be of a permanent character. I am satisfied in my mind that it is of the very essence of the Mahomedan Law relating to wakfs that it recognizes only bequests for public charities such as for the poor, for religious purposes and so on as being permanent and bequests for other purposes as being not permanent. When, therefore, in the proviso we have those words "of a permanent character" they clearly having regard to the language with which we are familiar, must be regarded as indicating only those general purposes which are called religious, pious or charitable under all systems of Mahomedan Law.

It cannot possibly be contended that a gift for the maintenance of one's children family or descendants could by any means be regarded as permanent. All religions recognize the mortality of human beings and also contemplate the line of succession coming to an end at some time or another. I cannot, therefore, regard that the Mahomedan Law, of all systems of religion could have regarded a bequest in favour of family, children or descendants as of a permanent character.

For these reasons I have come to the conclusion that by this Act the Legislature clearly provided that even after the passing of the enactment there ought to be a provision in the wakf for a bequest to the poor or other purpose generally recognised as religious, pious or charitable and of a permanent character. In the absence of such a bequest there could be no valid wakf. It is true that before the passing of this Act their Lordships of the Judicial Committee and several Courts in this country held that for the valid creation of a wakf it was not merely sufficient to have some bequests in favour of charity, but it was held repeatedly that such bequests should not be merely illusory in their character a sort of a makeshift or device for the purpose of tying up property through generations of successors but ought to be also substantial.

After these decisions were pronounced apparently there was a clamour amongst Mahomedans supported by great Mahomedan jurists, and for reasons of its own the Legislature thought it fit to pass this enactment and the question I have got to decide is whether in passing this enactment it has embodied as law the position which was held by those jurists who held the extreme view that it was competent to a Mahomedan to create a wakf purely and solely for the maintenance of the family or whether it merely did away with the effects of the decisions of Courts with regard to the illusory or unsubstantial character of the bequests for charity. I am inclined to take the latter view. I am satisfied in my mind that the true intention and object of the Legislature in passing this enactment was merely to do away with the effects of the decisions which said that the bequests for charity should not be illusory or unsubstantial. In S. 3 this enactment provides that it may be what is called illusory. In S. 4 it enacts that it need not be substantial. It may be postponed probably for ever but still whether it was illusory or unsubstantial, the Act requires that there must be some provision for some bequests in favour of the purpose generally considered religious, pious or charitable.

The last branch of the argument by Mr. Venkatarama Rao was this. He referred me to S. 5 of the Act and his argument if accepted, would result in doing away with the entire enactment. Having in the four previous sections enacted what the Legislature considered to be the proper law with regard to the subject, it is argued by Mr. Venkataramana Rao, in the 5th section it went

rubbing out the slate again. But I am glad to think that on a consideration of the argument I do no not feel compelled to agree with that contention. It is significant that in S. 5 the words used are "shall affect any custom or usage among Mussalmans." In all the previous sections the expression used is "the Mussalman Law," "the tenets and doctrines of Mussalman Law," "the provisions of Mussalman law" and so on. The word used is always "law" and not "custom" or "usage." The expression, therefore, custom or usage" in S. 5 should not be construed as meaning the same thing as law. because when the enactment itself draws a distinction between the two, it would be wrong to construe them as being identical. It seems to me that S. 5 was enacted, as is usual with the Indian Legislature which is always apprehensive of interfering with the unknown customs and usages of the Hindu or the Mahomedan Law almost to the point of trepidation, merely providing a safeguard that the enactment should not be construed as interfering with any local or sectional usage or custom, if such should be found to exist. Anyhow, as the section could not be reasonably construed to refer to the law relating to wakfs, I cannot agree with the contention that the effect of S. 5 is to do away with the proviso in S. 3.

In the result, I have come to the conclusion that even after the passing of the Wakf Validating Act it is necessary that every instrument before it can validly create a wakf should contain a provision for some religious, pious or charitable purpose of a permanent character generally so recognized by all systems of Mahomedan law. There is admittedly no such provision in the instrument before me. I must therefore, hold that Ex. A does not create a valid wakf for the purposes therein set forth.

I have already given my reasons for holding that it does create a valid trust in favour of the beneficiaries named in the various schedules, the deceased Pylvan Sahib constituting himself trustee in respect of all those trusts. Some question was raised in the course of the discussion of the case as to whether there was such valid acceptance of the trust by the various parties so as to make the trust complete and binding on all the parties. It is only the plaintiff that argued the point and so far as the plaintiff is concerned, the thing is made perfectly clear. Ex. III is a notice that was sent by Mr. P. M. S. Mudaliar as vakil on her behalf. That notice is admitted by her husband as her first witness. That contains statements which are only consistent with the plaintiff having accepted the trust in her favour contained in the so-called wakf deed. On behalf of Defendants 2 and 3, I have no materials before me on which I can hold whether they have accepted the trust or not. The learned vakils appearing for them tell me that they have to consult their respective clients and that then alone they will be able to tell the Court whether their position in the case would be on the footing of their having accepted their respective trusts or not. If they do not accept the trust, then it would follow that there not having been a completed and accepted trust the property will lapse to the general estate of the deceased and will be divisible amongst all the heirs and legal representatives of Pylvan Sahib.

Another question was also raised in the course of the discussion of the case and that was the restraints on alienation contained in the deed of wakf and it may also be taken that restraints are being necessarily imposad on alienation by the deed being called a wakf. If there is a bequest to a person and restraints are imposed on his enjoyment of the property which are not consistent with the bequest already made, it is undoubted law that the restraints would be invalid and the bequest will take effect, as though the instrument contained no such restraints. In this case the restraints were imposed by the deed merely because the ambition of the deceased wakif was to create a wakf solely for his family and descendants. That having failed, it cannot possibly be held that these restraints will have any legal effect. From this it follows that the various beneficiaries indicated in the schedules to Ex. A and their legal representatives in the case of such of them as are dead will be the beneficiaries in respect of the various trusts contained in Ex. A. I have already decided that in the case of the properties settled for charity in Schedule B, they have been validly dedicated. To the properties in Schedule B, we have to add Item No. 4

of Schedule C with regard to which also it is now clearly established by the admissions made by the first witness for the plaintiff and also on the basis of the recitals in the Will that that property had been validly dedicated for performing the annual ceremony of the Prophet during Bara wafat as set out in the pleadings.

Defendants 12 and 13 are merely debtors to the estate of the deceased Pylvan Sahib. An issue has been raised whether they are necessary parties to the suit. I asked the learned counsel for the plaintiff on what ground he justified making these debtors to the estate in an administration action like this parties to the suit. He has not been able to satisfy me as to the grounds on which he has made them parties. If moneys are due to the estate from them and there are disputes amongst the heirs and sharers of the estate with regard to the division of the moneys, that is of no concern to the debtors themselves. They have executed promissory notes in respect of the moneys due and the holders for the time being will be entitled to recover the moneys due thereon whatever shares therein the various parties might be entitled to and whatever might be the ultimate disposal of the moneys. On these grounds I hold that Defendants 12 and 13 are unnecessary parties and have been wrongly added. They will be dismissed from the suit with their costs up to date, payable by the plaintiff.

On these findings the case will stand adjourned till Friday next. On the 2nd and 3rd defendants intimating to the Court their acceptance or otherwise of the trust contained in Ex. A, further directions will be given and the case referred to the Official Referee for carrying out the partition amongst the various heirs and sharers. Costs reserved.

Case adjourned.

A. I. R. 1926 Madras 1117

RAMESAM, J.

Vikrala Ramachandracharyulu—Plaintiff—Appellant.

v.

Vikrala Srimath Rangacharyulu and *another*—Defendants—Respondents.

Second Appeal No. 559 of 1923, Decided on 2nd December 1925, from the decree of the Sub-J., Nellore, in A. S. No. 6 of 1922.

(a) *Registration Act, S. 17 (2) (v)—Agreement to divide property in certain shares is not a document purporting to convey property—To bring a case within sub-S. 2 (v) it is not necessary to expressly say that another document will be executed.*

An agreement to divide a property in certain shares is not an agreement conveying any property and therefore not compulsorily registrable. It is not necessary to bring the documents within the exempting Cl. 17 (v), to say expressly that another document will be executed. The test in all such cases is not whether a document expressly contemplated execution of another document, but whether by itself it created any right to immovable property, and if it did not, then it does not require registration: *A. I. R.* 1922 *P. C.* 266, *Rel. on,* [P. 1119, C. 1, 2]

(b) *Registration Act, S. 17 (1) (b)—Unregistered sale deed is admissible as an agreement to sell.*

Even where a document purports to be a sale deed and is inadmissible for want of stamp or registration, it is admissible as an agreement to sell in a suit for specifice performance: 14 *Mad.* 55, *Foll.* [P. 1119, C. 2]

(c) *Civil P. C., O. 6, R. 17—Amendment can be allowed in second appeal.*

An amendment of the plaint can even be allowed for the first time in second appeal in a proper case: 10 *M. L. T.* 116, *Rel. on.* [P. 1120, C. 2]

(d) *Specific performance—Agreement to sell—Suit for specific performance—Possession can be claimed.*

Possession also can be claimed in a suit for specific performance where possession is a relie consequent on a decree for specific performance. [P. 1121, C. 1]

M. Balasubramania Mudaliar for *A. Krishnaswami Aiyar*—for Appellant.

K. Bhashyam Aiyangar—for Respondents.

Judgment. — This Second Appeal arises out of a suit for specific performance of an agreement between co-owners to divide their property in a particular way.

The facts may be more specifically stated. One Appalacharlu was the last owner of the suit property. He died about 70 years ago leaving his widow

Lakshmamma and brother's widow Seshamma. Lakshmamma died in 1866. At the time of her death the plaintiff, a grandfather Lakshmanacharlu, 1st defendant's father Seshacharlu and the 2nd defendant's grand-uncle Sreenivasacharlu were the reversioners entitled to the property. But after taking possession they found that they had to arrange for the maintenance of Seshamma. So they entered into an agreement with Seshamma under which they allowed her to remain in possession until her death and they or their heirs should take the property after her death. Seshamma died in 1895. (vide Ex. BB-2, the date in para. 6 of the plaint in the printed papers is incorrect.)

At the time of her death, plaintiff's paternal uncle Seshacharlu, the 1st defendant, and the 2nd Defendant's father represented the three reversioners of 1866, and these were entitled to the property. But Seshamma disposed of the property in her possession by a Will and by several sale deeds though she had no right to do so, and the three persons entitled to the property had to bring a suit. Such a suit was filed as O. S. No. 30 of 1907 of the District Court of Nellore. It was afterwards transferred to the temporary Subordinate Court and became O. S. No. 60 of 1913.

In that suit, the 1st plaintiff was the present 1st defendant the 2nd plaintiff was the present 2nd defendant's adoptive father and the 3rd plaintiff was the present plaintiff's uncle. Before filing the said suit, the three plaintiffs therein entered into an agreement dated 5th August 1907, Ex. EE, under which it was agreed that in consideration of the 3rd plaintiff (uncle of the present plaintiff) conducting the suit by instructing vakils and in other ways and, in consideration of the document being in his possession, 1/8 of the properties recovered should be given to him solely and the other 7/8ths should be taken in equal shares: or in other words, while the 1st plaintiff and 2nd plaintiff was to get 7/24, the 3rd plaintiff was to get 10/24. While the suit was pending before the Sub-Judge they entered into another agreement modifying the former agreement, Ex. FF, dated 25th October 1909. In this agreement it was stated that the first two plaintiffs were unable to find their share of the expenses and, therefore, Ex. EE, the earlier agreement, was executed. It was then provided that all the further expenses of the suit should be borne by the 3rd plaintiff and in consideration of this, instead of the old 1/8, 1/4 share was to be kept apart for the 3rd plaintiff and the other 3/4 was to be taken in three shares; or in other words, the first two plaintiffs were each to get a fourth share while the third plaintiff was to get a half-share. Some time after this agreement the 2nd plaintiff therein died and his son, that is the present 2nd defendent was added as the 4th plaintiff and the 3rd plaintiff died, and his son, that is the present plaintiff, was added as the 5th plaintiff.

It may be added that the parties originally engaged the late Mr. V. Krishnaswami Aiyar (afterwards a Judge of this Court) as their vakil and had to incur heavy expenses. The Subordinate Judge decreed the suit only in respect of Item 1 of the present suit and in that item instead of decreeing the whole he decreed only 5/6, that is, one-third of the 1st plaintiff and one-third of the 4th plaintiff, but only 1/6 instead of 1/3 of the 5th plaintiff. As to another item, Item 7 of that suit, he dismissed the suit as beyond time. This was in 1914. There was an appeal to the District Court of Nellore. It was filed in respect of the 1/6 share of the 5th plaintiff disallowed by the Sub-Judge and the other item, the claim for which was held to be barred. It appears that the appeal was filed with insufficient stamp and it was returned for payment of deficient stamp duty on 30th July 1914.

After several extensions of time allowed it was stated that the 1st and 2nd appellants did not wish to continue the appeal and deficient stamp duty was paid only for the 3rd appellant who continued the appeal. This was on the 2nd September 1914. The appeal was disposed of in March 1916. The result of it was that the 3rd plaintiff's appeal was fully allowed. He got his 1/6 share disallowed out of the item decreed by the Subordinate Judge and his own 1/3 share of Item 7. The other shares of Item 7 were not decreed as the other appellants did not prosecute the appeal. Looking at the reasons of the District Judge (vide Ex. BB) one would think they too would have got a decree for their shares. It is obvious that in the interval between the

filing of the appeal and the 2nd September 1914 the first two appellants broke away from the 3rd appellant, either because they entered into a private arrangement with the opposite party or for some other reason. Soon after the disposal of that appeal, that is on 7th March 1917, the present suit was filed for specific performance of the agreement in Ex. FF. A number of objections were taken by the defendants. They denied the genuineness of the agreement of 1866 and of Exs. EE and FF. They denied that the plaintiff and his uncle performed their part of the agreements. They also contested that plaintiff is not entitled to the benefit of the agreement as the heir of his uncle. All these points were found by both the Courte below in plaintiff's favour and against the defendants. But in spite of this, the defendants succeeded in both the lower Courts on certain technical objections. The District Munsif found that Exs. EE and FF amount to a sale, and not being registered are ineffective to pass any property to the plaintiff. He also held that the plaintiff's remedy is to refer the matter to arbitrators and not to sue. On appeal the Subordinate Judge held that Exs. EE and FF are inadmissible for want of registration and dismissed the appeal. The plaintiff files the second appeal.

Exhibits EE and FF do not purport to be sale deeds. They purport to be agreements to divide the property in certain shares. Nor do they purport to convey any property. In my opinion, they are merely agreements to do all that is necessary on the part of the promisors to give effect to the division agreed upon. This remark is particularly true of Ex. FF which is executed by the two defendants in favour of the plaintiff unlike Ex. EE. It is true they do not expressly say that another document will be executed, but I do not think this is necessary to bring the documents within the exempting Cl. 17 (v) of the Registration Act. Seeing that they do not by themselves purport to convey property, it follows that if they are ineffective without another document there is an implied undertaking to execute a further document. In this respect I think this case is a far better case than the decision in *Mangamma* v. *Rammma* (1). In that case the document while contemplatiag the execution of another document, also purported to be a sale on its date and to place the vendee in possession. I must state there, are several unreported decisions of this Court taking the same view. So early as *Adakkalam* v. *Theethan* (2) it was held that a mere agreement does not require registration and is admissible for the purpose of obtaining specific performance. In *Nagappa* v. *Devu* (3) it was held that even where a document purports to be a sale deed and is inadmissible for want of stamp or registration, it is admissible as an agreement to sell in a suit for specific performance : see also *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (4). The same view is taken in *Indar Singh* v. *Munshi* (5). The test in all such cases is not whether a document expressly contemplated execution of another document, but whether by itself it created any right to immovable property, and if it did not, then it does not require registration : see *Rajangam Aiyar* v. *Rajangam Aiyar* (6). Whatever view we take therefore of Exs. EE and FF they are not inadmissible for want of registration.

It seems that two possible views may be taken of these documents. As the three sharers were tenants-in-common of the property, every one is strictly entitled in the theory of law to every particle of the properties, and, therefore, when they agreed to divide in certain shares it cannot be said there is a conveyance by some sharers in favour of another even though but for the agreement the shares would have been different. Where every one is owner of every part of the property there is nothing to convey, and it is only a question of shares. The inequality of shares may be due to various reasons. In all such cases, a mere agreement to divide is enough to enable the party who benefits by it to sue for specific performance of an agreement and to recover possession. The judgment of this Court in S. A. No. 760 of 1913 is an example of such a

(1) [1914] 37 Mad. 480=16 I. C. 587=(1912) M. W. N. 917.
(2) [1889] 12 Mad. 505.
(3) [1891] 14 Mad. 55.
(4) [1910] 15 C. W. N. 375 = 6 I. C. 346 = 12 C. L. J. 25.
(5) [1920] 1 Lah. 124=56 I. C. 272.
(6) A. I. R. 1922 P. C. 266=46 Mad. 373.

suit. In that case, a number of sharers who resisted the suit by another, relying on adoption, entered into an agreement by which one of them in consideration of supporting the plea of adoption by the others was to get a share larger than what he would be otherwise entitled to. The suit in which they were all defendants having been dismissed and the defendants having been given the shares to which they were entitled without the agreement, a subsequent suit was afterwards filed to enforce the agreement and to get the extra share. Both the lower Courts dismissed the suit. In appeal, the High Court (Sankaran Nair and Ayling, JJ.) allowed the second appeal holding that the agreement was binding as a settlement of a doubtful matter. It is true the question of registration was not discussed in second appeal but was taken in review and was disallowed. In the present case also, as the three plaintiffs were out of possession of the property and had to litigate to acquire them, it may be said the matter is doubtful and a settlement settling the shares in a particular way may be said to be a settlement of a doubtful matter, in which case it will not fall under the Transfer of Property Act and does not require to be registered even if it amounts to a complete transaction.

But a second view is possible ; it may be said that Ex. FF is merely an agreement to do the needful for conveying an extra share and by itself cannot give a right to the plaintiff to obtain a certain share. If so, all that the plaintiff has to do is to pray for a direction directing the defendants to execute the document if the Court so thinks fit. It is true that the original plaint did not contain any such prayer. After the appeal was filed in the lower appellate Court the plaintiff applied for permission to amend the plaint by the addition of such a prayer. The Subordinate Judge dismissed the appeal, but did not deal with this prayer for amendment and dismissed the petition without giving any specific reasons and the vakil for the appellant complained of this before me. Seeing that all the defendants' objections in the case are technical and they have really nothing in the merits it seems to me that in the interests of justice this is a case in which the lower appellate Court ought to have the amendment on such terms as it thought fit. An amendment of the plaint was even allowed for the first time in second appeal : see *Dronan Raju Ramayya* v. *Peddayya* (7). In this case it ought to have been permitted in the lower appellate Court and I accordingly allowed the plaint to be amended by the addition of such a prayer. I even think that the direction for the execution of an ancillary document might well be included under prayer C of the original plaint :

> such other relief as the Court thinks fit under the circumstances.

However, as the plaintiff was not diligent enough I think he must pay the costs of the defendants in the first two Courts.

Mr. Bhashyam for the respondents raised three minor objections. First, he said that the plaintiff was guilty of some fraud, relying on para. 4 of the written statement and that a finding on it is to be called for. There is no issue on it and the only issue as to plaintiff's conduct is the third issue, namely, whether he performed his part of the agreement. This has been found in favour of the plaintiff. Mr. Bhashyam originally suggested that the plaintiff fraudulently did not pay the deficient Court-fee in the appeal in the former suit, but the facts I mentioned above from Ex. BB-1 show that after the other appellants withdrew the 3rd appellant paid his own share of the Court-fee. I therefore do not think there is any point requiring fresh enquiry.

The second objection taken by Mr. Bhashyam is that the suit for possession is not maintainable along with the suit for specific performance. He relied on the Letters Patent decision in *Rangayya Reddi* v. *Subramania Aiyar* (8). One of the Judges dissented. But apart from it, I think that case is distinguishable from the facts before me. In that case the suit for specific performance was against one person and the relief for partition was claimed against other persons who were not parties to the first prayer and this fact furnished the ratio decidendi of the decision. The English cases relied on by Wallis, C. J., for instance, *De Hoghton* v. *Money* (9), also

(7) [1911] 2 M. W. N. 174 = 12 I. C. 119 = 10 M. L. T. 116.
(8) [1917] 40 Mad. 365 = 32 M. L. J. 575 = 40 I. C. 429=5 L. W. 797 (F. B.).
(9) [1866] 2 Ch.164=15 L.T.403=15 W.R. 214.

support the distinction. It is unnecessary to refer all of them. The recent decision of the House of Lords in *Mildred Howard* v. *William Miller* (10) also illustrates the distinction. In the present case the defendants are persons against whom both the reliefs, namely, specific performance and possession were asked. In such a case all reliefs consequent on the decree for specific performance ought also to be granted : (See Fry on Specific Performance, S. 1402).

The third objection raised by Mr. Bhashyam is that the plaintiff's remedy is to refer the matter to arbitrators and not to bring the suit. He relies on Ex. EE, the last sentence at page 1 of the documents. This clause is not repeated in Ex. FF. He contends that the clause remained operative after the execution of Ex. FF. On reading the two documents together, I do not agree with this contention. The intention is to drop the clauses from Ex. FF. It seems to me that Ex. FF is complete in itself and did not intend any further reference to Ex. EE. Again I do not see how one party can refer a matter to arbitrators (who are not even named) without the other co-operating. Thirdly, the document EE refers to advice of mediators and not to decision of arbitrators and the advice of mediators can be taken and acted upon only if all the three parties go to them. For all these reasons, I disallow this contention.

The only question that remains is, what is the relief to which the plaintiff is entitled ? There are two items in the suit, the first item was divided into 6 shares of which each of the three parties took two. According to the agreement plaintiff ought to have another sixth, that is, he ought to have one out of the four shares in the hands of defendants. Instead of this he claimed 1-1/2 out of the four shares in the hands of the defendants. He is entitled only to a half-share each from the two shares of each of the defendants. There will be decree directing that the plaintiff will be entitled to get 1/4 of such share which each defendant has in item 1. He will be entitled to proportionate costs of this throughout, but he will pay proportionate costs on the disallowed half-share in second appeal. As to the second item, the parties never prosecuted the appeal together, and the plaintiff wants now a share in item 1 in substitution of what he would have got from the other item if all had stuck to their agreement. I do not think he is entitled to this, and this claim will be dismissed with proportionate costs in second appeal. I have already said that the appellant will pay all costs of the respondents in both the Courts below. The plaintiff will be also entitled to mesne profits from the date of suit till delivery of possession on the item decreed. The District Munsif will ascertain the past profits and pass a final decree. The future profits will be determined in execution.

Appeal allowed in part and dismissed as to the rest.

(10) [1915] A. C. 318=84 L. J. P. C. 49 = 112 L. T. 408.

A. I. R. 1926 Madras 1121

DEVADOSS AND WALLER, JJ.

Venkatigadu and *others*—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 16 of 1926, Decided on 29th March 1926, from the order of the S. J., Anantapur, in Criminal Case No. 56 of 1925.

Criminal P. C., S. 297—Offence charged must be explained to jury—Theft case—Removal must be dishonest—"Dishonestly" must be explained to jury.

It is the duty of the Sessions Judge to explain clearly to the jury the offence with which the accused are charged and in doing so the Judge should keep before him the words of the section defining the offence. [P 1122, C 1]

In case of theft removal must be done dishonestly and the word "dishonestly," must be explained to the jury. [P 1121, C 2]

V. L. Ethiraj for *the Public Prosecutor*—for the Crown.

Judgment.—The only point in this case is whether the offence of theft has been properly defined by the learned Sessions Judge. He defines theft as the taking of moveable property, from a person's possession without that person's consent. This is not the proper definition of theft. Removal must be done dishonestly and the word 'dishonestly' must be explained to the jury. In the light of the facts of the case we cannot hold the incomplete definition of theft

has caused a miscarriage of justice, but we would draw the attention of the learned Judge to the duty of explaining clearly to the jury the offence with which the accused are charged and in doing so the Judge should keep before him the words of the section defining the offence. With these remarks we dismiss the appeal.

Appeal dismissed.

A. I. R. 1926 Madras 1122

VENKATASUBBA RAO, J.

Ramalinga Iyer—Appellant.

v.

Parvathathammal and *others*—Respondents.

Second Appeal No. 1469 of 1923, Decided on 21st April 1926, from the decree of the Sub-J., Tuticorin, in A. S. No. 11 of 1923.

Hindu Law—Alienation by widow—Income of property insufficient for maintaining widow, she is not bound to keep corpus intact for reversioners.

Where the income of the estate is insufficient for the maintenance of the widow, the Hindu Law does not impose upon her any obligation to preserve the corpus and keep intact for the benefit of the ultimate reversioner, Any such onerous duty is not cast upon a Hindu widow. She can certainly alienate the property for necessary purposes and the most obviously necessary purpose is her own maintenance. [P 1122 C 2]

K. Raja Iyer—for Appellant.

K. S. Ramabhadra Iyer—for Respondent.

Judgment.—I am clearly satisfied that the judgment of the lower Court is correct. One Veera Rama Aiyar and his widow made certain alienations. The plaintiff as the reversionary heir impeaches these transactions. Certain properties were left by the deceased and it is sufficient for the purpose of this judgment to state that by Exhibits I—C and by Exhibit A she sold certain portions of the land and utilized the proceeds for the payment of her husband's debts. This fact is not disputed. She then found herself in possession of 47 cents nanja and acres 1·44 punja. She sold this punja land in 1916 for Rs. 600 by Exhibit I—B. The nanja land amounting to 47 cents she sold under Exhibit I for another sum of Rs. 600 in the year 1918. We are concerned with the validity of the latter sale. It is not disputed that out of this Rs. 600 realized the widow paid Rs. 150 to the plaintiff in discharge of a valid debt. On these facts, can the sale under Exhibit I be impeached on the ground that it is not binding upon the reversion?

The learned Subordinate Judge points out that the land which remained in the widow's possession after the debts had been paid off was capable of fetching an annual income of Rs. 28. A portion of this land was sold under Ex. I-B and realized Rs. 600. If this amount had been invested even at 12 per cent. a fairly high rate the interest the lady could get would only be Rs. 6 a month. If likewise she should invest also the sum Rs. 450 which remained in her hands out of the proceeds of sale under Ex. I, the interest which that sum would earn would be Rs, 4-1-0 a month. In other words, by converting the land into cash, the widow is in a position to realize by way of interest Rs. 10-8-0 a month. In making this estimate the Subordinate Judge has certainly not taken too lenient a view of the case from the widow's standpoint.

It is not pretended that this young widow of 20 can live on Rs. 28 per year or Rs. 2 per month. In the circumstances, does the Hindu Law impose upon her any obligation to preserve the corpus and keep it intact for the benefit of the ultimate reversioner? I do not think that any such onerous duty is cast upon a Hindu widow. She can certainly alienate the property for necessary purposes and the most obviously necessary purpose is her own maintenance. If the widow had not sold these lands, she should be practically starving. I am clearly of the opinion that the purpose in the present case is a justifiable purpose.

The Subordinate Judge also points out that this lady is a native of Travancore and that the lands are in the Tinnevelly district. She cannot be expected for the purpose of realizing a paltry sum of Rs. 28 a year, to abandon her home and reside permanently in Tinnevelly. If she substitutes supervision by agents for her own supervision, the produce may not be sufficient even to meet the incidental expenses. The sale must be upheld. The appeal consequently fails and is dismissed with costs.

Appeal dismissed

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* A. I. R. 1926 Madras 1123

DEVADOSS, J.

(*Gollapalle*) *Sidda Reddi* and *another*—Appellant.

v.

Deva Jayarami Reddi and *another*—Respondents.

Second Appeal No. 1600 of 1923, Decided on 20th July 1926, from the decree of the Sub-J., Chittoor, in Appeal Suit No. 154 of 1922.

* *Hindu Law—Adoption—Setting aside—Case of aurasa son seeking to set aside is different from reversioners—His right is independent of the father—Suit by minor son is not governed by Limitation Act, Art.* 118.

The case of the aurasa son of an adoptive father stands on a different footing from that of a reversioner. The cause of action is one and the same whatever may be the number of the reversioners. But the case of an Aurasa son is altogether different, for the adoption affects him as it affects no one else; for if the adoption is held valid his right to the family property would be cut down under the Hindu Law. But if the adoption is held to be not valid then he would succeed to the whole of the family property. Therefore decisions which relate to suits by reversioners would not apply.

The mere fact that the father who made the illegal adoption was alive for more than six years after the adoption would not bar the right of a son born a year or two after the adoption to question it.

Article 118 would not apply to a case like this, for the cause of action begins from the time when the alleged adoption becomes known to the plaintiff. He, being a minor, could not be fixed with the knowledge of the adoption from the date of his birth.

Son's right to challenge the adoption is quite independent of that of the father. [P 1123 C 2]

P. Chenchiah for *P. Venkataramana Row*—for Appellants.

S. Varadachari—for Respondents.

Judgment.—The only question in this second appeal is whether the plaintiff's suit is barred by limitation under Article 118 of the Limitation Act. The contention of Mr. Chenchiah is that the adoption was made more than six years before the date of the suit and that the father of the plaintiff who could have challenged the factum and validity of the adoption did not do so and the plaintiff's claim is barred by limitation, and he relies very strongly upon cases which relate to reversioners bringing suits for setting aside adoptions. The plaintiff is the natural son of the adoptive father. The appellate Court finds that there was no adoption. The case of the aurasa son of an adoptive father stands on a different footing from that of a reversioner. The cause of action is one and the same whatever may be the number of the reversioners. But the case of a person like the plaintiff is altogether different, for the adoption affects him as it affects no one else: for if the adoption is held valid his right to the family property would be cut down under the Hindu Law. But if the adoption is held to be not valid then he would succeed to the whole of the family property. That being so, it is difficult to see how cases which relate to suits by reversioners would apply to the case of the plaintiff.

As Mr. Varada chariar very well put it, if the appellant's contention is to hold good, then, in the case of a widow making an adoption, if the adoption is not questioned by her within six years of the date of the adoption, the adoption could not be impeached by anybody. Surely that is not the Hindu Law. The mere fact that the father who made the illegal adoption was alive for more than six years after the adoption would not bar the right of a son born a year or two after the adoption to question it. The plaintiff is still a minor and it is difficult to see how Article 118 would apply to a case like this: for the cause of action begins from the time when the alleged adoption becomes known to the plaintiff. He being a minor could not be fixed with the knowledge of the adoption from the date of his birth. The contention is under S. 2 (8) of the Limitation Act that the plaintiff must be considered as a person claiming through his father. I am not prepared to accept this contention for the plaintiff's right is quite independent of that of the father. It is therefore unnecessary for me to consider the cases relied upon by Mr. Chenchiah which are *Hari Prasad Singh* v. *Sourendra Mohan Singh* (1); *Venkata Sivayya* v. *Ademma* (2); *Ayyadorai Pillai* v. *Solai Ammah* (3); *Chiruvolu Punnamma* v. *Chiruvolu Perrazu* (4).

The suit is not for a mere declaration. It is for an injunction as well. The relief as regards declaration is only incidental

(1) A. I. R. 1922 Patna 450=1 Pat. 506.
(2) [1920] 44 Mad. 218=12 L. W. 499=30 M. L. J. 621=60 I. C. 98=(1920) M. W. N. 783.
(3) [1901] 24 Mad. 405.
(4) [1906] 29 Mad. 390=16 M.L.J. 307 (F.B.).

to the main relief namely, the injunction prayed for. For the allegation is that the Defendants 1 and 2 are interfering with the enjoyment of the property belonging to the plaintiff and the Court is asked to grant a permanent injunction restraining them from doing so. That being so, I do not think that the suit is barred by limitation under Art. 118. In the result the Second Appeal fails and is dismissed with the costs of the plaintiff respondent,

Appeal dismissed.

A. I. R 1926 Madras 1124

WALLACE, J.

S. V. Nallaperumal Pillai—Plaintiff—Petitioner.

v.

R. Ponnaya Mudaliar and *others*—Defendants—Respondents.

Civil Revision Petition No. 1164 of 1925, Decided on 3rd March 1926, from the order of the Sub-J., Tuticorin, D/-18th September 1925, in I. A. No. 422 of 1925.

(*a*) *Civil P. C., O. 6, R. 17—Original suit on a mortgage bond for sum found due on running account on a certain date—Defendant denying character of the bond—Amendment to sue on original running account in the alternative must be allowed.*

The suit as originally framed was based on a security or mortgage bond executed by Defendants 2, 3 and 4 on behalf of Defendant No. 1. the mortgage amount being the sum found to be due to the plaintiff by the 1st Defendant on a certain date on running accounts. The running accounts went on even after that date and on the taking of accounts up to the date of plaint the plaintiff admitted that Rs. 1,016 was due by him and allowed for that set off in his plaint. Defendant No. 1 alleged that Defendants 2, 3 and 4 could not execute the bond on his behalf and hence it was not binding on him. Plaintiff applied to allow him to amend his plaint by adding an alternative prayer to the effect that if the mortgage is found to be not binding on the 1st defendant he may be allowed to sue on the running account on the footing that there was no settlement.

Held : that the amendment prayed for did not effect any real change in the cause of action and the amendment should be allowed : 24 *M. L. W.* 400. [P 1124 C 2]

(*b*) *Civil P.C., O. 6, R. 17—Refusal to allow just prayer for amendment—Revision lies—Civil P. C., S. 115.*

Where the lower Court has erred in its treatment of the matter and it has irregularly exercised its jurisdiction in refusing amendment, the error being vital to the trial of the suit, it will be corrected in revision. [P 1125 C 2]

C. S. Venkatachariar, P. N. Marthandam Pillai and *A. Ramamurthi Aiyar*—for Petitioner.

S. T. Srinivasagopalachariar and *R. Gopalaswami Aiyangar*—for Respondents.

Judgment.—The Civil Revision Petition is against the order of the lower Court refusing to permit an amendment of the plaint in O. S. No. 59 of 1924. The suit as originally framed was based on a security or mortgage bond, dated 1st July 1921, executed by Defendants 2, 3 and 4, the mortgage amount being the sum found to be due to the plaintiff by the 1st defendant on that date on running accounts. The plaint allegation was that as on 1st July 1921 it was asserted that the 1st defendant was insane and, therefore, could not himself execute the bond, Defendants 2, 3 and 4 executed it, the 3rd defendant doing so as guardian of the 1st defendant. After 1st July 1921 the running accounts went on, and on the taking of accounts between 1st July 1921, and 26th September 1924, the date of plaint, the plaintiff admitted that Rs. 1,016 was due by him and allowed for that set-off in his plaint. The defence inter alia was that the 1st defendant was not insane on the date of the mortgage and, therefore, the mortgage is an invalid document and does not bind him. The plaintiff, after putting forward a case that the 1st defendant had ratified the mortgage after recovering his sanity, applied to allow him to amend his plaint by adding an alternative prayer to the effect that if the mortgage is found to be not binding on the 1st defendant he may be allowed to sue on the running accounts on the footing that there was no settlement on the 1st July 1921. This prayer the lower Court has refused. It seems to me that the lower Court has not rightly exercised its jurisdiction in refusing this prayer. The suit is really to recover an amount due to the plaintiff by the 1st defendant on accounts between them. The plaintiff's original case was that at one stage this debt due was crystallized into a mortgage debt. Defendants in effect say it was not. The plaintiff then pleads that if it is found that it was not, he may be allowed to

sue on the accounts as if it was not. I cannot see here any radical change in the cause of action. The primary party liable on the accounts has all through been the 1st defendant. I shall come to the case of Defendants 2 to 4 later; but so far as the 1st defendant is concerned, I cannot see how the amendment prejudicially affects him or changes the essential cause of action against him. He cannot plead surprise because it is part of his case that he was unaware of the mortgage and was all along under the belief that the accounts were running on as before and that there was no settlement on 1st July 1921: see paragraph 11 of his statement.

His main objection is that the amendment will open to the plaintiff an opportunity of appropriating against time barred items prior to 1st July 1921 sums already appropriated against debts which have arisen after 1st July 1921 and thus entirely alter the complexion of the accounts as set out in the plaint after 1st July 1921. No doubt it will have this effect, but the lower Court is quite capable of dealing with such a contingency, and it will be open to the 1st defendant to plead before it such questions of limitation and re-appropriation. The 1st defendant cannot plead with the same breath that the plaintiff cannot rely on the mortgage and yet that he must be bound by his system of accounts following from it. The plaintiff no doubt taken by surprise when the 1st defendant repudiated the insanity, was entitled to put forward the alternative plea on the contingency that the insanity was not proved, and such a plea must proceed on the footing that there was no settlement on 1st July 1921, binding on the 1st defendant, because the settlement was not with him although he was mentally sui juris and that, therefore, the running account has not been interrupted by any such settlement.

The lower Court's order refusing this prayer seems to me to be based on a confusion of thought. It regards the amendment as introducing a new cause of action, because there was a settlement on 1st July 1921, when the old balance of account was discharged by the mortgage. But the whole question is whether or not there was a settlement, and if the Court held on trial that the 1st defendant was not insane, then there was no settlement with the first defendant. The plaintiff's case was not that he accepted the transfer of the debt from the shoulders of the 1st defendant to those of Defendants 2 to 4, but that he effected a direct settlement with the 1st defendant through his guardian. If there was no such direct settlement then the accounts with the 1st defendant are open and the case falls to be decided on that footing. Similarly with appropriations after July, there were on the footing that there had been a direct settlement with the 1st defendant and if there was no such direct settlement the plaintiff is entitled to re-appropriation so far as the law of limitation will permit. The plaintiff is entitled to whatever 1st defendant owes him on the footing of the items on running accounts which are not barred by limitation. On this footing, of course, the only items after 1st July 1921, to be reckoned in the accounts of the 1st defendant will be those items of personal dealing with the 1st defendant after that date and not any items of dealing with the other defendants.

As regards Defendants 2 to 4, the new case requires some security. They only came on the scene on 1st July 1921, and their dealings with the plaintiff date from this. They will not, if the mortgage is found not binding on the 1st defendant carry over any of the 1st defendant's liabilities either before or after the settlement, and the claims against them will be each on his own personal obligation, if any, under the mortgage, and on such transactions as he has had personally with the plaintiff since then. The plaintiff's prayer in his proposed amendment in paragraph 5 (a) that they should be held personally liable for the sum found after appropriating payments subsequent to 1st July 1921, towards earlier debts cannot therefore, be permitted and the last sentence, namely " and from Defendants 2 to 4 according to suit mortgage and security bond " must, therefore, be and is disallowed. Except for this I consider the amendment should be allowed. O. 6, R. 17 is wide enough to cover this case. The lower Court has erred in its treatment of the matter and it has irregularly exercised its jurisdiction. Such an error is vital to the trial of the suit and must be corrected here and now. I reverse the order of the lower Court

and allow the amendment subject to the restriction noted above. The petitioner will have his costs from 1st defendant here and pay the costs of Defendants 2 to 4 here.

Order set aside.

A. I. R. 1926 Madras 1126

RAMESAM, J.

M. E. Singaravelu Mudali and *another*—Petitioners.

v.

Balasubramania Mudali and *others*—Respondents.

Civil Misc. Petition No. 689 of 1926, Decided on 2nd August 1926, to issue an order restraining execution of the decree in O. S. No. 41 of 1921 of the Dt. J., South Arcot.

(a) *Civil P. C., O. 39, R. 1—High Court can stay execution or issue injunction in revision.*

The High Court has power to stay execution or issue an injunction in revision petitions provided it can do so in second appeals.

[P. 1127, C. 1]

(b) *Civil P. C., O. 39, R. 1—Injunction restraining party from proceeding with execution in another suit can be granted.*

A Court has an inherent power to issue an injunction restraining a party from proceeding with the execution of the decree in another suit as there is no difference between proceeding with another suit or proceeding with the execution of the decree n another suit. [P. 1127, C. 1 & 2]

K. V. Sesha Ayyangar—for Petitioners.

V. Ramaswami Aiyar for *K. Rajah Aiyar*—for Respondents.

Ramesam, J.—This is a petition praying for an injunction restraining the respondent from executing the decree in O. S. No. 41 of 1924 on the file of the District Court of South Arcot pending disposal of Civil Revision Petition No. 1372 of 1925 on the file of the High Court. The facts are as follows: There was a suit for partition in the Sub-Court of Chingleput. This was O. S. No. 3 of 1916. On the 6th of March, 1917, a preliminary decree was passed in it. The present petitioner was one of the plaintiffs in it. After the preliminary decree, the 3rd defendant in the suit filed O. S. No. 41 of 1921 in the District Court of South Arcot at Cuddalore to recover a sum of money from the petitioner and others. The disputes between the parties were settled by a compromise drawn up in the form of two agreements dated 6th October 1922, according to one of which a decree was to be passed in the Cuddalore suit for Rs. 9,000, Rs. 2,000 of which was to be paid within two weeks and the balance in 9 months. Under the other it was arranged that a fresh allotment of the property should be made in the final decree at Chingleput in such a way as to cover the payment of Rs. 7,000 to the decree-holder in the South Arcot suit.

Accordingly a decree was passed in the Cuddalore Court for Rs. 9,000 and the amount which had to be paid within two weeks after the decree was also paid. What remained to be done was that the re-allotment of the properties in the Chingleput Court was to be made and when this was brought to the notice of the Cuddalore Court the Cuddalore Court had to enter satisfaction of the money decree. Obviously, the provision for the payment of the balance of the Cuddalore decree was a surplusage as the decree was intended to be satisfied by re-allotment of properties. On the 12th of July 1923, an application to record the compromise was filed in the Chingleput Court; but this petition was overlooked and a decree was passed in pursuance of the original preliminary decree—the petitioner applied on that very day to make the necessary corrections in the decree but it could not be ordered as the respondent was absent. Afterwards respondent appeared and opposed the passing of the decree, but the Subordinate Judge after full enquiry passed an order in favour of the petitioner. On appeal to the District Judge—I doubt if any appeal lay to the District Judge against the order allowing the amendment as the respondent's remedy would be to appeal against the amended decree—the District Judge found all points in favour of the petitioner but allowed the appeal on the ground that the petitioner's remedy was to bring a fresh suit.

A Civil Revision Petition has been filed against the District Judge's order on the ground among other grounds that the District Judge had no jurisdiction to pass the order he has passed. The Revision Petition has been admitted by Wallace, J., who also ordered notice on the petition for injunction. This petition for injunction now comes on before me for final disposal. As I think there

are good grounds in the revision petition I am inclined to issue an injunction provided I have got the power to do so. The respondent contends that I have no power.

Now, it is conceded by poth parties that as the practice of this Court stands, the High Court has power to stay execution or issue an injunction in revision petitions provided it can do so in second appeals. If the matter before me is a second appeal from the Chingleput Court and I have the power to issue an injunction, certainly I can issue an injunction also in a revision petition. Again, if the Sub-Court has power to issue an injunction, the High Court has also the same power. This is also practically conceded by the respondent. The contention of the respondent is that neither O. 39, R. 1, nor R. 2, applies to the case and the Sub-Court could not have issued any injunction, and, therefore, I cannot. He contends that O. 39, R. 1 does not apply as no property is now sought to be attached in execution and no property is in danger. In the Cuddalore Court what is sought now by the respondent is the arrest of the petitioner. He also contends that the terms of O. 39, R. 2, do not apply. It seems to me that after the filing of the compromise petition in the Chingleput Court the nature of that suit is slightly altered. It was originally a suit for partition. The effect of the compromise was to add something to its character. Not only was it a suit for partition, but it was also a suit to enforce a contract between the parties to make the partition in a particular way. From the time the compromise petition was filed in Court all the efforts of the petitioner amount to enforcing the covenants of the compromise, or in other words the petitioner as plaintiff in the Chingleput suit seeks to restrain the defendant from committing a breach of contract. Therefore, I think the terms of O. 39, R. 2 apply.

Mr. Sesha Ayyangar for the petitioner referred to a number of cases which show that in such matters the civil Court has an inherent power to issue an injunction restraining a party from proceeding with another suit in another Court. I have not referred to these cases in detail as one of the objections of the respondent is based on the contention that neither O. 39, R. 1, nor R. 2, applies. But I must state that I do not see any difference between proceeding with another suit or proceeding with the execution of the decree in another suit. I, therefore, think that the cases cited do apply. I will only instance the decision in *Kumar Ganga Singh* v. *Pirthichand Lal* (1). I think I have the power to issue an injunction restraining the respondent from executing the decree of the Cuddalore Court in breach of the covenants of the compromise under which the properties are to be re-allotted in a certain way at Chingleput and on the matter being reported to the Cuddalore Court the satisfaction of the decree of that Court should be entered, and I accordingly direct such an injunction to issue.

Injunction ordered.

(1) A. I. R. 1922 Patna 34=1 Pat. 556.

A. I. R. 1926 Madras 1127

MADHAVAN NAIR, J.

Thandavaraya Pillai—Appellant.

v.

Kuppuswami Udayan—Respondent.

Appeal No. 40 of 1924, Decided on 25th March 1926, against appellate order of the Dist. J., South Arcot, in A. S. No. 240 of 1922.

Civil P. C., O. 21, R. 100—Court cannot enquire into the equities in favour of auction-purchaser.

The legitimate scope of an application under R. 100 does not necessitate the consideration of the question as to the share which the auction-purchaser has purchased under the sale, nor does it entitle the Court to go into questions as to the equities of the case in favour of such purchaser.

[P. 1128, C. 1]

M. S. Venkatrama Aiyar and *S. Jagadisa Aiyar*—for Appellant.

T. E. Ramabhadrachariar—for Respondent.

Madhavan Nair, J.—The mortgagee-decree-holder-purchaser is the appellant. The appeal arises out of an application under O. 21, R. 100 made by the respondent for being put into possession as he was wrongfully dispossessed by the decree-holder in execution of his mortgage decree. The appeal relates only to properties covered by Schedules C and D to the decree. These properties were mortgaged to the decree-holder by Defendants 3, 4 and 5 who were members of a joint undivided family. Defendants 2 and 6 had sold these properties prior to

the mortgage to the respondent who was the 7th defendant in the suit. It was decided in the mortgage suit that the decree-holder was entitled to get the shares only of Defendants 3, 4 and 5 in the plaint C and D Schedule properties. As a matter of fact the sale certificate issued to him covered more than what he was rightly entitled to under the judgment and decree and in execution of that decree he dispossessed the present respondent.

It is clear that under the decree the decree-holder is entitled to dispossess the respondent and so the lower Court allowed the petition filed by the respondent under O. 21, R. 100. It is now contended that since the appellant is entitled to a portion of these properties the question should have been considered by the lower Court as to what portion he was entitled to get, and it is only after such decision that the prayer of the respondent should have been granted. I agree with the lower Courts in holding that the legitimate scope of the application under O. 21, R. 100 does not necessitate the consideration of the question now raised by the appellant. I am inclined to think that the appellant has to work out his rights by a suit for partition. However that might be, it is clear that on the respondent's application which is of a restricted nature the Courts cannot go into questions raised by the appellant which would necessitate an enquiry into the equities of the case. I think the lower Court's order dismissing the request of the appellant to have his claim for a portion of the property considered in the course of the present application is right and this appeal should be dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1128

WALLER AND MADHAVAN NAIR, JJ.

Soundararajalu Naidu—Defendant—Appellant.

v.

Doraisami Naidu — Plaintiff—Respondent.

Appeal No. 129 of 1925, Decided on 6th May 1926, from the order of the Sub-J., Negapatam, D/- 16th February 1925, in Appeal Suit No. 20 of 1925.

Civil P. C., S. 11—Prior suit for possession based on exclusive title—Subsequent suit for partition and possession is not barred.

A suit by plaintiff for possession of his share after partition is not barred by the dismissal of his prior suit for recovery of specific plot of the land based on his exclusive title: *A. I. R.* 1923 *Mad.* 257, *Dist.* [P 1129, C 1]

C. A. Seshagiri Sastri—for Appellant.

S. R. Muthusami Aiyar—for Respondent.

Judgment.—The question for decision in this Civil Miscellaneous Appeal is one of res judicata and it arises in the following circumstances: Defendant is the appellant. Plaintiff's suit is for recovery of one acre of land in Survey No. 479-Q after partition, with past and future mesne profits. This property originally belonged to one Muthu Naidu. He executed a mortgage over one acre of this property in favour of Ayyavu Odayar. Ayyavu Odayar sued on the mortgage bond, got a decree and brought to sale the hypotheca. The plaintiff purchased the property and got possession through Court. He then sued the present defendant in O. S. No. 224 of 1919 describing the property purchased by him as a specific one acre of land in Survey No. 479-Q. The present defendant contested the suit and pleaded that the land was not mortgaged by Muthu Naidu and was not purchased by the plaintiff. It was held in that suit as well as in the appeal that the present plaintiff was not entitled to the western one acre specifically sued for in that suit. The defendant had purchased the entire land at a Court-sale held in execution of a money decree which he had obtained against the above-mentioned Muthu Naidu. The present suit by the plaintiff is thus to recover possession of one acre of land out of Survey No. 479-Q after effecting a partition and allotting to him that share.

It is pleaded in defence that this suit is barred by the rule of constructive res judicata under Expl. 4 to S. 11, Civil Procedure Code, by the decision in the prior suit, O. S. No. 224 of 1919. The learned Subordinate Judge held it was not so barred. We agree with his opinion. O. S. No. 224 of 1919 was a suit to recover a specific one acre based upon plaintiff's exclusive title to it on the footing of possession and dispossession. It was really based on trespass. The defendant then pleaded that the land which the plaintiff could claim was

unlocated and undivided. The present suit is one for partition on the footing of joint title and that the shares had not been specified. We do not think that the relief asked for in this suit could have been prayed for in the prior suit on the statement of facts made in it. It appears to us that the set of facts alleged in the present case is inconsistent with the facts which formed the basis of claim in O. S. No. 224 of 1919 and hence it cannot be said that the plaintiff ought to have alleged the same in that suit. Even if he might have done so, in our opinion the grounds of claim alleged in the two suits are so utterly dissimilar that they could not conveniently be put forward and tried in the same suit.

The case in *Muhammad Rowther* v. *Abdul Rehman Rowther* (1), relied upon by the learned vakil for the appellant is clearly distinguishable. The property sued for in that case in both the suits was the same and the suits were also of the same nature. In such circumstances the Court held that an additional ground of claim for the same property cannot justify a second suit and should have been urged in the first suit itself. The same cannot be said of the present case. As we have already stated, the causes of action in the two suits are utterly different and the grounds of claim are so dissimilar that they cannot conveniently be tried in the same suit without confusion. The order of the lower Court is right. We dismiss this Miscellaneous Appeal with costs.

Appeal dismissed.

(1) A. I. R. 1923 Mad. 257=46 Mad. 135.

A. I. R. 1926 Madras 1129

PHILLIPS AND MADHAVAN NAIR, JJ.

Ramanadhan Chettiar—Petitioner—Appellant.

v.

Ramachandra Sivaji Ghantikae and *others*—Respondents.

Civil Misc. Appeals Nos. 180 and 181 of 1924, Decided on 10th March 1926, from the orders of the Sub-J., Tanjore, in E. P. Nos. 96 and 97 of 1924, D/- 29th March 1924.

(a) *Civil P. C., O. 21. R. 16—R. 16 does not apply where the decree transferred is preliminary decree in partition suit.*

O. 21, R. 16, applies to the execution of a decree which has itself been transferred to the person seeking execution, but where the decree transferred is the preliminary decree in a partition suit, R. 16 is clearly inapplicable. [P 1129 C 2]

(b) *Civil P. C., S. 146—Transfer of preliminary decree—Assignee is not a person claiming under decree-holder.*

Where the preliminary decree in a partition suit is transferred, the assignee of the decree is not a person claiming under the decree-holder within S. 146. [P 1129 C 2]

K. Bhashyam Aiyangar—for Appellant.

T. R. Ramachandra Aiyar, A. V. Visvanatha Sastri and *S. Srinivasa Aiyar*—for Respondents.

Judgment.—*No.* 180 *of* 1924: The appellant is the transferee of the assignee of the rights of Defendants 1 and 2 at a time when they had obtained a preliminary decree for partition of their share in the family property. The appellant took no steps to be impleaded in that suit, but after the final decree has been passed he applies to execute the final decree passed in favour of Defendants 1 and 2. It is contended for the appellant that he can come in under O. 21, R. 16 but it is clear that that rule applies to the execution of a decree which has itself been transferred to the person seeking execution. Here the only decree that can be said to have been transferred to the appellant is the preliminary decree in the suit. That cannot be executed. Therefore, R. 16 is clearly inapplicable.

It is then argued that the case comes within S. 146 of the Code of Civil Procedure and that inasmuch as Defendants 1 and 2 can execute the final decree and the appellant is a person claiming under them he is equally entitled to execute the decree. Undoubtedly the appellant claims under Defendants 1 and 2 in so far as their right was declared by the preliminary decree, but that was an inchoate right being merely declaration of their right to a certain share without determining the extent of that share. After such transfer the defendants proceeded with the suit and obtained the further right, namely the right to secure possession of their separate share. That was a right which was not vested in them at the date of the transfer, and consequently that right did not pass to the appellant. So far, therefore, as that right is concerned, he cannot be deemed to be a person claiming under the defen-

dants, who are decree-holders. The cases cited before us for the appellant do not seems to be applicable. The appeal is dismissed with costs of the sole contesting respondent.

Appeal Against Order No. 181 of 1924 follows and is dismissed.

Appeals dismissed.

A. I. R. 1926 Madras 1130

WALLACE, J.

Rev. C. R. Vedantachari—Petitioner

v.

Marie—Respondent.

Criminal Revision No. 249 and Cri. Rev. Pet. No. 213 of 1925, Decided on 27th January 1926, from the order of the Ch. Presy. Mag., Madras Egmore, D/- 16th March 1925, in C. C. No. 18425 of 1925.

Criminal P. C., S. 488—Maintenance for child —Mother's evidence that counter-petitioner is the father of child should not be accepted without independent corroboration—Sufficient corroboration would be that when the child was conceived counter-petitioner was visiting the mother and had access to her.

In a case under S. 488, where the question at issue is, whether a certain man was the father of a certain child, it is prima facie improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity. Her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own word without some independent corroboration of it.

A Municipal record of the birth of the child of what the mother herself said at the time of the birth is not an independent corroboration, nor can the fact that letters, of which the contents were not known, passed between the mother and the alleged father is such a corroboration. The kind of evidence that one would look for to be given as corroboration in such a case would be evidence that at or about that time when the child was conceived, the petitioner was frequenting the society of the counter-petitioner, and had opportunities of access to her. [P. 1130, C. 2]

Nugent Grant and *V. P. Karunakara Menon*—for Petitioner.

K. Krishna Menon—for the Crown.

D. Kaulandai—for Respondent.

Order.—This is a Criminal Revision Petition to revise the order of the lower Court directing the petitioner to pay a maintenance of Rs. 20 per mensem for the child of which the lower Court finds the petitioner to be the father. The grounds urged for the interference of this Court are that the Magistrate has generally neglected the principles of legal evidence and proof and has admitted evidence that was irrelevant.

In a case like the present, where the question at issue is, whether a certain man was the father of a certain child, it is prima facie improper to accept without corroboration, the mere statement on oath of the mother who asserts the paternity. It is so obviously to her personal benefit and interest to secure a father for her illegitimate child, who will relieve her of the costs of providing for his maintenance that her evidence in such a case cannot but be highly interested, and it would be unreasonable and improper for any Court to act merely on her own word without some independent corroboration of it such as will satisfy the Court that her claim is true. The lower Court has recognized this principle and appears to think that such independent corroboration has been established. But it appears to me that its view is wholly unjustified.

The lower Court relies first on a Municipal record of the birth of the child. In the first place, that record is merely a record of what the counter-petitioner herself said at the time of the birth. That is clearly no independent corroboration of her present statement. Further, that record, as it stands, does not clearly apply to the counter-petitioner, and her present amplification and explanation of that entry in Court so that it may now be held to apply to the counter-petitioner, is again no independent corroboration of her present evidence. The Magistrate is in error in holding that the entry was a matter which the petitioner had to explain away. It was for the counter-petitioner to give a reasonable explanation as to why she did not give the full name and description of the father of her child at the time of the birth. Consequently the Municipal record cannot be viewed as independent corroboration. Beyond it I find no sort of corroboration. The kind of evidence that one would look for to be given as corroboration in such a case would be evidence that at or about that time when the child was conceived, the petitioner was frequenting the society of the counter-petitioner, and had opportunities of access to her. (After examining the evidence the order proceeded.)

The Magistrate's treatment of the whole of this case is decidedly defective. The fact that letters of which we do not know the contents, passed between the parties in 1918, which is the most he finds proved, is no corroboration of the fact that in April 1918, the parties had or could have had access to each other. It is quite clear that the evidence of the counter-petitioner is by no means free from suspicion, and there is no independent corroboration of her present story. No Court is entitled to infer from such unsatisfactory evidence that the petitioner was the father of the child. I am therefore unable to support the conviction. The order of the Magistrate must be set aside.

I direct that the order passed by the Magistrate be cancelled.

Order set aside.

A. I. R. 1926 Madras 1131

ODGERS AND MADHAVAN NAIR, JJ.

Muthu Balu Chetti, In re—Accused.

Criminal Revisions Nos. 377 to 404 of 1926, Decided on 20th August 1926, from the orders of the High Court, referred by the S. J., Madura, on 25th February 1926.

Madras District Municipalities Act (5 *of* 1920), *Ss.* 249 *and* 250—*Permission under S.* 250 *does not absolve owner from taking out license under S.* 249.

The object and scope of Ss. 249 and 250 are entirely different. The former contemplates an annual payment for the use of the machinery, while the latter, a payment once for all for installing it, and therefore permission under S. 250 does not absolve the owner of a rice-mill and engine from taking out licenses under S. 249: *A. I. R.* 1926 *Mad.* 576, *Diss. from. A. I. R.* 1924 *Mad.* 389, *Appr.* [P. 1133, C. 1]

F. S. Vaz—for Madura Muncipality.

S. T. Srinivasagopalachariar—for Accused.

Public Prosecutor—for the Crown.

Odgers, J.—This batch of criminal Revision cases has been referred by the Sessions Judge of Madura. The First Class Bench of Magistrates, Madura Town, convicted the persons concerned under S. 338 of the District Municipalities Act on the ground that they had not taken out licenses under S. 249 of the same Act. Permission had been obtained under S. 250 and it was contended before the Bench of Magistrates and before us in revision that if such permission is obtained it is unncessary to take out a license under S. 249. Reliance is placed on the ruling of a Bench of this Court in *Madura Municipality* v. *Muthu Balu Chetty* (1), and the learned Sessions Judge has referred the matter to this Court on the ground that the convictions are illegal having regard to that ruling. The Magistrates found as a fact that the working of the rice mills in question is likely to be dangerous to human life, or health or property and would therefore fall within the mischief of Sch. 5, Cl. (q) of the Act. So we must take it that the persons concerned have been found to be doing in the course of an industrial process something which is likely to be dangerous to human life or health or property.

The sole question is whether permission obtained under S. 250 absolves the persons concerned from taking out licenses under S. 249. This portion of the Act beginning at S. 249 is headed "Industries aud Factories" and S. 249 deals with "Industries" and S. 250 with the construction or establishment of factories, workshops or work-places in which it is proposed to employ steam power, water power or other mechanical or electrical power or with the installation of any machinery or manufacturing plant driven by steam, water or other power as aforesaid. The person intended to construct a factory or install machinery must, before beginning such construction, establishment or installation, apply to the Municipal Council for permission to undertake the work. This section says nothing about the kind of trade or industry to be carried on in the factory or on the premises in which machinery, etc., is to be installed, and in my opinion the proviso in 3 (a) of the section is not intended to apply to matters of this kind. The permission is to construct or establish a factory or to install machinery.

Section 249 deals with a wholly different state of things. It gives the Council power to notify that all or some of the trades or industries enumerated in Sch. 5 may not be carried on within Municipal limits or at a distance of three miles outside without the Chairman's license. They are all noxious or more

(1) A. I. R. 1926 Mad. 576.

or less objectionable trades or occupations. Many of them may be carried on without the establishment of a factory or workshop or the installation of any machinery. In the case referred to, *Madura Municipality* v. *Muthu Balu Chetty* (1), Devadoss, and Waller, JJ., recognize the distinction pointed out above in the Act between industries and factories. But they seem to have been impressed by the fact that the Council was to grant the permission under S. 250, whereas the Chairman is to grant the license under S. 249. I cannot with deference see the anomaly. The Council regulates the construction or user of buildings within the Municipality as factories; the Chairman in the first instance regulates their working if it is desired to carry on one or more of the scheduled occupations or trades therein. There is always an appeal to the Council from the decision of the Chairman. But much or most of the discussion in the judgment turns on the construction of Cl. (q) of Sch. 5 as to which as observed we must accept the finding of fact by the Bench.

There are two decisions of Krishnan, J., both reported in 45 *M. L. J.* The first at p. 555 *In re Ramchandra Rao* (2) is referred to by the learned Judges in the case under discussion. The case deals with the construction of Cl. (q) of Sch. 5. The other case at page 731 *In re Smith* (3), was not referred to by the learned Judges. In it Krishnan, J., was dealing with Ss. 287 and 288 of the Madras Act 4 of 1919 which are closely analogous to the sections now under review; and the learned Judge was of opinion that the license for the use of machinery and the payment once for all for erecting machinery are different things, and the fact that payment was made in the one case is no excuse for not paying in the other. With this opinion I respectfully agree, and on the above considerations I am unable, I regret, to concur with the ruling of the Bench in Cr. R. C. No. 503 of 1925. I must hold therefore that the convictions in these cases were right. I would return all these revision petitions to the District Judge to be dealt with in the light of the foregoing remarks.

Madhavan Nair, J.—The facts of this reference are not much in dispute. The accused keeps within the Municipal limits of Madura Town a rice mill for converting paddy into rice and for this purpose he used a rice-hulling machine which is worked by a 20 horse-power oil engine. He has been convicted by the Court of the 1st Class Bench of Magistrates, Madura Town, under Ss. 249 and 338 of the District Municipalities Act for having failed to take out a license for using the engine to work the machine. The main argument advanced on his behalf is that, having obtained permission under S. 250 of the Act for the installations of the rice-mill and the engine, he is not required to take out any further license for working the engine under S. 249. This argument is supported by a decision of this Court in *Madura Municipality* v. *Muthu Balu Chetty* (1). Mr. Adam argues that this case had been wrongly decided by the learned Judges.

It may be stated at the very outset that we have been asked by the learned Public Prosecutor to consider this reference on the assumption that the machinery in question falls within Sch. 5, Cl. (q) of the District Municipalities Act. The District Judge has not expressly stated so in his letter of reference; but the Magistrates who have convicted the accused have held that the working of this machinery is dangerous to human life, health or property as mentioned in Cl. (q) of the schedule.

Section 249 of the District Municipalities Act states that no place within the Municipal limits shall be used for any one or more of the purposes specified in Sch. 5 without the Chairman's license. Under this section it is obligatory on any one using a place for working machinery of the description specified in Sch. 5 to obtain a license. The license granted under the section shall enure for a year. It is obvious that the object of the section is to make the licensee pay an annual fee for using machinery of the kind described in Cl. (*q*) of Sch. V in his premises. S. 250 of the same Act states that every person intending to construct or establish any factory.....in which it is proposed to employ steam-power.....or to instal in any premises any machinery..... driven by.....steam, water..... shall before beginning such construction or installation obtain a license from the

(2) 45 M. L. J. 555 = A. I. R. 1924 Mad. 375.
(3) 45 M. L. J. 731 = A. I. R. 1924 Mad. 339.

Municipal Council Cls. (*a*) and (*b*). This section contemplates the levy of a fee before a factory is established or special kind of machinery is installed. The payment is a payment once for all and not annual, as in cases falling under S. 249. . The object and scope of the two sections are thus, in my opinion, entirely different. The one contemplates an annual payment for the use of the machinery, while the other a payment once for all for installing it. The argument advanced by Mr. Srinivasagopalachari, if accepted, would lead to this position, viz., that once permission is granted for installing the machinery, the applicant can work the machinery for ever without making any payment at all. This can hardly have been the intention of the Legislature in enacting Ss. 249 and 250 of the District Municipalities Act. In the judgment already referred to, it is stated that :

It would be completely anomalous to hold that, after the Council had granted permission for the erection of a mechanical power factory, it is open to the Chairman to refuse a license for its being worked or to impose impracticable conditions on its working.

With great respect to the learned Judges, I cannot see any anomaly in the situation if the scope and object of the two sections are correctly appreciated. In my opinion, the fact that the industries included in S. 249 and Sch. V are licensed by the Chairman, subject to the control of the Council, while the power factories referred to in S. 250 are regulated by the Council itself, subject to the orders of the Governor in Council, has no material bearing on the question under consideration.

Sections 287 and 288 of the City Municipal Act may be referred to with advantage in this connexion. S. 287 states that :

The owner or occupier of every place used for any purpose specified in Sch. VI shall, in the first month of every year, or in the case of a place to be newly opened, before it is opened, apply to the Commissioner for a license for the use of such place for such purpose.

Section 288 states that :

No person shall, without the permission of the Commissioner, erect anywhere any steam-boiler or machinery by the use of which smoke, smell, noise, vibration, dust or floating particles of combustible or other matter are produced or danger is likely to arise to the inhabitants of the neighbourhood.

In *In re Smith* (3), Mr. Justice Krishnan had to consider the true scope of these two sections under slightly different circumstances. In that case, the accused was convicted for not taking a license under S. 288. He had removed his machinery from its old place to a new one, and obtained permission to use it in his new premises, but he had not obtained permission to erect the machinery in the new place. It was argued as the first point that :

the accused having been allowed to use the machinery in Jones Street and it having been merely transferred to the new place, he could not be asked to pay any new license fee for erecting the machinery there.

The learned Judge in overruling this argument made the following observation :

I do not agree with this contention because the two things are different, the one is an annual payment of the license fee for the use of the machinery and the other is a payment once for all for erecting the machinery and the fact that payment was made in the one case is no excuse for not paying in the second case.

I think these observations may well be applied in considering the arguments advanced in the case before us.

For these reasons I would respectfully differ from the decision in *Madura Municipality* v. *Muthu Balu Chetty* (1). The other question raised in that case, viz., whether the machinery falls within Cl. (*q*) of Sch. V does not arise in the present case as already indicated. I would therefore return the reference and the connected cases to the District Judge and ask him to deal with the case in the light of the above observations.

Reference returned.

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* A. I. R. 1926 Madras 1133

KUMARASAMI SASTRI, O. C. J. AND CURGENVEN, J.

Dhurvas J. Subbarayar & Brothers and *another*—Appellants.

v.

J. K. Muniswami Iyer & Sons—Respondents.

Appeal Nos. 220 and 221 of 1921, Decided on 12th August 1925, from the decree of the 2nd Addl. Sub-J., Madura, in O. S. No. 27 of 1921.

(a) *Provincial Insolvency Act* (1920), S. 59 (*d*)—"*Relating to*" *does not mean* "*affecting*."

There is no authority for holding that the words "relating to" must be taken to mean "affecting."

[P 1135, C 2]

* (b) *Provincial Insolvency Act, S. 59 (d)—Suit for damages against insolvent—Right to appeal does not vest in Official Receiver—Suit by insolvent for refund of deposit on a contract—Official Receiver can continue.*

Section 59 does not authorize the Official Receiver to appeal against a decree against the insolvent in a suit for damages. But when the insolvent has filed a suit for return of the deposit money for breach of contract on the defendant's part, the Official Receiver is entitled to continue the suit. [P 1136 C 1]

(c) *Contract—Breach—Deposit can be forfeited on depositor's default.*

In all cases of deposits on contracts a person in default cannot claim a return of the deposit. [P 1136 C 2]

C. V. Anantakrishna Iyer and *P. V. Krishnaswami*—for Appellants.

A. Krishnasami Iyer and *P. C. Seshadri Iyer*—for Respondents.

Judgment.—These appeals arise out of a contract for purchase and delivery of goods entered into by the appellant in each of the cases with the respondent. The contract has been filed as Exhibit D, which, after describing the goods and the place where the goods were to be got from and delivered in paras. 1 and 2, goes on to say that the purchaser shall be bound by the contract he (respondent) entered into with his vendors and should take delivery of the goods. As regards the delivery of the goods and the advance, paras, 5, 6 and 7 are material: they run as follows:

On the very day on which the aforesaid two persons (their vendors) inform that the aforesaid bales have arrived here you should pay money and take delivery of the bales. Whenever the afore-specified bales are issued from the mill you should take delivery of the same. We are not liable therefor. As the afore-specified advance money is with us without interest, as the bales are issued, according to the proportion of the advance, you should deduct for the bales at the rate of Rs. 190 and at the rate of Rs. 160 per bale.

Then clause 8 says:

If the bales are received irom the aforesaid two persons and if we have not informed you of the same we are liable for the matters of loss that may result therein. In the matter of your not taking delivery after we informed you of the receipt, you yourself are liable for the loss that may arise therein.

This is signed by the respondent firm and is addressed to the appellant firm. Suit No. 27 of 1921 which led to appeal No. 220 of 1921 was filed by the present respondent against the appellant for recovery of damages for breach of contract, the allegation being that the appellant has not performed his contract in taking delivery, The particulars are given in the plaint and the claim, after credit is given for the advance, is for Rs. 8,860 as detailed in Schedule A or in the alternative for Rs. 3,460 as detailed in Schedule B with interest and costs. Suit No. 58 of 1921 which refers to Appeal No. 221 of 1921 was filed by the present appellant against the respondent for the recovery of the advance paid with interest. His case is that under this contract he paid advances, that the respondent did not deliver the goods and therefore the contract was broken by the respondent and that the appellant is entitled to recover the advance with interest. He claims Rs. 5,289-10-0. The suits were tried together and the Subordinate Judge decreed the plaintiff's claim in O. S. No. 27 of 1921, holding that the breach was on the part of the defendant in that suit and awarded a decree for about Rs. 7,000 odd as damages after giving credit for the advance which was paid. He dismissed suit No. 58 of 1921, the suit filed by the present appellant against the respondent on the ground that the breach of contract being on the part of the plaintiff in that suit, he was not entitled to recover the deposit.

These appeals are filed by the appellant against the two decrees. After the filing of the appeals, the appellant became insolvent. He applied for the benefit of the provisions of the Provincial Insolvency Act and an Official Receiver was appointed. When the appeals came on, the appellant who became insolvent did not press the appeal. The Official Receiver not being a party did not appear and the result was that the appeals were dismissed. The Official Receiver then applied to be made a party to the appeals on the ground that he had no notice of the appeals and their pendency and that there was a good case to represent to the Court against the decrees of the Subordinate Judge. His petition was granted on terms that he gave security and the dismissal was set aside; and he now appears by Mr. Anantakrishna Iyer to prosecute the appeals.

A preliminary objection was taken by Mr. Krishnaswami Iyer on the ground that under the Provincial Insolvency Act it is not competent to the Official Receiver to prosecute an appeal which relates to a claim for damages only and does not affect any property of the insol-

vent. He bases his contention on two grounds, first of all, he states that so far as the claim for damages is concerned, S. 28 of the Provincial Insolvency Act of 1920 states the effect of an order of adjudication. Cl. 2 states that on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided, and shall become divisible among the creditors and thereafter, except as provided by this Act, no creditor to whom the insolvent is indebted in respect of any debt provable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding, except with the leave of the Court and on such terms as the Court may impose.

Then follow what properties, for the purposes of the section, shall be included and excluded. As regards exclusion, Cl. 5 of the section says (S. 5 was quoted.)

We have now, therefore, to turn to the Civil Procedure Code to see what are exempted from attachment because such exempted property could not vest in the Court or in the Receiver. S. 60 of the Code in treating of property not liable to attachment refers in clause (e) to a mere right to sue for damages. We take it by mere "right to sue" is meant a right which has not ripened into or merged in a decree of Court and which still exists as a cause of action which the insolvent can enforce if he chooses by filing a proper suit. S. 6 (e) of the Transfer of Property Act is also relied upon which exempts from transfer a mere right of suit and states that it cannot be transferred. In the case of an unliquidated claim for damages there can be no doubt that it is a mere right of suit and the contention of Mr. Krishnaswami Iyer is that reading these sections together in this case, the right of suit would not vest in the Official Receiver and secondly, that he has no right to come in as a party. If the matter rested here, there may be some force in this contention. But in this case there are two points to be considered. On the date when the appellants became insolvent not only had the respondent exercised his right of filing a suit but there was also decree which they obtained against the insolvent and the matter did not rest merely on a chose in action which has not ripened into a decree. The case must therefore be judged with reference to S. 59 of the Provincial Insolvency Act. (Here the section was quoted.)

Turning to this section, what we have to see is what under Cl. (3) is the meaning of the term, "Relating to the property of insolvent." Is it a suit which directly or immediately affects the property of the insolvent or is it a suit or legal proceeding which might ultimately result in a decree which if executed or sought to be enforced would be payable out of the assets of the insolvent and thereby affect the property? The argument of Mr. Krishnaswami Iyer is that it should be such as directly and immediately affects the property and that we cannot hold "Relating to the insolvent's property" to mean "affecting the property," because that construction would result in every cause of action which the insolvent had being continued or defended by the Official Receiver for the benefit of the insolvent, while the law clearly is that so far as regards merely personal actions the Receiver cannot continue them but he can continue actions which are not personal, and he referred to some English cases on the point. We do not think there is very much use in referring to English law on the subject because the Provincial Insolvency Act has codified and crystallized the law which we have to administer on the subject and we have not been referred to any corresponding section in the English Act. We do not think there is any authority for holding that the words "Relating to" must be taken to mean "affecting." Mr. Anantakrishna Iyer himself admits that such a construction, which would give the Official Receiver power to conduct suits of a purely personal nature, which no Court has yet allowed to be done, would be placing an undue stretch on the section. What he argues is that where once a decree is passed or where the cause of action does not relate to personal actions but relates to actions founded on contracts and not of a purely personal nature, as the effect of a decree passed would be, if improper, to reduce the assets which are divisible among creditors, or, as the effect of a suit dismissed, if proper, should be to diminish

the amount coming into the hands of the Receiver for distribution to the creditors, a wide construction would be placed on S. 59 (d). It is argued that the Official Receiver has no remedy in such cases unless a liberal construction is put on S. 59. It seems to us that the Official Receiver has in such cases a remedy. The definition of a debt under the Insolvency Act includes a decree debt because S. 2 (a) states that "Creditor" includes a decree-holder and "debtor" includes a judgment-debtor. Now the section as regards proof of debt in S. 33: (here S. 33 was quoted).

Then there is the provision that:

Any creditor of the insolvent may, at any time before the discharge of the insolvent, tender proof of his debt and apply to the Court for an order directing his name to be entered in the schedule, and the Court, after causing notice to be served on the insolvent and the other creditors who have proved their debts, and hearing their objections (if any), shall comply with or reject the application. Then comes S. 49 which describes the mode of proof and it says that "A debt may be proved under this Act by delivering, or sending by post in a registered letter, to the Court affidavit verifying the debt. The affidavit shall contain or refer to a statement of account showing the particulars of the debt, and shall specify the vouchers (if any) by which the same can be substantiated. The Court may at any time call for the production of the vouchers.

Then S. 50 says:

Where the Receiver thinks that a debt has been improperly entered in the schedule, the Court may, on the application of the receiver and after notice to the creditor, and such enquiry (if any) as the Court thinks necessary, expunge such entry or reduce the amount of the debt.

Cl. 2 deals with cases where no receiver is appointed. Thus we find that where a decree is passed without the receiver being made a party, it is open to him to contest the validity of that decree in proper proceedings under the Insolvency Act. So far as the law in England is concerned, it is clear that the Bankruptcy Court is not bound by the decrees passed against the insolvent but can go into proof of the consideration and the amount which is due and validity of those decrees. We may refer to Williams on Bankruptcy (13th Edition, page 258). It is therefore not a case where the Official Receiver is without a remedy. We are of opinion that S. 59 does not authorize the Official Receiver to appeal against a decree which was passed against him in a suit for damages which the respondent filed against him. The suit which the insolvent-appellant filed against the respondent for the return of the deposit stands in an entirely different position. His case is that he deposited a certain sum of money with the respondent which was to be appropriated in a certain manner and when certain contingencies happened, that the respondent is not entitled to retain the money as he has not given the goods which was the consideration for the deposit being given and that therefore he is entitled to the return of the deposit. Now, deposit under those circumstances is the insolvent's property. The money is with the respondent but it is the insolvent's property and he is entitled to get a return of the money in certain contingencies. It cannot be said that because the respondent in that suit might justify the retention on the ground that the insolvent has not fulfilled the conditions which entitle him to its return on a breach of contract, the suit is a suit for damages sounding entirely in damages without any reference to the property of the insolvent. None of the sections would apply because, if it is property of the insolvent, and the suit is only for the return of that property, it clearly vests in the Official Receiver under S. 20 and he is entitled to get back the money. The defence which the defendant may raise is no criterion in estimating or appropriating the cause of action of the plaintiff. What we have to see is whether that money can be said to be his property and there can be little doubt that the money would be his property unless the defendant can show a right to appropriation and not to return it.

We are of opinion therefore that Appeal No. 220 of 1921 fails and is dismissed with costs as the Official Receiver could not prosecute it and that Appeal No. 221 of 1921 is competent and that the Official Receiver can appeal against that decree in so far as it relates to the dismissal of the suit to recover the deposit. In this view the question is material as to whether this deposit which was admittedly received by the respondent in this case is returnable or not; and that question will turn upon who committed the breach of the contract. In all cases of deposits on contracts it is well established that a person in default cannot claim a return of the deposit and in this case, as it is not denied that if the contract was broken damages would be much more than the

amount deposited no obligations arise to return the deposit for which credit will be given as in estimating the amount of damages. In fact, in the other suit in which a decree was obtained damages were awarded to the extent of Rs. 7,000 after giving credit to the advance. (The judgment then discussed the evidence and continued.) It is clear from the evidence that so far as damages are concerned, it far exceeds the deposit and the suit will therefore fail as the appellant who claimed deposit committed breach of a very large portion of the contract. The appeal therefore fails and is dismissed with costs. The Memorandum of Objections is not pressed. Dismissed. No costs.

Appeal dismissed.

A. I. R. 1926 Madras 1137

COUTTS-TROTTER, C. J., AND RAMESAM, J.

Official Assignee of Madras—Appellant.

v.

Narayana Goundan and *others*—Respondents.

Original Side Appeals Nos. 46-48 of 1925, Decided on 15th December 1925, from an order of Srinivasa Aiyangar, J., D/- 2nd February 1925.

Insolvency—Discharge of insolvent—Official Assignee cannot prosecute further proceedings against debtors to insolvents' estate.

A Bankruptcy Court both in England and in India does very often pass conditional orders of discharge which keep alive remedies on one side or the other.

While pending certain proceedings against the debtors to the insolvent's estate by the Official Assignee, the insolvent is discharged on account of a composition between his creditor to which the Official Assignee is a party, it does not lie in the mouth of the Official Assignee to say that the bankrupt's estate is in any way vested in him so as to enable him to prosecute proceedings to recover additional sums of money over and above those provided for, for distribution in the compromise for the benefit of the bankrupt's estate.

[P 1137, C 2, P 1138 C 1]

Grant and *Grantorex*—for Appellant.

Coutts-Trotter, C. J.—This is a perfectly plain case. It is to my mind an audacious attempt t evade the plain provisions of the Insolvency Law in this Court. The insolvent was adjudicated and, of course, his estate vested in the Official Assignee who brought proceedings calling upon certain persons whom he alleged to be debtors to the bankrupt's estate to discharge their obligations. While these proceedings were pending, an arrangement was come to, to which the Official Assignee was a party whereby, on payment of certain sums of money into the hands of the Official Assignee for distribution among the creditors, a composition was arrived at and the bankrupt got his discharge. It is now sought by the Offiicial Assignee to go on with those pending applications against the debtors to tbe bankrupt's estate for the benefit of the creditors who have accepted what they have already had as a full discharge in satisfaction of their claims. It is obvious that such a thing cannot be done. A Bankruptcy Court, both in England and in India, does very often pass conditional orders of discharge which keep alive remedies on one side or the other. Such have been some of the cases which have been mentioned to us where funds already in the hands of the debtors are earmarked for certain purposes on the one hand and where orders are passed keeping open the remedy to the bankrupt's estate conditional until certain other debtors of the bankrupt whose money has not been collected are made to pay their debts. Here no provision was made in the order of discharge for keeping alive the seisin of the bankrupt's estate in the hands of the Official Assignee, still less in the form of safeguarding his rights of suit against these persons against whom the applications were made. It seems to me the only conclusion that can be drawn is that, when the Official Assignee carried through that compromise, he deliberately intended to release his hold on those assets, which are after all only potential assets of the estate in his hands. What remedies the bankrupt himself may have against these alleged debtors it is not our province to inquire. It may be that they are all barred by limitation. This much is clear that in the light of what has taken place it does not lie in the mouth of the Official Assignee to say that the bankrupt's estate is in any way vested in him so as to enable him to prosecute proceedings to recover additional sums of money over and above those provided for, for

distribution in the compromise for the benefit of the bankrupt's estate. This being so the learned Judge's decision is quite correct and these appeals must be dismissed.

Ramesam, J.—I think this case illustrates the inconvenience of garnishee proceedings. If the Official Assignee had filed suits, the insolvent has merely to bring himself on the record to continue again, and there is no question of any fear of those suits being barred.

Appeals dismissed.

A. I. R. 1926 Madras 1138

KUMARASWAMI SASTRI, O. C. J., AND CURGENVEN, J.

Russa Engineering Works Ltd.—Plaintiffs—Appellants.

v.

Kanara Transport Co., and *others*—Defendants—Respondents.

Appeal No. 26 of 1925, Decided on 20th July 1926, from the order of Waller, J., D/- 28th January 1925, in Civil Suit No. 576 of 1923.

Contract Act, S. 249—Person entering into partnership agreeing to become liable for antecedent debts of firm—Agreement cannot be enforced by creditor.

Apart from privity of contract a creditor of the firm is not entitled to rely on an agreement between the partners.

Where by a deed one partner is admitted into the partnership in place of another the former cannot be made liable in respect of antecedent transactions on the strength of an agreement contained in that deed between the partners inter se that he would be liable for transactions hitherto incurred and future liability: *Rolfe and the Bank of Australia* v. *Flower, Salting and Co.*, (1865) *L. R.* 1 *P. C.* 27, *Appl.*; 40 *Cal.* 814, *Ref. to.* [P 1139, C 2]

Nugent Grant and *K. S. Krishnaswami Aiyangar*—for Appellants.

V. Radhakrishnayya and *K. Sanjiva Kamath*—for Respondents.

Kumaraswami Sastri, O. C. J.—This is an appeal that arises out of an application to execute a decree which was passed against two defendants, the Kanara Transport Co. and Captain Bhandarkar. The decree, as is usual with decrees against firms, was obtained in the firm's name, there being at that time no question as to who were the partners of that firm. Under the Rules on the Original Side that question has to be raised, in cases where each of the alleged partners is not served personally in execution of the decree. Where it is sought to execute the decree against persons who are not named, but simply as against a firm, notice has to go to those persons to show cause why execution should not go against them as partners of the firm. In this case such notices went and we are concerned with two persons, Sanjeeva Rao and Panduranga Bhat. Sanjeeva Rao did not appear and contest the motion and an ex parte order for execution was passed as a matter of course. Panduranga Bhat appeared and denied that he was a partner. His case was that he was asked to become a partner in this firm by Captain Bhandarkar who is his brother-in-law, that he agreed to become a partner on condition that the accounts were looked into, and Sanjeeva Rao ceased to be a partner and he took his place as partner and that as none of these conditions was fulfilled he has not become a partner of the firm and therefore is not liable on any claim against the firm.

The partnership was started under an oral agreement; at any rate, we do not find any document evidencing the partnership when it was started. According to the evidence it was started on the 1st October 1922. It is clear from the evidence and Exs. III, IV and VI, that Panduranga Bhat was not a partner when the partnership was started or for some time afterwards. Ex. II, as to the genuineness of which there is no dispute, is dated the 17th April 1923 and is signed by Panduranga Bhat, Bhandarkar, Sundar Rao and Shiva Rao. The document runs as follows.

We, viz., (1) Uppinangady Panduranga Bhat, (2) P. R. Bhandarkar, (3) Kalle Sundar Rao, and (4) Kalle Shiva Rao, are the only partners of the concern named Kanara Transport Co., Mangalore, South Kanara, and there are no other partners. Mr. Kalle Sanjeeva Rao is no longer a partner of the firm. All the four partners are entitled to share in the profits and losses equally. All the four of us are jointly and severally liable for the debts of the concern hitherto incurred. A regular deed of partnership will be entered into within a fortnight from date.

It is clear from this document that there is a specific statement made that Sanjeeva Rao was no longer a partner of the firm, so that, even assuming the respondent's case to be true, one of the

conditions that were necessary, namely, the retirement of Sanjeeva Rao, is specifically stated in Ex. II. As regards other conditions they are not set out in Ex. II and we agree with the learned Judge in thinking that we cannot import into Ex. II the other conditions alleged.

The learned Judge has disposed of the case on the ground that as the appellants have claimed against Sanjeeva Rao also as a partner, and as it is not shown that he has left the firm, they cannot have it both ways, and that therefore the fact that they claimed against Sanjeeva Rao is evidence to show that Panduranga Bhat could not be a partner. We think the proper way to appreciate the evidence in this case is first of all to see whether there is anything in the evidence to show that the statement which has been made in Ex. II that Sanjeeva Rao was no longer a partner of the firm is not correct. The onus, we think, clearly lies upon Panduranga Bhat who now wants to show that the recitals in Ex. II are not correct. There is no evidence that Sanjeeva Rao, after the date of Ex. II, did any act or made any assertion which could lead one to a reasonable supposition that he continued to be a partner of the firm. On the contrary Sanjeeva Rao went further than the statement in Ex. II. He denied that he ever was a partner of the firm and on the evidence there is nothing to show that Sanjeeva Rao, either by reason of his own acts or by reason of any acts of the partnership, can be treated as continuing as a partner of the firm after the date of Ex. II.

The next question is whether the plaintiffs, by claiming against both Sanjeeva Rao and Panduranga Bhat, have done anything which would support the case of Panduranga Bhat that he is not liable. The claim is in respect of dealings between the plaintiff firm and the firm of Kanara Transport Company. The account which appears on page 39 of the printed book, as to which there is no dispute, shows that dealings began on the 31st August 1922, and went on till the 14th August 1923, and Ex. II is dated 17th April 1923 so that Sanjeeva Rao has gone out and Panduranga Bhat has come in under Ex. II after that date. Being a continuous transaction Panduranga Bhat would be liable for transactions from the 30th April 1923, to the date when they close. Being one continuous transaction the plaintiffs would have to make both of them parties and claim against both of them in any event; and the fact that they chose to claim against Sanjeeva Rao in respect of the transactions subsequent to his withdrawal and against Panduranga Bhat for transactions antecedent to his coming in would not by itself be a ground for denying the plaintiffs such rights as they might have against each of the partners. We think that on the evidence it is difficult to hold that Sanjeeva Rao continued to be a partner after the date of Ex. II and the onus being on the respondent to show that he ceased to be a partner, we do not think that we can hold that he has no liability under this decree.

As regards the liability of the respondent, we agree with the contention of Mr. Radhakrishnayya that we cannot make him liable in respect of antecedent transactions on the strength of an agreement contained in Ex. II between the partners inter se that he would be liable for transactions hitherto incurred and future liability. The law on this subject is, we think, clearly contained in S. 249 of the Indian Contract Act which expressly excludes such liability as regards the creditors of the firm. S. 249 of the Indian Contract Act is really the same as S. 17 of the English Partnership Act and the law has been set out in Lindley on Partnership (3rd Edition) pages 273 and 275. This view is also supported by the decision of the Privy Council in *Rolfe and the Bank of Australia* v. *Flower, Salting and Co.* (1). The learned Judge has referred to *Jagarnath and Co.* v. *Cresswell* (2), a decision of Imam, J., on a question of trademark; but if that decision held that apart from privity of contract a creditor of the firm is entitled to rely on an agreement between the partners, we respectfully dissent from it. It is, however, possible to distinguish that case from the present one that all the parties were aware of this agreement and entered into it on that footing. It seems to us to be clear that the respondent cannot be made liable for any transactions before the

(1) [1865] 1 P. C. 27=3 Moor P. C. (N. S.) 365=35 L. J. P. C. 13=12 Jur. N. S. 365=14 W. R. 467.

(2) [1913] 40 Cal. 814=22 I. C. 372.

30th April 1923. Sanjeeva Rao has not appealed against the order which makes him liable for subsequent transactions, but we have got power under the Code, even though he has not appealed to adjust the rights so as to do justice between the present appellant and respondent. We think the proper order to make is to direct execution to go against Sanjeeva Rao for Rs. 5,334-3-3. As regards Panduranga Bhat execution will issue against him for Rs. 3,621-6-0 with interest at 12 per cent. from the various dates in the account till decree and 6 per cent. thereafter. As regards costs the respondent will pay the appellant half his taxed costs.

Decree modified.

A. I. R. 1926 Madras 1140

MADHAVAN NAIR, J.

(*Pamur*) *Atchi Reddi* and *others*—Petitioners.

v.

Nelaturu Venkata Rangacharlu and *another*—Respondents.

Civil Revision Petition No. 1010 of 1925, Decided on 3rd May, 1926, from the order of the Sub-J., Nellore, D/- 7th November 1924.

Civil P. C., O. 1, R. 1—Suit by several plaintiffs—Each plaintiff having separate cause of action in which others not interested—Misjoinder of causes of action arises.

A suit for the establishment of occupancy rights by several plaintiffs in their various holdings which they claimed against the shrotriamdar is not maintainable where cause of action of each plaintiff is separate and the others are not interested. [P. 1140, C. 1]

B. Somayya—for Petitioners.

K. S. Champakesa Ayyangar—for Respondents.

Judgment.—This is an application under S. 115 of the Civil P. C. to revise an order of the Subordinate Jndge which directed the plaintiffs to amend the plaint. The suit instituted by these plaintiffs was for the establishment of occupancy rights in their various holdings which they claimed against the Shrotriamdar. The Subordinate Judge, holding that the cause of action of each plaintiff was distinct and also that there were special causes of action in which all the plaintiffs were not interested thought it would be more convenient if the plaintiffs were called upon to amend the plaint and therefore made an order to that effect. That order has also been acted upon to a certain extent by the 9th plaintiff. The vakil appearing for all the plaintiffs put in an application stating that in obedience to the order of the Court he was prepared to confine the plaint to the 9th plaintiff alone, and accordingly the plaint was amended.

It is now argued that the order of the lower Court is unsustainable because, really speaking, there is only one cause of action alleged in the plaint. But, on reading the pleadings, it is clear that two or three separate questions arise for consideration. In paragraph 8 of the plaint, as pointed out by the learned Subordinate Judge, the genuineness of the muchilikas, which have been executed by some of the plaintiffs, is denied. In paragraph 9 certain decrees obtained against some plaintiffs are challenged as having been fraudulently obtained. As regards some of the plaintiffs, therefore, additional questions besides the existence or otherwise of the occupancy rights alleged by all of them have to be considered.

I cannot see why tha plaintiffs should insist on combining in the same suit two or three different causes of action in which all are not interested. If all the plaintiffs had only one common relief, namely the establishment of occupancy rights, which they allege against the defendants, certainly the suit will not be bad on account of misjoinder of causes of action. The observations of the Privy Council in *Seturatnam Aiyar* v. *Venkatachala Goundan* (1), quoted by the learned Subordinate Judge, apply pre-eminently to cases like the present one.

I, therefore, dismiss the petition with costs.

Petition dismissed.

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(1) [1920] 43 Mad. 567=56 I. C. 117=47 I. A, 78 (P.C.).

* A. I. R. 1926 Madras 1141

MADHAVAN NAIR, J.

P. R. M. Muhammad Abdul Kadir Sahib Marakkayar—Assignee Decree-holder—Appellant.

v.

Abdul Kadir Marakkayar—Defendant 5—Respondent.

Appeal No. 46 of 1924, Decided on 31st March 1926, from the decree of the Dist., J., Ramnad, D/- 8th October 1923, in A. S. No. 190 of 1922.

* (a) *Civil P. C., O. 21, R. 16—Transfer brought about by death is also contemplated—Transfer by death of judgment-debtor—Character of judgment-debtor and decree-holder can become united only in legal representatives of judgment-debtor.*

The principle upon which R. 16 of O. 21 is based seems to be that when one of the persons jointly liable under a decree takes in himself the character of creditor and judgment-debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree: 5 *All.* 27, *Foll.* Therefore when on account of death a creditor becomes heir to a creditor and thus the two opposite characters of 'debtor and creditor' become united in the same person, the obligation to pay money may be regarded as extinguished, and the decree became unexecutable: 5 *All.* 27, *Foll.*

But where the transfer of the decree happens by death of the judgment-debtor, the two characters of 'debtor and creditor' can become united only in the persons of the legal representative of the judgment-debtor. [P 1141 C 2, P 1142 C 1]

(b) *Civil P. C., O. 21, R. 10—"Decree for money against several persons" means personal decree against two or more persons jointly.*

The expression "a decree for the payment of money against several persons" in proviso 2 of O. 21, R. 16, signifies a personal decree against two or more persons jointly: 14 *C. L. J.* 639 and 31 *Bom.* 308, *Rel. on.* [P 1142 C 2]

S. R. Muthuswami Aiyar—for Appellant.

P. N. Appuswami Aiyar—for Respondent.

Judgment.—This is an appeal against an appellate order in a matter relating to the execution of a decree for Rs. 1,069-4-0 with interest. In O. S. No. 134 of 1918 on the file of the District Munsif's Court of Paramakudi the plaintiff obtained for the said amount a joint decree against Defendants 1, 5 and 6 personally and the assets of one Hamid in the hands of Defendants 2 to 4. The decree is dated 13th February 1919. On the 24th August 1919 it was transferred to the appellant and he applied to the Court on 8th September 1919, to recognize the transfer and to execute the decree. On 16th December 1921 the 1st defendant, a Mahomedan died. His daughter also died, and, on her death, the assignee decree-holder, as her husband, became one of the heirs of the deceased 1st defendant and in that capacity one of the judgment-debtors. The 5th defendant, against whom the decree was sought to be executed, objected to the execution mainly on the ground that the decree has ceased to be executable under O. 21, R. 16, Cl. (3) inasmuch as the assignee decree-holder himself became one of the judgment-debtors as the legal representative of the 1st defendant. This objection was overruled by the District Munsif but was allowed by the District Judge. The transferee decree-holder has filed this appeal against the order of the District Judge dismissing his application.

Order 21, R. 16 after providing that when a decree has been transferred by assignment in writing or by operation of law, it may be executed by the assignee, lays down in proviso 2, that "where a decree for the payment of money against two or more persons has been transferred to one of them it shall not be executed against the others." The learned vakil for the appellant argues that the proviso does not apply to the present case for two reasons: (1) because, while the proviso contemplates a transfer of the decree (by the assignment or by operation of law) to one of several judgment-debtors, in the present case there has been no such transfer to a judgment-debtor, inasmuch as the judgment-debtor died two years after the transfer, and (2) because, while the proviso as illustrated by several decisions contemplates the transfer of a decree for the payment of money personally (personal decree) against two or more persons jointly, in this case there has been no such transfer of a personal decree inasmuch as there is no personal decree against the transferee decree-holder as he is in law liable only for the assets of the 1st defendant in his hands.

In my opinion both these arguments are unsubstantial as they ignore the principle underlying the rule. No authorities have been cited in support of them. "When on account of death a creditor becomes heir to debtor (as here), or:

a debtor becomes heir to a creditor and thus the two opposite characters of 'debtor and creditor' become united in the same person, the

obligation to pay money may be regarded as extinguished.

[See *Banarsi Das* v. *Maharani Kuar* (1)]. This principle which, as Mahmud, J., points out, owes its origin to the confusio of the Roman Law, has been applied by Prov. 2 of O. 21, R. 16 to the case of joint judgment-debtors, when a decree for the payment of money has been transferred to one of them. In *Degumbree Dabee* v. *Eshan Chunder* (2) it was held that one of several judgment-debtors who satisfied the judgment-debt by taking an assignment thereof could not enforce it by execution against his co-debtors and that his only remedy against them was by a regular suit for contribution. This rule has been adopted by the Legislature in Prov. 2 of O. 21, R. 16.

The principle upon which this rule is based seems to be that when one of the persons jointly liable under a decree takes in himself the character of creditor and judgment-debtor in respect of the whole decretal debt, the effect is to extinguish the liability of all the co-judgment-debtors under the decree.

[*Banarsi Das* v. *Maharani Kuar* (1)]. It is clear that the assignee decree-holder and the 5th judgment-debtor are joint judgment-debtors and one of them at the same time is also a decree-holder.

In a case like the present where the transfer of the decree happens by death of the judgment-debtor, the two characters of 'debtor and creditor' can become united only in the persons of the legal representative of the judgment-debtor; and when such 'union' takes place the 'proviso' would apply. Thus, there is no meaning in saying that the decree has not been transferred to the judgment-debtor. O. 21, R. 16, Prov. 2, therefore clearly prohibits the present appellant from executing his decree against his co-judgment-debtor, the 5th defendant-respondent. The decision in *Lalla Bhagun Pershad* v. *Holloway* (3) does not support the appellant as in that case there was no joint personal decree against the judgment-debtors. Referring to the facts the learned Judges state:

It [S. 232, proviso (*b*)] does not apply to such a case as the present, in which nothing was due from the assignee of the decree personally, he having been made a defendant only by reason that he had become the owner of the property mortgaged under the bond and subject to the mortgage.

(See p. 396.)

(1) [1883] 5 All. 27=(1882) A. W. N. 140.
(2) [1868] 9 W. R. 230=B. L. R. Sup. Vol. 938.
(3) [1885] 11 Cal. 393.

The second argument is also equally devoid of any substance. Decisions have laid down that the expression:

"a decree for the payment of money against several persons" in prov. 2 of O. 21, R. 16 signifies a personal decree against two or more persons jointly.

[See *Laldhari Singh* v. *Manager, Bharatpura Estate* (4) and *Panachand* v. *Sundarabai* (5)]. It is not disputed that there was such a decree in this case against the predecessor-in-interest of the assignee decree-holder (i. e., the 1st defendant judgment-debtor) and other defendants and this personal decree has been by operation of law transferred to the appellant 'who is the legal representative of the judgment-debtor, in effect the judgment-debtor himself. This is all what is required to make the 'proviso' applicable and in consequence to render the decree inexecutable. If I give effect to the arguments of the learned vakil for the appellant it would mean that I should exclude from the operation of the proviso transfer of personal decrees brought about by the death. The principle underlying the rule does not contemplate this restriction in its application. This Civil Miscellaneous Second Appeal is dismissed with costs.

Appeal dismissed.

(4) [1911] 14 C. L. J. 639=12 I. C. 70=16 C. W. N. 132.
(5) [1907] 31 Bom. 308=9 Bom. L. R. 409.

A. I. R. 1926 Madras 1142

JACKSON, J.

Nagaiya Naidu and *another*—Petitioners.

v.

Ekambara Chettiar—Respondent.

Civil Revision Petition No. 230 of 1926, Decided on 29th July 1926, from the order of the Small Cause Court J., Madras, D/- 22nd October 1925, in Ejectment Suit No. 158 of 1924.

(*a*) *Madras City Tenants Protection Act* (1922), *S. 7—Suit for ejectment of tenant—Defence considered on merits and rejected—No revision lies—Civil P. C., S.* 115.

Where in a suit for ejectment of a tenant a Court, which has considered the defence of the tenant on its merits and has rejected it, cannot be said to have failed to exercise jurisdiction.

[P 1143 C 1]

(b) *Madras City Tenants Protection Act* (1922), *S.* 2 (4)—*Lower Court holding that tenant must, be of land only—Finding is not perverse—Civil P. C., S.* 115.

To hold that the tenancy must be exclusively of land under S. 2 (4) cannot be said to be so perverse or irregular as to attract the provisions of S. 115, Civil P. C.

V. Sivaprakasa Mudaliar—for Petitioners.

K. Duraiswamy Iyengar—for Respondent.

Judgment.—The petitioner seeks to revise the judgment in Ejectment Suit No. 158 of 1924, Madras Court of Small Causes.

The ground for revision is that the Judge failed to exercise the jurisdiction vested in him by the Madras City Tenants' Protection Act 3 of 1922. It is not correct to say that this Act vests jurisdiction in any Court. The Act creates a certain class of privileged tenants and a defence open to a tenant of Madras City in a suit for ejectment may be that he belongs to this privileged class. A Court which has considered this defence on its merits, and has rejected it cannot be said to have failed to exercise jurisdiction.

The short point for decision by the lower Court was whether the tenant of two rooms with a vacant piece of land in front was a tenant as defined by Act 3 of 1922. Under S. 2 (4), a tenant means a tenant of land, and under S. 2 (2) land does not include buildings. To hold therefore that the tenancy must be exclusively of land, cannot be said to be so perverse or irregular as to attract the provisions of S. 115, Civil P. C.

The petition is dismissed with costs.

Petition dismissed.

A. I. R. 1926 Madras 1143

WALLACE, J.

G. P. Satyanaryanamurthi—Complainant—Petitioner.

v

Pilla Ramayya—Accused-Respondent.

Criminal Revision No. 688 and Criminal Revision Petition No. 567 of 1925, Decided on 21st April 1926, from the judgment of the Jt. Mag., Berhampore, in Criminal Appeal No. 97 of 1925.

Madras Estates Land Act (1 *of* 1908), *S.* 212 (*b*) —"*Distraint duly made.*"

The essence of a distraint is the act of taking out of the possession of the real owner, and such act will not be completed, until the taking out of the possession of the real owner is complete. *A. I. R.* 1925 *Mad.* 578, *Dist.* [P 1143 C 2]

K. Bhashyam Aiyangar — for Petitioner.

Public Prosecutor—for the Crown.

V. Narayana Rao—for Accused.

Wallace, J.—The chief point in this case is whether the accused resisted "a distraint duly made" under Act I of 1908. The facts are that the agent of petitioner for arrears of rent seized certain cattle said to belong to accused, and was proceeding to drive them out of accused's pen when accused interfered and prevented him from doing so. Petitioner contends that this was resistance to a distraint. I am inclined to agree. No doubt a learned Judge of this Court held in *Narayana Reddi* v. *Dyvadeenachar* (1) that cattle are not "produce" within the meaning of S. 212 (b), but the offence regarding produce is forcibly or clandestinely removing it after it has been duly distrained. In the present case my view is that the distraint was not complete when accused interfered and therefore it is not a case on all fours with *Narayana Reddi* v. *Dyvadeenachar* (1). The essence of a distraint, I take it, is the act of taking out of the possession of the real owner, and such act will not be completed, until the taking out of the possession of the real owner is complete. Here the cattle were still in accused's pen when accused resisted, and I would hold therefore that the act of taking them out of his possession hnd not been completed when he resisted the taking and that therefore he was "resisting a distraint" within the meaning of S. 212 (b). Accused urges that even so it has not been proved that the distraint was legal since the power-of-attorney of prosecution 1st witness has not been produced. Prosecution 1st witness swore that he had a registered power-of-attorney to distrain and this statement has never been challenged by accused until now and I cannot uphold the contention.

The next point is the contention that the cattle were not the accused's because he is divided from his father. The first Court found that unproved. The lower appellate Court did not consider it, and it is not worth while sending the case back for a finding on that point.

With this expression of opinion on the main point of law I dismiss the petition.

Petition dismissed.

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1 A. I. R. 1925 Mad. 578=48 Mad. 505.

* A. I. R. 1926 Madras 1144

WALLACE, J.

S. K. Subba Aiyar—Appellant.

v.

Pichumani Aiyar and *others*—Respondents.

Appeal No. 76 of 1924, Decided on 1st March 1926, from the order of the S. J., Tuticorin, in A. S. No. 7 of 1924.

(a) *Civil P. C., S.* 11—*Ex parte decree.*

Ex-parte decree does operate as res judicata. [B 1144 C 2]

* (b) *Civil P. C., S.* 11—*Party not entitled to appeal but in a position to file cross-objection is barred by res judicata.*

A party who is not entitled to appeal but who could file cross-objections and does not so file is barred by res judicata. [P 1144 C 2]

(c) *Execution-decree binding—Transfer of property Act, S.* 81.

When the right of marshalling has been decided in the judgment it cannot be reopened again in execution proceedings : 24 *L.W.* 257, *Ref. to.* [P 1144 C 2]

L. A. Govindaraghava Aiyar and *L. S. Veeraraghava Aiyar*—for Appellant.

P. N. Appuswami Aiyar and *P. V. Krishnaswami Aiyar*—for Respondents.

Judgment.—This appeal is against the order of the lower appellate Court reversing the order of the Principal District Munsif of Srivaikuntam in a matter in execution viz., the order in which certain mortgaged preperty shall be sold in execution of a mortgage decree. Two items are involved in this case. The appellant is the decree-holder and the respondent is the 8th defendant who is interested in Item 2 and wants it to be sold last. The District Munsif permitted the property to be sold in the order selected by the decree-holder, as ordered in M. P. No. 99 of 1918. The decree-holder has chosen to sell Item 2 first. It has been sold and the sale has been confirmed. The lower appellate Court reversed the order, cancelled the sale, and directed that further enquiry be held that the sale of the properties shall be in the order in which they are set out in the decree, provided that the 8th defendant has the right of marshalling.

The order of the lower appellate Court seems to me vitiated by several faults. If the lower Court had looked into the judgment in the suit in which the decree was passed, it would have found that the question of the 8th defendant's right of marshalling had already been decided. In paragraph 22 of that judgment the District Munsif held that the 8th defendant took his mortgage with full knowledge of the decree-holder's mortgage. The 8th defendant contends before me that this is not res-judicata (1) because he was ex parte in the suit, (2) because he could not have appealed against that finding ; and (3) because such a matter, even if decided in the suit, can be re-opened in the execution proceedings. None of these grounds seems to me tenable. As to the first, the decision is none-the-less res judicata because the party is ex parte, as to the second, the judgment rejected the 8th defendant's prayer that the first item be sold last. Even if he could not present an appeal, he could at least have moved by way of cross-objections in the appeal preferred by the 1st defendant, or have moved the matter at the hearing of the suit which was remanded by the District Court. He did neither of these things. As to the third point, the ruling in *Raghavachariar* v. *Krishna Reddy* (1) is quoted; a ruling which has been accepted in *Narasimha Rao* v. *Subbarayalu* (2) which follows it. These rulings, however, appear to me to be no authority for the contention advanced. In these cases, the point was whether the order in which property shall be sold is a matter which can be agitated in execution, even though it had been decided in the suit, and it was held that it can, presumably on the principle that such an order is primarily a matter in execution and need not have been decided in the suit. But no authority has been advanced before me which lays down that when the right of marshalling has been decided in the judgment, it could be re-opened again in execution proceedings. The judgment in *Chokkalinga Tambiran* v. *Ramanadhan* (3) to which my attention has been drawn does not touch this point at all. Obviously the question whether the mortgage was taken with notice of a prior mortgage is one that may on occasions be an extremely important issue in the suit itself and must be decided there, and might in fact be the only important issue for decision and I cannot accept the argument that when the judgment has decided such a matter

(1) A. I. R. 1924 Mad. 509.
(2) A. I. R. 1926 Mad. 834.
(3) A. I. R. 1926 Mad. 1031.

it can be reoponed in execution proceedings. Therefore, the 8th defendant took the mortgage with full knowledge of the prior mortgage, and under S. 81 of the Transfer of Property Act he has no statutory right of marshalling. The order of the lower Court, therefore, which directs that this point shall now be decided by the executing Court is based on misconception of the facts and an error in law.

This is enough to dispose of the appeal as the 8th defendant has no right of marshalling. The decree-holder is unfettered as to the order in which the property has to be sold. The lower appellate Court seems to find some sort of fraud in the decree-holder's conduct merely because his election to have Item 2 sold first coincides with the desire of one of the mortgagors, the 2nd defendant. I can see no basis for deducing fraud from these circumstances. The decree-holder had an order in his favour in M. P. No. 99 of 1918 which gave him power to choose the order in which the properties should be sold, and why he should be accused of fraud merely because he exercised his right of choice which that order gave him I I do not understand.

The sale of item 2 has been held and confirmed. No other defendants were made parties by the 8th defendant in his appeal to the lower appellate Court. so that the order of the lower appellate Court will not bind these. It is only introducing needless confusion to cancel that sale so far as the 8th defendant's interests are concerned, when it is not cancelled so far as the interests of the other defendants are concerned. Defendants 4 and 5 whose interests the 8th defendant claims he now represents as well as his own, did not appeal to the lower appellate Court against the order of the principal District Munsif.

I am of opinion that the lower appellate Court's order is wrong. I reverse it and restore the order of the Principal District Munsif with costs to the decree-holder from the 8th defendant here and in the lower appellate Court.

Order reversed.

A. I. R. 1926 Madras 1145

DEVADOSS, J.

Govindasami Pillai—Defendant—Appellant.

v.

Ranaveerapandian Servai—Plaintiff—Respondent.

Second Appeal No. 1735 of 1923, Decided on 4th August 1926, from the decree of the Addl. Sub-J.. Mayavaram, in A. S. No. 100 of 1922.

Provincial Insolvency Act (1920), *S.* 29—*Party to suit adjudged insolvent—Court should ask other party to bring Official Receiver on record, and if latter is unwilling to join, Court may go on with suit on any terms it may impose—Omission to do this does not vitiate judgment on merits.*

Section 29 gives an option to the Court to continue a suit on such terms as the Court may impose. When a party has been adjudicated an insolvent, the Court would be well advised in directing the other party to the suit to bring on record the Official Receiver as a party, and if the Official Receiver is unwilling to become a party, then the Court may proceed with the suit on such terms as it may impose upon the party wishing to proceed with the suit, but omission to do this does not in any way vitiate the judgment on the merits. [P. 1145, C. 2]

K. S. Desikan—for Appellant.

T. Nallasivam Pillai—for Respondent.

Judgment.—The only point in this case is whether the District Munsif ought to have stayed the suit when he was informed that the defendant had been adjudicated an insolvent. The contention of Mr. Desikan for the appellant is that the Court ought to have done so under S. 29 of the Provincial Insolvency Act. That section gives an option to the Court to continue a suit on such terms as the Court may impose. In this case the Court did not impose any terms, nor did it direct the plaintiff to make the Official Receiver a party. When a party has been adjudicated an insolvent, the Court would be well advised in directing the other party to the suit to bring on record the Official Receiver as a party, and if the Official Receiver is unwilling to become a party, then the Court may proceed with the suit on such terms as it may impose upon the party wishing to proceed with the suit. This has not been done by the District Munsif. But I do not think that this has in any way vitiated the judgment on the merits. Whether the plaintiff will be able to enforce his right against the Official Receiver or not is

not a question for decision here. So far as the second appeal is concerned I do not think the judgment of the lower Court is against law.

In these circumstances the second appeal is dismissed without costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 1146 (1)

DEVADOSS, J.

Valliakkal and *another*—Appellants.

v.

Karuppa Goundan—Respondent.

Second Appeal No. 1534 of 1923, Decided on 28th July 1926, from the decree of the Sub-J., Coimbatore, in A. S. No. 1 of 1923.

* *Specific Relief Act, S. 31—Compromise decree—Mistake in—Suit to rectify lies.*

A decree is an instrument in writing and therefore, when a mlstake has been committed in drawing up a compromise petition and that mistake finds place in the decree embodying the terms of the compromise, it is open to the Court to have that rectified in a subsequent suit: *Wilding* v. *Sanderson*, (1897) 2 *Ch. D.* 534, *Dist*; 40 *Mad.* 177, *Ref.* [P. 1146, C. 2]

V. Narasimha Iyengar—for Appellants.

T. M. Krishnaswamy Iyer—for Respondent.

Judgment.—The first point raised in this second appeal is that no suit lies to rectify a mistake in a compromise decree. It was held by Napier and Krishnan, JJ., in Second Appeal No. 62 of 1920 that a decree is an instrument within the meaning of S. 92 of the Evidence Act. If a compromise decree is an instrument in writing, it is difficult to see how S. 31 of the Specific Relief Act does not apply to it. The contention of Mr. Narasimha Iyengar is that a suit does not lie to rectify a mistake in a compromise decree, but that the decree could only be set aside in toto and the parties relegated to the position in which they were before the compromise was entered into. S. 31 of the Specific Relief Act provides for a suit to rectify a mutual mistake in an instrument in writing. The opening words of S. 31 are:

When, through fraud or a mutual mistake of the parties, a contract or other instrument in writing does not truly express their intention, either party, or his representative in interest, may institute a suit to have the instrument rectified.

Mr. Narasimha Iyengar relies upon *Ram Lagan Sahu* v. *Rambirich Koeri* (1) as supporting his contention. No doubt, in that case the learned Judges observed:

Once the decree has been passed and signed, then the remedy is, except in cases to which S. 152 of the Civil Procedure Code applies, to institute a suit to set aside that decree on one of the grounds aforesaid.

They rely on *Wilding* v. *Sanderson* (2) for their position. In that case it was held that if the Court was satisfied that a mistake was committed in a compromise decree, the Court was competent to amend the decree to bring it in conformity with the intention of the parties. It is therefore clear that when a mistake has been committed in drawing up a compromise petition and that mistake finds place in the decree embodying the terms of the compromise, it is open to the Court to have that rectified in a subsequent suit. Reference may also be made to *Triuvambala Desikar* v. *Manickavachaga Desikar* (3). (The judgment then dealt with the evidence and concluded.) Both the Courts have taken into consideration all the circumstances and have come to the conclusion that the mistake was a mutual and bona fide one and that the intention of the parties was that both of them should have the extents assigned to them inclusive of the rocky portions. I hold that both the Courts have rightly held that this is a case for recification.

In the result, the second appeal fails and is dismissed with costs.

Appeal dismissed.

(1) [1919] 4 Pat. L. J. 205=50 I. C. 497.
(2) [1897] 2 Ch. 534=66 L. J. Ch. 684=45 W. R. 675=77 L. T. 57.
(3) [1916] 40 Mad. 177=4 L. W. 306=30 M. L. J. 274=34 I. C. 57=(1916) 2 M. W. N. 43.

A. I. R. 1926 Madras 1146 (2)

PHILLIPS AND MADHAVAN NAIR, JJ.

Chellakani Lakshmi Venkata Bhusura Ram Rao—Defendant 2—Appellant.

v.

Yandapalle Venkataraju and *others*—Plaintiffs—Respondents.

Appeal No. 241 of 1924, Decided on 19th March 1926, from an order of the Sub-J., Cocanada, D/-24th March 1924 in E. A. No. 1621 of 1923.

Civil P. C., O. 32, R. 4—Mortgage by father before son's birth—Suit against father and the minor son—Father's interest is not adverse to minor.

Where in a suit on a mortgage executed by the father before the son's birth, the father was impleaded as such and also was guardian for the minor son, his interest is not adverse to that of the minor and the decree therefore cannot be set aside on that ground: *A. I. R.* 1924 *Mad.* 297, *Dist.* [P. 1147, C. 1]

C. Rama Rao—for Appellant.

P. Somasundram—for Respondents.

Judgment.—The appellant, a minor, applied through his mother and guardian to set aside certain sales held in execution of a mortgage-decree obtained against him and his father, who had executed the suit mortgage. It is now contended that in accordance with the law laid down in *Sellappa Goundan* v. *Masa Naiken* (1) that the minor who was represented in the suit by his father was not properly represented, as the father's interest was adverse to that of his son and consequently that the decree passed in the suit and subsequent proceeding thereon are all void.

The head note to the case relied on certainly seems to support this proposition as a proposition of law, namely, that the interest of a father is adverse to that of the minor sons. Whether this is not somewhat too broadly stated it is unnecessary to consider now, because the present case can be differentiated by the fact that when the mortgage in this suit was executed the appellant was not born. When he was born the family property had already been encumbered and he only became entitled to an interest in that property as it was on that date. There can, therefore, be no question of the father's interest being adverse to that of the son. If the mortgage is not valid it was equally to the interest of the father to set it aside as to the interest of the son and consequently, there is no reason for holding in this case that the interest of the father was adverse.

The Subordinate Judge's order refusing the application is, therefore, right and this appeal must be dismissed with costs of Respondents Nos. 1 to 3. No other point has been argued.

Appeal dismissed.

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(1) A. I. R. 1924 Mad. 297=47 Mad. 79.

A. I. R. 1926 Madras 1147

JACKSON, J.

Mahamed Meera and *another*—Defendants—Petitioners.

v.

P. Duraisami Naidu—Respondent.

Civil Revision Petition No. 828 of 1924, Decided on 4th November 1925, from the judgment of the Sub-J., Dindigul, D/- 3rd November 1924, in C. M. A. No. 31 of 1924.

Civil P. C., O. 39, R. 2—No mischief is caused by election under improperly notified notification of Governor-in-Council under Madras District Municipalities Act (1920), *S.* 328.

Holding of an election by the Chairman of a Municipality under a notification of the Governor in Council under S. 43 of the Madras District Municipalities Act not properly notified under S. 328 of the Act does not give a cause of action to a voter for an injunction against the Municipality. [P. 1147 C. 1]

A. C. Sampath Iyengar—for Petitioner.

Judgment.—Petitioner seeks to set aside the order of the Subordinate Judge of Dindigul confirming the injunction passed by the District Munsiff of Dindigul in I. A. No. 747 of 1924 arising out of O. S. No. 380 of 1924. The plaintiff in that suit is a voter in Dindigul Municipality, and he has sued in order to restrain the Chairman of the Municipality from holding an election for three councillors alleging that the notification by the Governor in Council under S. 43 of the Madras District Municipalities Act (5 of 1920) was not properly notified under S. 328.

Assuming this allegation to be true it is impossible to see what harm an election could cause within the mischief of O. 39, Civil P. C. The plaintiff's apprehension that if an improper election is held his vote will be frittered and wasted away is quite groundless. Quite apart from the question whether the lower Courts are not interfering entirely without jurisdiction, even if they had jurisdiction, they would be gravely misconceiving their duties and responsibilities under O. 39; and I would observe generally that the anxiety evinced by local Courts to control elections is wholly regrettable. Democracy cannot be interpreted in terms of injunctions. The Chairman in obeying the Government Order does no harm, waste or damage and ought not to be restrained.

The petition is allowed and the injunction is vacated. Costs to petitioner. Counter-petitioner is ex parte.

Petition allowed.

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* A. I. R. 1926 Madras 1148

WALLACE, J.

Gopala Padayachi and *others*—Petitioners.

v.

Rajagopal Naidu—Respondent.

Civil Revision Petition No. 88 of 1926, Decided on 16th April 1926, from the decree of the Sub-J., Tiruvalur, D/-22nd December 1925, in Small Cause Suit No. 1214 of 1925.

(a) *Stamp Act, S. 36—Section is mandatory and applies to appellate or revisional Court also—Whether objection is raised in lower Court or not is immaterial.*

Section 36 is of a mandatory nature and applies also to a Court of appeal or revision, independently of the fact whether the admissibility was challenged in the lower Court or not. But the appellate or revisional Court is not bound to admit the document any further or for any other purpose, than the lower Court has admitted it: 13 *Bom.* 449 (*F. B.*), *Dist.*

[P. 1149, C. 1]

*(b) *Promissory note—Consideration a contemporaneous or antecedent debt — Pro-note operates only as suspension of remedy of the original debt—If pro-note becomes unenforceable, original remedy revives.*

When a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the promissory note does not discharge the debt, but only suspends the creditor's ordinary remedy on the debt during the currency of the promissory note and that when the promissory note is taken for an antecedent debt, the promissory note operates only as a suspension of the ordinary remedy until it matures or is enforced. If then the promissory note is unenforceable in law, the ordinary remedy on the original debt is revived and is enforceable provided it is not barred by limitation: 24 *Bom.* 360; *A. I. R.* 1922 *Mad.* 181 and 36 *All.* 259, *Foll.* [P. 1150, C. 1.]

*(c) *Limitation Act, S. 19—Pro-note, insufficiently stamped; substituted in place of a previous note operates as acknowledgment.*

Where a pro-note is granted as a substitute for a previous pro-note, but is not sufficiently stamped, then, although a substitued pro-note does not operate as a pro-note, it remains and is sufficient acknowledgment within the meaning of S. 19. [P. 1150, C. 1]

K. Bhashyam and *T. K. Ramaswami Iyengar*—for Petitioners.

A. V. Viswanatha Sastri—for Respondent.

Judgment.—This Civil Revision Petition is against the judgment and decree of the lower Court in Small Cause suit. The suit was inter alia for money due on a promissory note in the following circumstances: On 8th November 1921 the first defendant executed a promissory note, Ex. A, to one Subba Nayakar. On 30th October 1924 Rs. 285 was due on this note. For this amount the 1st defendant executed a fresh promissory note, Ex. B, in favour of the same promisse. Both the notes have been transferred to the plaintiff.

The main point in the case was whether Ex. B was enforceable as a promissory note. It is admittedly insufficiently stamped under the amended Stamp Act, as it bears only an one-anna stamp. The lower Court, however, has admitted it in evidence as an acknowledgment of the debt in Ex. A, for which purpose it is sufficiently stamped, has hald that it serves to keep the debt alive, and has given judgment for the sum claimed. The defendants put in this Civil Revision Petition and contend that the lower Court has erred in law in holding this view.

Three main contentions have been argued before me: (1) that Ex. B was inadmissible for any purpose, (2) that even assuming that it is admissible as an acknowledgment of the debts in Ex. A, that debt has been discharged and therefore no claim can be founded on it; and (3) that even taking the Subordinate Judge's view that the suit can be founded on the debt in Ex. A, the amount decreed is too large. A subsidiary contention of Defendants Nos. 2 and 3 who are sons of the 1st defendant is that they are not liable for the debt as it was not for family purposes.

The last contention may be shortly dismissed. The Defendant No. 2 was exparte in the suit; the Defendant No. 3, a minor, represented by the Defendant No. 1 did not raise the point in his written statement or challenge the plaintiff's claim that the money was borrowed by the Defendant No. 1 as manager for family purposes, and the point was not pressed before the lower Court. Clearly it cannot be taken here. It raises matters of fact of which the plaintiff was never put to proof.

As to the admissibility of Ex. B the lower Court has, as pointed out, rejected

it as a promissory note, but admitted it as an acknowledgment of the debt in Ex. A. It is pointed out by the plaintiff that under S. 36 of the Indian Stamp Act this Court cannot go behind the decision of the lower Court in a matter of this kind. This section has been interpreted in many cases as of a mandatory nature and as applying also to a Court of appeal or revision, independently of the fact whether the admissibility was challenged in the lower Court or not, and I must hold that it precludes this Court from interfering with the decision of the lower Court on this matter.

The case in *Venkatarama Iyer* v. *Chella Pillai* (1) is no doubt a case in which the objection was not taken before the first Court; but the rulings in *Ramasami* v. *Ramasami* (2); *Devachand* v. *Hirachand Kumarai* (3); and *Nagappa Chettiar* v. *V. A. A. R.* (4); are cases where objection was taken at the beginning. I am not at present prepared to go further and admit the respondent's contention that, once it has been admitted, it can be used for any purpose. These are remarks no doubt in 13 *Bom.* 449 which might go to support that contention; but it may be pointed out that in that case, although the first Court had admitted the documents as bonds, the lower appellate Court admitted them as promissory notes, and therefore the High Court was precluded by S. 36 from questioning their admissibility as promissory notes. I take it that this Court is not bound under S. 36 to admit the document any further or for any other purposes, than the lower Court has admitted it.

The lower Court has clearly admitted it only as an acknowledgment of the debt in Ex. A. It has not been admitted, and cannot be admitted, here as an acknowledgment of the debt set out in itself; i. e., it is not admissible as an ackdowledgment of any independent contemporaneous debt. As a promise to pay, constituting a contractual obligation to pay the debt set out in it, it is not admissible and has not been admitted. On the second point, the question is whether the debt in Ex. A. is a subsisting debt, or does it stand dischagedr or is it, even though it purports to have been discharged, revived because of the invalidity and unenforceability of Ex. B? I am not fortunately hampered in this case by the circumstances of third party's, possibly endorsee's, interests, since the plaintiff is the transferee of both notes.

Now, Ex. B recites:

> I have settled at Rs. 285 the amount due for principal and interest under the promissory note executed by me in your favour on the 8th November 1921 and have executed this for Rs. 285 in full satisfaction thereof

and the contemporaneous endorsement on Ex. A is:

> For the sum of (Rs. 285) two hundred and eighty-five due for principal and interest under this note another note has been executed on the said date. The amount due having been thus paid off, this note has become discharged.

On 30th November 1925 there follows another endorsement on Ex. A.

> As I understand that the note which was executed in renewal hereof and endorsed to you is not valid, you . . . . . are to receive from Gopal Padayachi the aforesaid amount due under this note.

It will be observed that Ex. A was retained with the promisee even after Ex. B was taken, and was transferred by him later on to the plaintiff. The real point is: Did the parties intend that Ex. A should be finally discharged, or was the discharge contingent on Ex. B being enforceable? This was really a question of fact into which the lower Court should have gone fully if the point had been clearly raised before it; but probably it was not clearly raised there. But having regard to the fact that the endorsement on Ex. A clearly sets out that in substitution of it Ex. B was taken and that the amount due on Ex. A has been "thus paid off," and that Ex. A was retained with the promisee and not returned to the promisor, and having regard also to the inherent improbability that the plaintiff intended to discharge Ex. A whether or no Ex. B was enforceable, I think it must be held that the parties only intended that Ex. A should be considered as discharged if Ex. A was enforceable.

The law on this subject has been lucidly discussed in *Kaleckalingam Chetty* v. *Annamalai Chetty* (5). It has there been laid dowa following *Raman* v. *Vairavan* (6) the principle of which has also been endorsed by the Privy Council

(1) [1921] 40 M. L. J. 479=62 I. C. 607.
(2) [1882] 5 Mad. 220.
(3) [1889] 13 Bom. 449 (F. B.).
(4) A. I. R. 1925 Mad. 1215.
(5) [1916] 34 I. C. 415.
(6) [1884] 7 Mad. 392.

in *Mt. Raheswari Kuar* v. *Rai Balakrishnan* (7) and by the Bombay High Court in *Krishnaji* v. *Rajmal* (8), that when a promissory note is taken for a contemporaneous debt, the balance of opinion is that the execution of the promissory note does not discharged the debt, but only suspends the creditor's ordinary remedy on the debt during the currency of the promissory note, and that when the promissory note is taken for an antecedent debt, the authority is overwhelming that the promissory note operates only as a suspension of the ordinary remedy until it matures or is enforced. If then the promissory note is unenforceable in law, the ordinary remedy on the original debt is revived and is enforceable provided it is not barred by limitation. This is clearly laid down in *Anantanarayana Iyer* v. *Savitri Ammal* (9); *Natarajulu Naicker* v. *Subramanian Chettiar* (10); *Jagan Prasad* v. *Indar Mal* (11).

In this view therefore the debt under Ex. A is enforceable provided it is not barred by limitation, and the question remains whether Ex. B is a valid acknowledgment of that debt sufficient to save limitation.

In my view, Ex. B clearly admits and acknowledges the indebtedness under Ex. A, and that this indebtedness is not discharged otherwise than by the execution of Ex. B in its place. The promisor in effect says:

I acknowledge the amount under Ex. A as due from me to you and to enable you to recover it from me I give you Ex. B.

Though Ex. B now proves useless for that purpose, the aknowiedgment of the debt under Ex. A remains and is in my view, sufficient acknowledgment within the meaning of S. 19 of the Indian Limitation Act to save limitation. The lower Court's view on this point is therefore correct.

Following that view, however, it ought to have based its decree on the amount due under Ex. A whereas it has given a decree on the amount claimed in the plaint which is based on the footing of Ex. B being a valid promissory note. I understand the difference comes to about Rs. 10. The decree amount will therefore have to be reduced by this amount.

With this difference the decree of the lower Court is confirmed and the revision petition dismissed with costs.

Petition dismissed.

(7) [1886] 14 I. A. 142 (P. C.).
(8) [1900] 24 Bom. 360=2 Bom. L. R. 25.
(9) [1912] 36 Mad. 151=22 M. L. J. 231=13 I. C. 458=(1912) M. W. N. 59.
(10) A. I. R. 1922 Mad. 181=45 Mad. 778.
(11) [1914] 36 All. 259=23 I. C. 589=12 A. L. J. 361.

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* A. I. R. 1926 Madras 1150

DEVADOSS, J.

Settikara Venkatarama Chettiar and *others*—Appellants.

O. P. Damodaram Chettiar and *others*—Respondents.

Second Appeal No. 238 of 1925, Decided on 26th November 1925, from the decree of the Dist. J., Salem, in Appeal Suit No. 60 of 1922.

* (a) *Hindu Religious endowment—Person building a temple either out of his own funds or funds collected by subscriptions—Direction by him as to the manner and person by whom it is to be managed is not illegal—Civil P. C., S. 92.*

Where a person collects subscriptions from various persons and builds a choultry or a temple he has a right to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. This is recognised by the Hindu Law. There is nothing illegal or improper in a person who builds a temple, whether out of his own funds or out of the funds collected by subscriptions or getting donations from people to create a trust and endow it, directing by the deed of endowment, in what manner and by whom it should be managed. [P. 1152, C. 1]

* (b) *Civil P. C., S. 92—Framing scheme—Interest of institution and not of individuals is to be seen—Court can remove trustee if necessary for the continuance of institution.*

The Court should primarily look to the interests of the institution rather than the right of individuals in framing a scheme. Where the interests of the institution do require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the proper management of the institution or that the number of trustees is so large that it will not be possible for any scheme to work with all of them as trustees. In framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others. But where the Court finds that their continuance could not be for the welfare of the institution and is not conducive to the proper working of the scheme it should not hesitate to remove them. But where they can be retained without any detriment to the institution the Court may do so: 4 *L. W.* 228, *Foll.* [P. 1153, C. 1

* (c) *Civil P. C., S. 92—Temple built on subscriptions—Subscribers not objecting to the builder*

or founder to make the management hereditary—Founder can make it hereditary.

If persons invite subscriptions on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscriptions to some other purpose, the subscribers have a right to object to the funds being diverted to other purposes than those for which they were collected. But so long as the subscribers do not object to the person or persons collecting subscriptions for building or endowing any particular institution, the person or persons so building or endowing it have the right to provide for its management for all time to come.

Where there is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management, the founder can direct that the management should be hereditary in his families.

[P. 1152, C. 1, 2]

T. R. Ramachandra Aiyar and *S. R. Dikshit*—for Appellants.

Advocate-General and *K. S. Sankara Aiyar*—for Respondents.

Judgment. — The plaintiffs have brought this suit under S. 92, Civil P. C., for framing a scheme for the management of Ramalingam and Choudeswari Amman temple in Andichetty Street, Cogai, Salem. The 1st Defendant is a managing trustee of the temple and Defendants 2 to 10 are trustees of the temple who aided and instigated the 1st Defendant in his various misdeeds and breaches of trust. In the plaint the plaintiffs alleged various acts of mismanagement against the 1st Defendant who denied all of them and opposed the framing of the scheme. When the case came on for trial the plaintiffs and the defendants did not press for the trial of all the issues raised in the case. They agreed to the Court framing a suitable scheme for the proper management of the institution. The plaintiffs did not press for the removal of the defendants from office and the defendants did not press for the trial of the case on the merits and waived their objection to the validity of the sanction obtained by the plaintiffs from the Collector for the institution of the suit. The Subordinate Judge of Salem framed a scheme and provided for a Board of nine trustees of whom three should be elected by the Chettithanakars from among their number and four by all the beneficiaries including the Chettithanakars and one to be elected by those who pay or have paid one thousand rupees or more towards the temple at a time, and one should be nominated by the eldest member of the family of Nungavalli Venkatarama Chettiar, the founder of the temple. The Defendants 2, 3, 4, 7 and the legal representative of the 10th Defendant appealed to the District Judge, Salem, who dismissed their appeal. They have preferred this second appeal.

Two points are raised in this appeal: one is, that the 19 Chettithanakars are hereditary trustees and (2) that they should not have been removed without finding that they were guilty of misconduct and not fit to be trustees. The District Judge, on a consideration of the evidence in the case, has come to the conclusion that the 19 Chettithanakars among whom some are plaintiffs and some defendants, are not hereditary trustees. Ex. A is the deed of trust dated 9th January 1925, executed by Venkatarama Chetti in favour of 19 persons. In that he stated that he alone was unable to make and set up idols of Ramalingam and Choudeswari Amman in the Choudeswari Amman Temple Devasthanam built by him and that the 19 persons agreed to raise a fund and to put up the idol in the temple and according to the agreement that they set up the idols of Ramalingam and Choudeswari Amman and that they agreed to purchase property for endowing the temple and the document goes on to state:

That the 19 persons should manage the temple from generation to generation. The contention of the learned Advocate-General is that the document does not confer hereditary right upon the 19 persons mentioned in Ex. A. It is clear from the documents that funds were collected by Venkatarama Chetti and by the 19 persons mentioned in it; that they built the temple, installed the idols in it and that they collected funds for the upkeep of the temple and managed the temple under Ex. A. The recital as regards the devolution of the management is to manage the same from generation to generation performing the daily pooja, aradhanai, festivals and other things regularly and live happily as long as the Sun and Moon last.

There is a further recital to the same effect after mentioning the properties of the temple:

The properties are delivered to you as being fit to be managed, held, and enjoyed from generation to generation by setting up the idols of Ramalingam and Choudeswari Amman and others as stated above.

From the document it is clear that Venkatarama Chetti and the 19 persons intended that the management should be in their families. Considering the Hindu

sentiment as regards the hereditary management of trust institutions it cannot be successfully urged that the parties to Ex. A did not intend that the right to trusteeship should be in their families.

The next contention of the learned Advocate-General is that the persons mentioned in Ex. A collected subscriptions from various persons and they could not be said to be the founders of the temple and therefore they had no right to confer hereditary right of management upon themselves or others. Where a person collects subscriptions from various persons and builds a choultry or a temple he has a right to direct in what manner the institution should be managed and what right the trustees should have in the management of that institution. This is recognized by the Hindu Law. There is nothing illegal or improper in a person who builds a temple whether out of his own funds or out of the funds collected by subscriptions or getting donations from people to create a trust and endow it, directing by the deed of endowment, in what manner and by whom it should be managed. The case in *Ananda Chandra Chuckerbutty* v. *Broja Lal Singh* (1) does not help the respondent. Justice Mookerjee observes at page 301:

If a number of persons provide the original endowment, they may apparently together constitute the founder: *Re. St. Leonard* (2) . . . As stated by Lord Mansfield in *St. John's College* v. *Todington* (3), a charitable foundation, in so far as it is charitable, is the creature of the founder, and on this view Lord Hardwicke ruled in *Green* v. *Rutherford* (4) that the founder may provide for the government and administration of his creature.

In the matter of the Endowed Schools Act, 1869, and *In the matter of the St. Leonard, Shoreditch, Parochial Schools and the Endowments relating thereto* (2) it was held that it was open to a number of persons to collect subscriptions and endow an institution and provide for its management and that the persons who collected the subscriptions and endowed the institution were the founders and they had the right to provide for its management and for its devolution. If persons invite subscriptions on a representation that they would devote the subscriptions so collected to a particular purpose and they divert the subscription to some other purpose the subscribers have a right to object to the funds being diverted to other purposes than those for which they were collected. But so long as the subscribers do not object to the persons or persons collecting subscriptions for building or endowing any particular inititution, the person or persons so building or and endowing it have the right to provide for its management for all time to come. There is nothing in the evidence to show that the persons who gave subscriptions gave them on the understanding that the founders should not have the hereditary right of management. All that appears from Ex. A is that subscriptions were collected, funds were raised, a temple was built and idols were installed and the management was in the hands of Venkatarama Chetti and others and all of them. Venkatarama Chetti and 11 persons agreed that the temple should be a trust and should exist for all time to come and the management should be hereditary in their families.

In *Attorney-General* v. *Clapham* (5) Lord Cranworth, Lord Chancellor observes at p. 652:

Where a fund is raised for a charitable purpose like that of founding a chapel and the contributors are so numerous as to preclude the possibility of their all conourring in any instrument declaring the trusts, but such a declaration is made by the persons in whom the property is vested, at or about the time when the sums have been raised, that declaration may reasonably be taken prima facie as a true exposition of the minds of the contribntors. The presumption is, that the trusts declared were those which the contributors intended. It would be open to them, if the trusts were not so framed as to effect the object they had in view, to take steps for getting any errors corrected. If no such stepe are taken, it must be assumed that the instrument declaring the trusts fairly embodies the intentions of the contributors.

I therefore hold that the 1st defendant, the other defendants and the Chettithanakars have a hereditary right to manage the temple affairs,

The next question is, whether the order removing the trustees is legal in the absence of a finding that they were guilty of breach of trust. The Subordinate Judge has not actually removed the trustees from management. What he has done is, finding that the management by 19 persons would not be possible he has given them the right to

(1) 50 Cal. 292=A. I. R. 1923 Cal. 142.
(2) [1884] 10 A. C. 304=56 L. J. P. C. 30=51 L. T. 305=33 W. R. 756.
(3) [1757] 1 Burr. 158=1 Ld. Ken. 441.
(4) [1750] 1 Ves. J. 462.
(5) [1855] 43 E. R. 638=4 De. G. M. & G. 591=24 L. J. Ch. 177=1 Jur. (N.S.) 505=3 Eq. R. 702=3 W. R. 158.

elect 3 of their own number as trustees, and 4 others are elegible for election by all the beneficiaries including the Chettithanakars. The Chettithanakars are the head men of the community. Each group of families has one man to manage its communal affairs and that man is called a Chettithanakar. There were at the time of Ex. A. 19 Chettithanakars. It is now represented that there are about 30 of them.

Granting for argument's sake that the defendants have been removed from the trusteeship it cannot be said that the order of the Subordinate Judge is illegal. S. 92, Civil P. C., gives power to the Court to frame a scheme of management.

Where the Court finds that for the proper administration of a trust, charitable or public, that a trustee should be removed, it has power to do so without finding that the trustee is guilty of mismanagement.

Section 92 was specially enacted in the interests of public, charitable and religious trusts. The Court should primarily look to the interests of the institution rather than the right of individuals. Where the interests of the institution do require that certain trustees should be removed the Court can do so without actually finding that they are guilty of mismanagement provided their remaining as trustees is incompatible with the proper management of the institution or that the number of trustees is so large that it will not be possible for any scheme to work with all of them as trustees. No doubt in framing a scheme the Court should not lightly exclude the interests of hereditary trustees and others. But where the Court finds that their continuance could not be for the welfare of the institution and is not conducive to the proper working of the scheme it should not hesitate to remove them. But where they can be retained without any detriment to the institution the Court may do so. This principle was followed by the learned Chief Justice and and Phillips, J., in *Muthiah Chetti* v. *Periannan Chetti* (6) at p. 234 :

Though the past user of the institution is not binding on us in framing a scheme under the section yet it may well be taken into account and departed from only as far as may be necessary.

It is unnecessary to discuss this point further as I hold that the trustees were not removed from the trusteeship under the scheme. The contention of Mr. T.R. Ramchandra Aiyar for the appellant is that all the ten persons should be trustees. It will not be possible to have 19 persons as trustees and from their past conduct it is clear that all the affairs were managed by the 1st defendant on behalf of all the trustees and this has been so not only during the lifetime of Venkatarama Chetti but also during the time of the 1st defendant. When for the last 30 years only one man has been managing the temple with hardly any restraint from the other trustees they have no reason to complain if the scheme provides for at least three of them being on the committee. As observed by their Lordships of the Privy Council in *Muhammad Ismail Ariff* v. *Ahmed Moola Dawood* (7).

In giving effect to the provisions of the section and in appointing new trustees and settling a scheme, the Court is entitled to take into consideration not merely the wishes of the founder, so far as they can be ascertained, but also the past history of the institution, and the way in which the management has been carried on heretofore, in conjunction with other existing conditions that may have grown up since its foundation. It has also the power of giving any directions and laying down any rules which might facilitate the work of management, and, if necessary, the appointment of trustees in the future.

It is frankly conceded by Mr. Ramachandra Aiyar that the Court has power under S. 92 to appoint additional trustees to manage charitable or religious trusts along with hereditary trustees. This point was settled so long ago as 1905 in *Prayag Doss Ji Varu Mahant* v. *Thirumala Srirangacharlu Varu* (8). If additional trustees can be appointed to manage trusts along with hereditary trustees it is difficult to see how the appellants could complain when a few trustees are appointed under the scheme to manage the property along with three of the so-called hereditary trustees. In cases of this kind as already observed it is not the interest of private individuals that should be considered paramount. The interest of the institution is of paramount importance and the Court should have that in view in framing a scheme. In this case the interests of the defendants is safeguarded by three at least of the members being on the board of management. In this view it cannot be said that the rights of the

(6) [1916] 4 L. W. 228=34 I. C. 551.

(7) [1916] 43 Cal. 1085=35 I. C. 30=43 I. A. 127 (P. C.)

(8) [1905] 28 Mad. 319=15 M. L. J. 133.

Chettithanakars have been overlooked by the Subordinate Judge in framing a scheme.

I think the scheme as framed is a proper one and the appellants have no reason to complain that their rights have been overlooked. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1154

RAMESAM, J.

Nallaya Goundan—Appellant.

v.

Palani Goundan—Respondent.

Second Appeal No. 1396 of 1923, Decided on 21st April 1926, from the decree of the Dist J., Coimbatore, in Civil Appeal No. 244 of 1922, D/- 15th January 1923.

(a) *Bills of exchange Act, Ss,* 13 (2) *and* 89 —*Sections apply to negotiable instruments.*

The principle of S. 13, Cl. 2 of the Bills of Exchange Act taken with S. 89 is applicable to negotiable instruments though there is no express provision that antedating or postdating of a bill or a note or an endorsement does not by itself make the document invalid. [P. 1155, C. 1]

(b) *Negotiable Instruments Act, S.* 58—*Antedating endorsement by holder does not amount to obtaining a promissory note by fraud by the endorsee.*

A promissory note cannot be said to have been obtained from the holder by means of an offence or fraud within the meaning of S 58 by reason of its endorsement being antedated. [P.1155 C. 1]

S. T. Srinivasagopalachari for *V. L. Ethiraj*—for Appellant.

K S. Venkatarama Iyer—for Respondent.

Judgment.—The facts out of which this second appeal arises may be briefly stated. One Chellapa Goundan had some mis-understanding with his wife and to spite her and his minor son he executed a sale deed of his property to his nephew the defendant in this case, Ex. II, dated 23-11-1917. For a portion of the consideration of the sale a promissory note, Ex. A, was executed. The promissory note has been endorsed in favour of the plaintiff and the endorsement bears the date 23-1-19. On 5th May 1919 Chellappa Goundan's son filed a suit for partition and recovery of his half share of the property. Before the suit came on for trial, there seems to have been a compromise of the suit but before this compromise could be recorded the defendant fell il and an ex parte decree was passed in favour of the plaintiff therein for half the property. The defendant afterwards applied to set aside the ex-parte decree, but the matter was again compromised. The defendant also says that he sold the lands to one Gevindaswami Goundan for Rs. 1,900 and it is said that under the final compromise it was arranged that a reconveyance for half the lands should be taken from Govindaswami. The plaintiff as endorsee of the promissory note filed this suit on 23rd November 1920.

Five issues have been framed by the District Munsif in this case. The 1st issue is whether there has been a partial failure of consideration for the suit promissory note, the second whether the promissory note has been since paid up by the defendant, the third whether the endorsement is antedated, the fourth whether the plaintiff is a holder in due course and the fifth relating to costs. The fourth issue goes with the first issue. The District Munsif found that the suit promissory note is supported by consideration only to the extent of a half as the vendor's son ultimately succeeded in his suit for partition and recovery of a half-share of the property. He also found that the plaintiff practically knew this fact and therefore he was not a holder in due course and would not be entitled to recover the whole of the amount due on the note.

On the 2nd issue the defendant produced Ex. I which purports to be a receipt for the full amount due on the note said to have been paid by him to Chellappa Goundan. The Munsif found the payment of the amount due on the note at a time when the son's suit was contemplated was improbable and also relied on the evidence that no money was paid at the time and he found that Ex. I was not supported by consideration. As to the third issue he was of the opinion that it does not really arise in the case. The suggestion of the defendant was that Ex, A I, the endorsement, was really executed after the minor's suit was filed and was antedated. Assuming that the object of so antedating it is to get a decree for the full amount, the point really becomes one of no importance as the District

Munsif gave a decree to the plaintiff only for half the amount of the note. The Munsif, however, points out that P.W. 1, D.W. 1 and P.W. 2 prove the endorsement on the date it bears and there is no evidence contra. I agree with the District Munsif.

It was contended before me by the vakil for the respondent that the antedating of the endorsement amounts to a forgery, though the document is genuine in the sense that Chellappa Goundan executed it, because the object of the assignment is to sustain a suit for the full amount against the defendant. It seems to me that the principle of S. 13, Cl. 2 of the Bills of Exchange Act taken with S. 89 is applicable to negotiable instruments though there is no express provision to that effect viz., that antedating or postdating of a bill or a note or an endorsement does not by itself make the document invalid. But assuming there has been some offence the offence was if at all against the defendant and so far as the plaintiff and Chellappa Goundan are concerned it cannot be said that the note was obtained from the holder by means of an offence or fraud within the meaning of S. 58 of the Negotiable Instruments Act. Therefore I think there is nothing in law to prevent the plaintiff recovering half the sum due on the note.

The District Judge based his judgment solely on this point. He thinks that the assignment is a forgery and he also finds that the plaintiff did not pay any consideration for the endorsement, and on these grounds refused to give a decree to the plaintiff. In my opinion, the question of consideration for the endorsement does not arise. That is a matter between plaintiff and Chellappa Goundan and cannot arise in this case. I have already shown that the antedating (assuming that there is such antedating,) cannot prevent the plaintiff from sustaining the suit. But, in my opinion, there has been no evidence to prove it nor do I find any suspicious circumstances from which such a thing can be inferred.

The only other point that should be considered in the case is whether Exhibit I was really supported by payment (After discussing the evidence the judgment proceeded). Anyhow I do not see any reason for rejecting the District Judge's finding that Exhibit I was not supported by consideration and calling for a fresh finding.

The result is the promissory note is undischarged to the extent of a half (the other half of the consideration having been found to have failed), the plaintiff is the holder of it in due course and is entitled to a decree. I therefore reverse the judgment of the District Judge and restore that of the District Munsif with costs here and in the lower appellate Court.

Appeal allowed.

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* * A. I. R. 1926 Madras 1155

PHILLIPS AND RAMESAM, JJ.

(Ayyagari) Venkata Suryanarayana—Plaintiff—Appellant.

v.

Makka Venku Naidu and *others*—Defendants Nos. 1-7 and 9-15—Respondents.

Second Appeal No. 1171 of 1922, Decided on 22nd July 1925, from a decree of the Addl. Sub-J., Vizagapatam, in Appeal Suit No. 215 of 1921.

* * *Adverse possession—Lands belonging to Government—Trespasser in possession for 12 years—Lands granted to third person by Government without resuming them from the trespasser—Trespasser can successfully plead adverse possession against the grantee—Limitation Act, Art. 149.*

Where a person has been in adverse possession for 12 years of lands belonging to Government and the lands are granted by Government to a third person, the grantee can successfully be met with a plea of adverse possession, although it would have been open to Government to resume the lands, 60 years adverse possession not having been completed as against the Government. Whether 12 years' possession as against the grantee was completed before the grant or afterwards is immaterial: *A. I. R. 1924 Mad. 783, Diss. from*; *30 Mad. 245* and *A. I. R. 1924 Cal. 394, Rel. on*: *Case law discussed.*

[P. 1156, C. 2]

Y. Suryanarayana—for Appellant.

B. Jagannatha Das—for Respondents.

Order.—In this case the plaintiff is the appellant before me. The suit was filed to recover certain lands which were originally service inam lands attached to office of karnam and were enfranchised by Government. The Subordinate Judge found that Item No. 1 had been held adversely by the defendants from before 1889, and as to Items

Nos. 2 and 3 that the defendants were holding them adversely for at least 20 years before suit. On these findings he held that the suit is barred by limitation. The plaintiff files the second appeal.

The enfranchisement was effected by Government in 1906, the title-deed, Ex. B, being dated December 2, 1906, and the present suit was filed on June 26, 1918. If the plaintiff gets a fresh cause of action from the date of the enfranchisement by Government, there is no doubt that the plaintiff's suit is not barred. The Privy Council have now held that enfranchisement constitutes a fresh grant. If the plaintiff obtained the title in 1906, free of the prior adverse possession then his suit is not barred. The point in appeal thus reduces itself to the question whether when the Crown makes a grant at a time when the defendant was already in adverse poesession for less than 60 years, what adverse possession counts in a suit by the grantee. If the prior adverse possession would not be counted against the grantee, the period would be 12 years from the date of the grant. This is the view now pressed before me by the appellant. The other view is that preceding adverse possession should count against the plaintiff and if the period of prior adverse possession exceeded 12 years, the suit is barred; in other words, the moment the grant is made by the Crown the title is extinguished subject to the possibility of obtaining peaceful possession: vide below.

It is claimed by the respondent that the latter view is supported by *Jagadindra Nath Roy* v. *Hementa Kumari Debi* (1). The point was not directly discussed in it, but it was held that the period of 60 years under Art. 149 does not avail the grantee from the Crown and, therefore, the period of limitation was only 12 years. It was held that the suit was not barred as the plaintiff was a minor and the adverse possession began in his time. I think the case is not conclusive on the point. Another case relied on by the respondents is *Gunga Gobind Mundul* v. *Collector of the 24-Pergunahs* (2). This case also does not seem to me to be conclusive. The respondent next relies on a case in *Municipal Commissioners for the City of Madras* v. *Sarangopani Mudaliar* (3). All that was held there was that the period of sixty years cannot be taken advantage of by a Municipality. But assuming it is 12 years, from what time that should be computed was not discussed in it. The same remarks apply to *Pullanppally Sankaran Nambudri* v. *Vittil Thalokat Mahomed* (4). The actual decision went off on a ground other than limitation. Though these cases are not clear in favour of the respondent the case in *Annada Mohon, Roy* v. *Kina Das* (5) supports his contention and I do not see why, on principle, the defendant's adverse possession prior to the grant from the Crown is terminated by the grant and cannot be tacked on to later adverse possession after the grant. If such prior adverse possession was for a period of more than 12 years, there is no need to tack it on to the later adverse possession and we would think the assignee's title is extinguished if he cannot get peaceable possession and has to sue to recover possession.

This view is supported by *Deo* v. *Morris* (6). The respondent also refers to a case in *Emmerson* v. *Maddison* (7). It seems to me that this case lays down the correct principle in such matters. In such a case, if the Crown takes peaceable possession from the trespasser and then hands it over to the grantee and the grantee enters into possession the case does not present any difficulty. The long possession of the trespasser short of 60 years does not avail him. Even if the Crown does not obtain possession, if the grantee from the Crown is able to get peaceable possession it may be that such possession will be upheld against a trespasser in a suit by the trespasser and it may not be correct to say strictly that the grantee's title is extinguished immediately on the making of the grant. But where the grantee could not obtain peaceable possession and has to resort to a Court of

(1) [1905] 32 Cal. 129=31 I. A. 203=8 C. W N. 809=8 Sar. 698 (P. C.).
(2) [1866] 11 M. I. A. 345=7 W. R. 21=1 Suther. 676=2 Sar. 284 (P. C.).
(3) [1896] 19 Mad. 154.
(4) [1905] 28 Mad. 505=15 M. L. J. 416.
(5) A. I. R. 1924 Cal. 394.
(6) [1835] 2 Bing. (N. C.) 189=132 E. R. 75=42 R. R. 587=4 L. J. C. P. 285.
(7) [1906] A. C. 569=75 L. J. P. C. 109=95 L. T. 568.

law then I do not see how an exception can be made to the general principle of limitation and cut up the defendant's adverse possession into two parts, the portion prior to the grant and the portion after the grant, the former being unavailable to the defendant; and yet this seems to be the view taken in *Gourikantam* v. *Ramamurthy* (8). In that case the grant from the Crown was in 1911. The defendant was in adverse possession from 1905 and it was held that the period prior to 1911 could not be added to the period after 1911. It is true, that case differs from the case before me in the fact that there the period prior to the grant was less than 12 years whereas in the case before me it is more than 12, but I do not see how this makes any difference.

It seems to me the case in *Gourikantam* v. *Ramamurthy* (8) is opposed to all established principles of law and is not correctly decided. I am informed a Letters Patent appeal against the decision was dismissed without notice to the respondent. In my opinion the case requires re-consideration. Another case relied on by the appellant is *Krishna Sastri* v. *Singaravelu Mudaliar* (9). The actual decision itself is capable of explanation and of being distinguished. In that case, the plaintiff was not the grantee from the Crown. The grantee seems to have somehow got peaceable possession and the trespassers who had previously been in possession had to bring the suit, the grantee being the defendant. The case may be regarded as correctly decided with reference to observations in *Emmerson* v. *Maddison* (7), but some of the observations in the case are more in consonance with *Gowrikantam* v. *Ramamurthy* (8) and I cannot agree with them. For instance, at page 475 (48 *M. L. J.*) it is said

> The grant of a new title which would be questioned by any outsider who had trespassed on the property would be meaningless.

If the trespasser had been in possession for more than 12 years and sticks to the possession, that is if he succeeds in preventing the Government or the grantee from getting peaceable possession, I do not see why his questioning the new title should be meaningless. But apart from the sentence, seeing that the grantee got possession and was defendant, the decision itself need not be attacked. I do not see my way to distinguish *Gourikantam* v. *Ramamurthy* (8). It is inconsistent with *Annada Mohan Roy* v. *Kina Das* (5). If *Gourikantam* v. *Ramamurthy* (8) is correct, this appeal must be allowed. But I do not think *Gourikantam* v. *Ramamurthy* (8) is correct and I think this appeal ought to be dismissed. I, therefore, refer this case to a Bench of two Judges.

Judgment.—This case has been referred to this Bench by one of us and the arguments on both sides have been dealt with in the order of reference. It will, therefore, be unnecessary to repeat this in detail. The reference was rendered necessary on account of the decision of Wallace, J., reported as *Gourikantam* v. *Ramamurthy* (8) in which he held on the authority of the Privy Council decision reported as *Venkata Jagannadha* v. *Veerabhadrayya* (10) that unless the Government had at the time of resumption no right to resume, the first defendant has no case; that is to say that although there might have been 12 years' adverse possession against the grantee, such adverse possessien could not be effective when there was a further grant by the Government before the right of Government had been lost by prescription. In coming to this conclusion the learned Judge appears to have relied on a sentence in the judgment of Ayling, J.

In *Krishna Sastri* v. *Singaravelu Mudaliar* (9) that is the grant of a new title which could be questioned by any outsider who had trespassed on the property would be meaningless, but we may observe that that sentence merely relates to the validity of the title conferred by the grant and has no reference to the question of possession. In the present case it would, no doubt, have been open to Government to have asserted its title and resumed possession from the defendant and given possession to the grantee. That has not been done. The Government is no party to the suit. As against the plaintiff there has been adverse possession for over 12 years and such adverse possession was also adverse to the Government and the question of whether such possession gives a good title against

(8) A. I. R. 1924 Mad. 783.
(9) A. I. R. 1925 Mad. 780=48 Mad. 570=48 M. L. J. 470.
(10) A. I. R. 1922 P. C. 96=44 Mad. 643.

plaintiff has been definitely decided in the affirmative in *Kuthaperumal Rajali* v. *Secretary of State* (11) and *Anada Mohan Roy* v. *Krishna Doss* (5). These two decisions are also in accordance with the principle laid down in *Jagadindra Nath Roy* v. *Hemanta Kumari Debi* (1); *Municipal Commissioners for the City of Madras* v. *Sarangapani Mudaliar* (3); and *Pullanpally Sankaran Nambudri* v. *Vittil Thalokat Mohamed* (4).

We accept these authorities in preference to the decision of Wallace, J., in *Gourikantam* v. *Ramamurthy* (8) and accordingly dismiss the second appeal with costs.

Appeal dismissed.

(11) [1907] 30 Mad. 245=17 M. L. J. 174.

A. I. R. 1926 Madras 1158

PHILLIPS AND MADHAVAN NAIR, JJ.

O. K. Ramaswami Aiyar & Sons—Defendants—Appellants.

v.

C. K. K. Subbier & Brothers—Plaintiffs—Respondents.

Appeal No. 295 of 1924, Decided on 8th March 1926, from the order of the 1st Addl. Sub-J., Madura, D/- 4th August 1924, in E. A. No. 75 of 1924.

Civil P. C., Sch. 2, Para. 15—Questioning parties on different dates is not misconduct so long as opportunity of meeting representations of other side is given.

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it, and therefore the mere fact of questioning the parties on different dates does not amount to misconduct so long as the parties are given an opportunity of meeting the representations made by the other side: 18 *Bom.* 299, *Foll.* [P. 1158, C. 2]

K. Rajah Aiyar—for Appellants.

K. V. Krishnaswami Aiyar—for Respondents.

Judgment.—This is an appeal against an order refusing to file an award on the ground of misconduct on the part of the arbitrators. The misconduct found is that the arbitrators examined the parties on different dates as admitted by one of the arbitrators himself. The reference is a somewhat peculiar one, for the parties had been parties in a suit in Court and a decree had been obtained by the plaintiff. Instead of preferring an appeal from that decree, the parties agreed to refer the matter to two arbitrators in the following words:

As we have rspresented to you to decide the matter in dispute in the judgment given by the 1st Additional Sub-Court, Madura, in O.S. No. 21 of 1922, so that we may not appeal against it, we have executed this muchilika with our free will agreeing to abide by the decision that you may give in the aforesaid suit as panchayatdars.

This in fact makes the arbitrators a sort of an appellate tribunal in the suit and this was done in order to save the trouble and expenses of an appeal. In the award no reference is made to the examination of the parties, the arbitrators merely stating "we have considered the points in favour and against them on either side." The plaintiff (respondent) did not take objection to the award on the ground that the parties were examined on different dates. When one of the arbitrators, Venkatramier, was examined he said:

We sent for defendant and questioned him about the facts of the case. We sent for the plaintiff. Ho came and represented his case.

In cross-examination he said:

In a week after examining the defendant we examined the plaintiff.

On this bare admission the Subordinate Judge has held that the arbitrators were guilty of misconduct. The principle to be observed is laid down in *Cursetji Jehangir Khambatta* v. *W. Crowder* (1) as follows:

An arbitrator ought not to hear or receive evidence from one side in the absence of the other side without, if he does, giving the side affected by such evidence the opportunity of meeting and answering it.

Apart from the question as to whether the parties were really examined by the arbitrators or were merely asked to put forward their respective cases, it would appear that the mere fact of questioning them on different dates would not amount to misconduct so long as the parties were given an opportunity of meeting the representations made by the other side. In this case it is the plaintiff that now complains of want of opportunity, but inasmuch as he was examined after the defendant there is nothing to show that he was not told the case of the defendant which he had to meet. The misconduct, therefore, is not proved beyond doubt and in fact, inasmuch as the question was not in issue during the trial of the case, there can

(1) [1894] 18 Bom. 299.

no finding of misconduct and consequently the Court was certainly not justified in raising a point which had not been raised by the parties. If misconduct has been conclusively proved, the Court may take notice of it, even when the misconduct has not been alleged by a party, and act accordingly; but when it has not been conclusively proved, and the other party has not been given an opportunity of disproving it, the Court certainly went beyond its functions in taking the objection.

We must, therefore, allow this appeal, set aside the order of the Subordinate Judge and direct that the amount in Court be paid to the plaintiff and satisfaction of the decree recorded. The plaintiff will pay costs thoughout.

Appeal allowed.

A. I. R. 1926 Madras 1159 (1)

COUTTS-TROTTER, C. J.

Union Board of Pattukottai—Defendant 2—Appellant.

v.

Athmanatha Aiyar — Plaintiff—Respondent.

Second Appeal No. 1292 of 1924, Decided on 6th April 1926, from the decree of the Sub-J., Tanjore, in Appeal Suit No. 5 of 1924.

Madras Local Boards Act, S. 3 (23) (a)—The words "Over which the public have a right of way" qualify whole section.

The words "over which the public have a right of way" qualify the whole section, and therefore where a Local Board finds a strip of land running along the side of the road to which nobody can make out a title, that strip of land does not become part of the road, unless it is proved that the public have a right of way over it.

[P. 1159, C. 2]

K. V. Krishnaswami Aiyar—for Appellant.

M. S. Venkatrama Aiyar and *R. Srinivasa Aiyar*—for Respondent.

Judgment.—This appeal must be dismissed with costs. The contention put forward is that this piece of property to which the plaintiff apparently cannot prove his paper title may be deemed to be a road by reason of the definition of "road" in the Madras Local Boards Act, S. 3 (23) (a) which runs thus:

"'Road'" includes any road, street, square, Court alley or passage whether a throughfare or not, over which the public has a right of way, together with the drains on either side and with the land, whether covered or not by any pavement, verandah or other erection, which lies on either side of the roadway up to the boundaries of the adjacent property, whether that property be private property or property reserved by Government for other purposes; and also includes the roadway over any public bridge or causeway.

It is no doubt possible to argue that that means that, if a Local Board can find a paddy field running along the side of the road to which nobody is able to make out a good title, that paddy field at once becomes part of the road. That construction is so repugnant to commonsense that I decline to adopt it; and wretchedly drafted as this section is, I can hardly put that absurdity on the unknown draftsman. The only way to make sense out of it is to hold that the words "over which the public have a right of way" qualify the whole section. No doubt there would be no great inconvenience because the public have rights of way over many things which are not roads; but the probability is that the very inconvenience of that construction would be obviated by this, that any strip of land over which the public have a right of way lying on the side of the roadway would almost certainly follow the line alongside the roadway so that really no practical inconvenience would result. I think it is very foolish of the Local Boards to bring up points of this kind at the ratepayers' expense to the High Court and I think the practice should be discouraged as much as possible especially when I mention that the value of this land is said to be Rs. 15 and, I suppose, twenty times that sum has already been expended in costs. If I were an auditor I should surcharge the Board with the costs and disallow them against the ratepayers.

Appeal dismissed.

A. I. R. 1926 Madras 1159 (2)

PHILLIPS AND MADHAVAN NAIR, JJ.

K. P. S. Karuthan Chettiar — Appellant.

v.

R. M. M. Raman Chetti— Respondent.

Appeal No. 244 of 1924, Decided on 22nd March 1926, from the order of the Dist. J., Ramnad, in M. P. No. 63 of 1919.

Provincial Insolvency Act (1920), *S.* 69—*To obtain order of annulment, order of adjudication must be shown to be improper.*

In order to obtain an order for annulment it must be shown that the order of adjudication ought not to have been made. In order to show that, it must be proved that the act of insolvency on which the order was based did not really exist. [P. 1160, C. 1]

C. S. Venkatachariar—for Appellant.

S. T. Srinivasagopalachariar—for Respondent.

Judgment.—A preliminary objection is taken on the strength of the decision in *Iyappa Nainar* v. *Manicka Asari* (1) that no appeal lies in this case. That decision was one under the Insolvency Act of 1907 and it is argued that it is not applicable to the present Act which is somewhat different in form. It is, however, unnecessary to decide this question as we think that on the merits the appeal must fail. The District Judge has dismissed the appellant's application: (1) to annul the insolvency adjudication: and (2) to take action against him under S. 69. In order to obtain an order for annulment it must be shown that the order of adjudication ought not to have been made. The only allegation put forward by the appellant is that the insolvent was in possession of accounts in 1907, and when he was adjudicated in 1914 he alleged that he had no accounts at all. Even if the insolvent's statement was false it does not necessarily follow that the order of adjudication was wrong. In order to show that, it must be proved that the act of insolvency on which the order was based did not really exist. This has not been done and the Judge has rightly dismissed the application. So far as taking penal action is concerned there is little more than suspicion against the insolvent and the Judge has rightly declined to take any penal action. The appeal is dismissed with costs.

Appeal dismissed.

(1) [1917] 40 Mad. 630=27 I. C. 241.

A. I. R. 1926 Madras 1160

RAMESAM, J.

Charukonda Keechappa—Petitioner.

v.

Pujari Lakshmanna and *others*—Respondent.

Civil Revision Petition No. 555 of 1924, Decided on 17th March 1926, from an order of the Dist. J., Anantapur, D/- 29th Dec. 1923, in O. P. No. 33 of 1922.

Civil P. C., O. 33, *R.* 5—*Elaborate enquiry about merits should not be made.*

It is not permissible in a pauper petition to go into an elaborate enquiry on the merits of the plaintiff's case: 27 *Mad.* 37 *and* 27 *Mad.* 120, *not Foll.* [P. 1160, C. 2]

G. Musalappa Reddi and *K. V. Sesha Ayyangar*—for Petitioner.

B. Somayya—for Respondents.

Judgment.—This revision petition is against an order of the District Judge of Anantapur refusing to permit the plaintiff to sue in forma pauperis. The suit was for a declaration that the alleged Will of his maternal grandfather was not genuine. The plaintiff is described in the plaint as aged 18. The District Judge has found that the petitioner is able to pay the Court-fee on his plaint and has already expressed an opinion on the merits of the case that there was a former litigation started by his grandmother and that the judgment in that suit bars the present suit as res judicata, and even if it is not res judicata, the petitioner has not got any subsisting prima facie cause of action. He relies on *Amirtham* v. *Alwar Manikkam* (1). The plaintiff has filed this petition.

Two points have been argued before me. The first is that the District Judge is wrong in going into the merits of the plaintiff's case as disclosed in the plaint. The decision in *Amirtham* v. *Alwar Manikkam* (1) was followed in *Sankararama Ayyar* v. *Subaramania Ayyar* (2). But the latter decision was reversed in Letters Patent appeal and we must now take it that it is not permissible in a pauper petition to go into an elaborate enquiry on the merits of the plaintiff's case. But at the same time, some effect must be given to the provisions in O. 33, R. 5, which permits the Court to reject the plaintiff's application on the ground that his allegations do not show a cause of action. Mr. Somayya contends for the respondent that while an elaborate enquiry into the merits is prohibited, if on a slight enquiry it can be shown that the plaintiff has really no subsisting right, it is open to the Court to express an opinion on such a matter. Here, what has been done is the exhibiting of Ex. 1, the judgment in the former suit. On the other hand, Mr. Sesha Ayyangar relies on *Govindasmi Pillai* v. *Municipal*

(1) [1904] 27 Mad. 37.
(2) [1904] 27 Mad. 120.

Council, Kumbakonam (3) which has been followed in some cases. According to that case the Court cannot go into the question of limitation to see if the petitioner has a subsisting cause of action.

I do not think it necessary to express any final opinion on this question as this petition may be disposed of on the other ground raised by the petitioner. But to safeguard the interests of the petitioner, I think it is necessary for me to formally vacate this portion of the lower Court's order so that if the petitioner choose to file a regular suit the plea of res judicata may not be put forward by reason of anything contained in this order. I, therefore, direct that para. 4 of the learned Judge's order be considered as expunged from his judgment.

The second point argued is that the learned Judge erred in holding that the petitioner has not shown that he is unable to pay the Court-fee. On this point the defendant examined two witnesses to show that the plaintiff possesses 16 indigo vats and 6 looms. The District Judge rejected their evidence to the extent that the vats and looms were said to belong to the plaintiff. The Judge says that the looms and the vats are in the house of the petitioner's grandmother and must be presumed to belong to the mother and grandmother of the petitioner. But he proceeds to consider the evidence of D. W. No. 2 according to which the plaintiff gets an income of Rs. 40 or Rs. 50 per mensem. If it were open to me to weigh the evidence, it seems to me that the District Judge has formed too high an opinion as to the income to be derived from handlooms and indigo vats. But it is not open to me to go into the evidence whatever my view of the evidence may be. The District Judge makes his own calculations and thinks that the plaintiff must have been saving during three years prior to the petition at the rate of Rs. 200 per annum. Incidentally, I must mention that D. W. No. 1 says that the plaintiff has been earning for the last 16 years. Seeing that his age is 18 this evidence is absurd. There is no absurdity about the evidence of D. W. No. 2.

The result is I am unable to interfere in revision and to help the petitioner. I do this more readily because the heavy Court-fee he has to pay in this suit was particularly the result of his own doing. It is really a declaratory suit: but because he has added a prayer for the appointment of a Receiver he has to pay a heavy Court-fee. Seeing that there is a regular declaratory suit open to him, and probably he may conduct his case more cheaply by altering the frame of his suit, I see no reason to interfere in this petition.

The petition is dismissed with costs

Petition dismissed.

(3) [1918] 41 Mad. 620=45 I. C. 95=34 M. L. J. 399.

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* A. I. R. 1926 Madras 1161

DEVADOSS, J.

Korlapati Thammayya—Plaintiff—Appellant.

v.

Medida Ramanna and *others*—Defendants—Respondents.

Second Appeal No. 1525 of 1923, Decided on 5th May 1926, from the decree of the Sub-J., Rajahmundry, in A. S. No. 149 of 1922.

* *Transfer of Property Act, S. 52—Sale for realizing Abkari dues during pendency of mortgage suit—Doctrine applies.*

During the pendency of a mortgage suit in respect of the properties sold, a sale for realising the abkari dues, or forest dues or other dues, than the land revenue would not give such right to the purchaser as the sale for arrears of revenue and therefore the doctrine of lis pendens applies: 16 *Mad.* 479, *Diss. from.* [P. 1163, C. 1]

N. Rama Rao and *P. V. Rangaram*—for Appellant.

K. Ramamurthi—for Respondents.

Judgment.—The only point in this second appeal is, is the plaintiff entitled to redeem the suit property? In order to understand the contention a few facts are necessary. The 2nd defendant was an abkari contractor and defaulted to pay the amount due to Government. A demand notice was served on him on 27th May 1917 followed by a sale notice on 3rd July 1917, and the sale of the property by the revenue authorities was held on 10th August 1917, and was purchased by the plaintiff. The suit property was at the time of the sale under a mortgage in favour of the 3rd defendant. He filed a suit on 13th July 1917, obtained a mortgage decree and brought the mortgage property to sale on 4th

March 1919. The property was purchased by the 1st defendant herein. There were criminal proceedings between the plaintiff and the defendants and the plaintiff has brought this suit for possession of the suit property on the ground that he is entitled to it, and in the alternative he prays for redemption of the mortgage in favour of the 3rd defendant. The 1st defendant got possession of the property on 13th July 1919, and the present suit was filed on 10th July 1920.

The contention of Mr. Rangaram for the appellant is that the sale for arrears of abkari rent or kist was by the Government and therefore he is entitled to the plaint property, and if that contention is not good he prays that he may be given a decree for the redemption of the mortgage in favour of the 3rd defendant. The property having been sold in execution of the mortgage decree, and purchased by a third person, the question is whether the person who purchased the mortgage property pending the mortgage suit is entitled to redeem the mortgage after the mortgage has been merged in the decree and the property was purchased by a third person. The argument is that inasmuch as the Government attached the suit property for arrears of abkari rent, effect must be given to the attachment, and the sale by Government after the attachment must convey some title to the purchaser ; in other words, a purchaser under such circumstances stands on a much higher footing than a private purchaser. It is contended that if the 2nd defendant had sold the property to a private purchaser pending the mortgage suit the purchaser would not get a higher title than the mortgagor himself. But such a purchaser would be entitled to come in and ask to be made a party to the mortgage suit so as to enable him to redeem the mortgage. After the mortgage decree was passed and the property was brought to sale in execution of the mortgage decree and purchased by a third person, can such private purchaser from the mortgagor be held entitled to redeem the mortgage on the ground that he had acquired title prior to the date of sale in execution of the mortgage decree. I do not think that anybody could contend that a private purchaser under such circumstances would be entitled to redeem the property in the hand of the auction-purchaser.

Reliance is placed by Mr. Rangaram upon *Sarangapani* v. *Secretary of State* (1) as supporting his contention. In that case certain land was put under attachment for arrears of revenue under the Madras Abkari Act, S. 28. The same land was subsequently attached in execution of a money decree against the defaulter and the defendant purchased it at the Court sale. The Collector objected to the sale of the land in question but his objection was rejected. A suit was brought in the name of the Secretary of State for a declaration that the land was liable for the arrears of revenue in respect of which the attachment under the Abkari Act was made. A Bench of this Court held that the plaintiff was entitled to the declaration asked for. In support of the decision reliance was placed upon *Subramanya* v. *Rajaram* (2), With due respect to the learned Judges I am unable to see how the case in *Subramanya* v. *Rajaram* (2) applied to the facts of the case in *Sarangapani* v. *The Secretary of State for India in Council* (1). What the learned Judges says is that the interest acquired by the auction-purchaser in execution of the money decree was subject to the liability which had been legally imposed in due course of law and the puchaser could take no more. The attachment for arrears of abkari dues does not create any interest in the property. The attachment does not create a charge,and it is difficult to see what other rights it could create. If it does not create a charge, how could it affect the sale subsequently held in execution of a money decree by the civil Court. The case in *Subramanya* v. *Rajaram* (2), instead of supporting the principle of the decision in *Sarangapani* v. *The Secretary of State for India in Council* (1) seems to be directly against it. In that case the interest of a tenant in a certain land was attached by his creditor in execution of a money decree. The landlord attached the same land for arrears of rent and brought it to sale and purchased it under the provisions of the Rent Recovery Act. The creditor subsequently purchased the interest of the tenant which was sold in execution of the decree. It was held by Muthuswami Aiyar and Parker, JJ., that the landlord's purchase was subject to the creditor's,

(1) [1893] 16 Mad. 479=3 M. L. J. 47.
(2) [1885] 8 Mad. 572.

attachment. They observed at page 575:

It follows then that the landlord could only sell the tenant's interest, such as it was at the date of his attachment and sale, and that his power under S. 38 is nothing more than the power which an execution-creditor ordinarily has over his debtor's property ..... In the view which we take of the landlord's power under S. 38 of Act VIII of 1865, he could only stand in the place of the tenant, and bring to sale for arrears of rent such interest as the tenant had power to sell at the date of the attachment and sale. The interest the tenant had no power to alienate to the prejudice of any claim enforceable under the attachment, and the landlord could not do more.

In the present case, there was a mortgage suit pending, and pending the mortgage suit the revenue authorities brought the properties to sale for arrears of abkari dues. Could the Collector by such a sale give a higher title to the purchaser at the sale than the owner of the land himself could have given if he had alienated the property privately? The contention that the Collector or the Government could give a higher title to a puchaser under such circumstances is on the face of it untenable. The Collector or the revenue authorities in such a case act only as the owner of the land himself could act. No doubt the case will be different if it was a revenue sale for arrears of land revenue; for under the Revenue Recovery Act land revenue is the first charge on the property and any sale for arrears of land revenue would convey good title to the purchaser free of all encumbrances on the land. But a sale for realizing the abkari dues, or forest dues, or other dues than the land revenue would not give such a right to the purchaser as the sale for arrears of revenue. The authority of *Sarangapani* v. *Secretary of State* (1) cannot be accepted as good law in view of the decision of the Privy Council in *Ragho Prasad* v. *Mewa Lal* (3). There, there was a sale by the Collector under the Civil P. C. for the amount due in respect of Court-fees payable by the plaintiff on a suit 'in forma pauperis. The Privy Council held that the purchaser under such a sale got no title which would prevail against the purchaser in a suit which was pending at the time the Collector brought the property to sale. Lord Macnaghten, in delivering the judgment of their Lordships, observed:

The Crown has no more right than a 'common person' to seize A's property and apply it in or towards the discharge of a debt due from B. That is not a question of law. It is a matter of common justice, and it may be added, of common honesty.

(3) [1912] 134 All. 223=15 I. C. 177=39 I. A. 62 (P. C.).

Reference may also be made to *Kader Mohideen Marakkayar* v. *Muthukrishna Aiyar* (4) in this connexion. In that case the share of a coparcener was sold for arrears of income-tax. It was held that the share of the coparcener was bound by the decree in the mortgage suit notwithstanding such coparcener was not joined in the suit as one of the legal representatives of the mortgagor. The learned Judges observe at page 236:

If the second defendant had been a purchaser at a revenue sale for arrears of land revenue which accrued due in respect of the land purchased by him, the case would be quite different and the doctrine of lis pendens would not apply; for in that case the revenue sale would be in enforcement of a right f the Crown paramount to the mortgage right sought to be enforced by the decree of the civil Court and not simply of the right, title and interest of the defaulter as in the case of a sale for arrears of income-tax.

In this case the sale was during the pendency of the mortgage suit and as such cannot avail against the 1st defendant who purchased the property in execution of the mortgage decree. The doctrine of lis pendens applies to this case, and I therefore hold that the plaintiff is not entitled to redeem the suit property.

In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

(4) [1902] 26 Mad. 230=12 M. L. J. 368.

* A I. R. 1926 Madras 1163

RAMESAM, J.

Avudai Ammal and *others*—Defendants 1-3—Appellants.

v.

Ramalinga Reddiar and *others*—Plaintiffs—Respondents.

Second Appeal No. 704 of 1923, Decided on 18th December 1925, from a decree of the Dist. J., Tinnevelly, in A. S. No. 419 of 1910.

* *Hindu Law—Succession—**Female bandhus take after male bandhus are exhausted.***

Brother's daughter's son is a preferential heir to a son's daughter. Female Bandhus can succeed only after all the male bandhus are exhausted: *A. I. R.* 1924 *P. C.* 209, *Expl.* [P 1164 C 1]

T. L. Venkatarama Ayyar and *K. V. Krishnaswami Aiyar*—for Appellants.

K. Bhashyam Ayyangar—for Respondents.

Judgment.—The question raised in this second appeal is whether the son's daughter of a Hindu is entitled to preference to brother's daughter's sons in the matter of succession to his property. The 3rd defendant is the son's daughter and the respondents are the brother's daughter's sons. This question was not raised in the Courts below, but the second appeal is admitted as a pure question of law and for the same reason I have allowed it to be argued.

The contention for the appellants briefly is that both the rival claimants are bandhus and no preference should be given to male bandhus over female bandhus but that the order should be determined in accordance with the principles applying to bandhus in general. Mr.K. V. Krishnaswami Aiyar, who appeared for the appellants, argues that all older cases in which it is laid down that male bandhus are entitled to preference over female bandhus whatever the nearness in degree may be have lost their weight in view of the recent decision of the Privy Council. He refers to *Khenchava* v. *Girimallappa* (1) but I am unable to see how this decision can be said to throw any doubt on the weight of the decisions of this Court in which it was held that the female bandhus can succeed only after all the male bandhus are exhausted namely, *Lakshmanammal* v. *Tiruvengada Mudali* (2), *Narasimma* v. *Mangammal* (3), *Chinnammal* v. *Venkatachala* (4), *Sundarammal* v. *Rangasami Mudaliar* (5), *Venkatasubramaniam Chetti* v. *Thayarammah* (6). *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (7).

This case far from being in his favour, sounds against him. At page 577 Lord Phillimore refers to the decision in *Narasimma* v. *Mangammal* (3) in which a father's sister was postponed to a mother's brother on the ground of general preference of male bandhus. Then His Lordship points out that

> this decision was quoted without disapproval before their Lordships and this Board in the case of *Vedachela Mudaliar* v. *Subramania Mudaliar* (8).

This looks like a double approval by the Privy Council of the Madras decision. In the next paragraph he then takes up the contention that the Madras decision ought not to be used in the case before him, because it was a Bombay case. Even if the contention had succeeded it shows that the decisions in Madras remain good law, but even for Bombay the contention did not prevail. In the course of discussion His Lordship refers to *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (7) and merely points out that a Bombay decision in *Saguna* v. *Sadashiv* (9) was not referred to in it. He next points out another Bombay case *Balkrishna Bhinaji* v. *Ramkrishna Gongadhar* (10) in which the Madras case was followed and finally at page 579 the principle that male bandshus should be preferred to female bandhus upheld. The judgment winds up with shis remark :

> And there is no doubt indeed the learned counsel for the appellants did not contend that there was any doubt, that throughout the rest of India, preference for the male would be certain.

This sentence is practically fatal to the contention of the appellants.

The recent judgment of the Privy Couucil in *Vedachala Mudaliar* v. *Subramania Mudaliar* (8) dealt only with order of preference among male bandhus. There is no suggestion in that case that as between a male bandhu and a female bandhu the principle of propinquity should be applied. The same remarks apply to the judgment of myself and my brother Venkatasubba Rao, J., in the present decision reported as *Rami Reddi* v. *Gangireddi* (11) Mr.Krishnaswami Iyer says that in *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (7) these female bandhus were described as irregular bandhus whereas now they are recognised to be regular bandhus. I do not think there is anything in this contention. All that was meant by irregular bandhus in that decision was that they were not expressly enumerated in the ancient text quoted in Mitakshara and other commentaries

(1) A. I. R. 1924 P. C. 209=48 Bom. 569.
(2) [1882] 5 Mad. 241.
(3) [1890] 13 Mad. 10.
(4) [1892] 15 Mad. 421=2 M. L. J. 86.
(5) [1895] 18 Mad. 193=4 M. L. J. 275.
(6) [1898] 21 Mad. 263.
(7) [1908] 31 Mad. 321=18 M. L. J. 409.
(8) A. I. R. 1922 P. C. 33=44 Mad. 753.
(9) [1902] 26 Bom. 710=4 Bom. L. R. 527.
(10) A. I. R. 1921 Bom. 189=45 Bom. 353.
(11) A. I. R. 1925 Mad. 807=48 Mad. 722.

and they have come to be recognised only by a series of decisions of their High Court. The Privy Council have not yet decided on the heirship of female bandhus. The Punjab High Court have adopted the Madras view in *Tirath Ram* v. *Kahan Devi* (12). A long current of decisions of this Court must be followed and the second appeal must be dismissed with costs.

I may add that even if the male bandhus and female bandhus are on the same footing, the respondents are nearer in degree than the 3rd appellant. According to the well known Hindu Law mode of computation (the number of degrees from the common ancestor of the claimant or proprietor whichever is larger) the appellant is within four degrees and the respondent three degrees. Even if the steps from the proprietor to the claimant are contra, the respondent is nearer.

The delay in representing the memorandum of objections is excused. There is nothing on merits and it is dismissed. Half costs.

Appeal dismissed.

(12) [1920] 1 Lah. 588=60 I. C. 10=3 L.L.J. 35.

A. I. R. 1926 Madras 1165

WALLACE AND MADHAVAN NAIR, JJ.

Mayandi Thevan— Accused—Appellant.

v.

King-Emperor—Opposite Party.

Criminal Appeal No. 203 of 1926, Decided on 3rd September 1926, from the order of the Asst. S. J., Madura, in Criminal Case No. 93 of 1925.

(a) *Criminal Tribes Act* (6 *of* 1924), *S.* 23 (1) (b)—*2nd and 3rd convictions must be after tribe is declared to be criminal.*

What S. 23 (1) (b) means is that both the second and third convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused is registered a member of the criminal tribe: *Cr. Apps.* 318 and 367 *of* 1925, *Foll.*: *Cr. Ref. No.* 17 *of* 1924, *not Foll.* [P 1165, C 2]

(b) *Criminal Tribes Act, S.* 23 (1)—" *Special reasons to the contrary* " *must be apart from nature of offence.*

The mere fact that the offence is not of a very serious nature cannot form a special reason for reducing the sentence. Such special reasons must be something apart from the nature of the offence, such as youth, or age or illness or sex. [P 1166, C 1]

Public Prosecutor—for the Crown.

Judgment.—The appellant in this case has been convicted on the unanimous verdict of a jury of offences under Ss. 457 and 380, I. P. C., and sentenced to rigorous imprisonment for seven years. It was held that he broke into P. W. 1's house and stole a ram therefrom. There is no misdirection in the charge and none is urged in the appeal petition. The only question for consideration is the question of sentence. The appellant is a member of a notified criminal tribe and has had two previous convictions, both subsequent to 1911. Prima facie, therefore, the sentence which ought to have been passed on him for a third conviction under S. 23 of Act VI of 1924, transportation for life. Notice was served on him to show cause why the sentence imposed should not be enhanced. The Sessions Judge has given no reasons for not imposing the sentence of transportion for life.

In a judgment of this Bench in Reference No. 17 of 1924 we held that, when an accused person was a member of a criminal tribe, but was not registered as such until 1923, his second and third convictions must be convictions after his registration, and not merely his second and third conviction " he being a member of a criminal tribe " since, if the latter view prevailed, S. 23 (1) (b) could be applied before 1 (a) had been applied. By the proviso all convictions prior to 1st March 1911, count as one. If the second conviction may be a conviction after 1st March 1911, but before the tribe is declared a criminal tribe, then at the time of the conviction S. 23 (1) (a) would not be applied, but if the third conviction was after the tribe was declared a criminal tribe then, if mere membership of a criminal tribe operates to bring S. 23 into force for a third conviction, S. 23 (1) (b) must be applied although 1 (a) had not yet been applied. This seemed to us to indicate that what the section really meant was that both the second and third convictions should be after the tribe to which the accused belongs had been declared a criminal tribe or after the accused was registered a member of the criminal tribe. The correctness of this ruling was, however, doubted by a member of another Bench

in Criminal Appeals Nos. 318 and 367 of 1925, Devadoss, J. holding with us and Waller, J., taking the other view. In this difference of opinion the matter was placed before a third Judge, the learned Chief Justice, who upheld the view of Waller J., and pointed out that the statute did in words distinguish, when it intended to do so, between a member of a criminal tribe and a registered member of a criminal tribe : compare S. 23 with Ss. 22, 24 and 25. We think there is considerable force in this point though it does not wholly get over the difficulty that in certain cases S. 23 (1) (b) will apparently have to be applied before S. 23 (1) (a) has been applied. We are not prepared to press our previous view which was, we admit, partly induced by a reluctance to suppose that the Legislature intended such an extreme severity as the Act would seem to imply.

We have called for the notification under which the tribe of this accused was notified as criminal. It is dated 5th June 1918 and the accused was apparently registered on 14th July 1920. The fact that he was a member of a criminal tribe seems to have been overlooked by the 1st Class Magistrate of Usalampatti who convicted him, his second conviction, on 20th December 1923 and sentenced him to 18 months' rigorous imprisonment. He ought then to have sentenced him to an imprisonment of not less than 7 years. Now undoubtedly the only legal sentence which can be imposed on him is transportation for life, unless the Court is satisfied that there are special reasons for reducing the sentence. We cannot think that the mere fact that his offence is not of a very serious nature, that is to say house-breaking and not robbery or dacoity can form a special reason for reducing the sentence. Such special reasons must in our view be something apart from the nature of the offence, such as, youth or age or illness or sex. The Act clearly implies that on a third conviction of an offence under Sch. I the punishment to follow is transportation for life. We must, therefore, enhance the sentence on the accused to one of transportation for life.

At the same time we feel the sentence is unduly harsh and doubt if the framers of the Act really intended such a result. It means, for instance, that for, say, three separate thefts of a goat, the three goats being worth perhaps Rs. 9 in all, at different times, a man may be sentenced to transportation for life. The result of enforcing such penalties must be, we feel sure, a crop of recommendations to Government to reduce the sentences and we would suggest that the better course would be to consider whether the extreme rigour of the Act may not be mitigated by fresh legislation. In the present case we intend to move the Government to reduce the sentence to rigorous imprisonment for 7 years which we think is an adequate sentence even for a member of a criminal tribe in the circumstances of this case, and we shall do so accordingly.

Sentence enhanced.

A. I. R. 1926 Madras 1166

BEASLEY, J.

In the matter of C. Subramanian Chetty and Sons.

Insolvency Petition No. 50 of 1925 and Application No. 386 of 1926, Decided on 22nd September 1926.

Presidency Towns Insolvency Act, Ss. 28 and 29 —Payments made by insolvent to creditors and composition arrived at—Procedure is irregular and composition should not be sanctioned.

Any payments made by insolvents or by persons on behalf of the insolvent behind the back of the Official Assignee are entirely irregular. No insolvent or anybody on his behalf has any right whatever to make any payments at all to creditors. The insolvent's estate vests in the Official Assignee and the only person who can discharge debts of the insolvent is the Official Assignee. [P 1166, C 2, P 1167, C 1]

S. Arunachala Iyer—for Insolvent.

M. A. T. Chari—for Official Assignee.

Order.—This is an application for the sanction of a compromise approved at the meeting of the creditors held on the 26th April 1926. Without going any further into this application, it appears that the insolvent has made payments himself to the creditors before the meeting of the creditors at which the composition was approved. I have said before and repeat it now that payments made by insolvents behind the back of the Official Assignee or payments made by persons on behalf of the insolvent in this manner are entirely irregular

and I have been caused a great deal of trouble in the past in consequence of this irregular procedure. No insolvent or anybody on his behalf has any right whatever to make any payments at all to creditors. The insolvent's estate vests in the Official Assignee and the only person who can discharge debts of the insolvent is the Official Assignee. This fact having come to my notice on this application I shall adjourn it and refuse to sanction the composition at this stage. The proper procedure must be adopted in this case and in every other case and the money which is said to have been paid to the creditors must be returned to the Official Assignee. Then he will deal with it as provided in the Presidency Towns Insolvency Act. After he has done that and taken proper discharge from the creditors, I shall be prepared to consider whether this composition is to be sanctioned by the Court or not. I think that what I have said ought to be brought to the notice of the public in order that this entirely irregular procedure may be stopped as soon as possible. I do not propose to sanction any composition with creditors in which any irregular procedure has been adopted or which is the result of an irregular practice. This application will stand over.

A. I. R. 1926 Madras 1167 (1)

VENKATASUBBA RAO, J.

Alamelu Ammal—Plaintiff — Appellant.

v.

Raja and another—Defendants—Respondents.

Second Appeal No. 1257 of 1923, Decided on 10th March 1926, from the decree of the Dist. J., N. Arcot, in A. S. No. 9 of 1922.

(a) *Will—Construction—Clause relating to payment of maintenance directing maintenance to be paid at certain rate does not create specific charge on inheritance.*

Where the clause in a will relating to payment of maintenance is, in the usual form directing the testator's son to pay the plaintiff maintenance at a certain rate, it does not create a specific charge on the inheritance, but merely imposes an obligation upon the son to make a payment for the maintenance of the person specified: 3 *Bom.* 415 (*P. C.*), *Foll.*[P. 1167, C. 2]

(b) *Registratson Act, S.* 17 (2) (*xi*)—*Receipt not extinguishing charge is not cumpulsorily registrable*

Where there are no words in the receipt purporting to extinguish a charge on immovable property, it does net require registration: *A. I. R.* 1925 *Mad.* 348, *Foll.* [P. 1167, C. 2]

L. A. Govindaraghava Aiyar — for Appellant.

C. V. Anantakrishna Aiyar and *N. S. Rangaswami Aiyangar*—for Respondents.

Judgment.—There is clearly no point in this second appeal. It is urged for the appellant that her maintenance was by the terms of the Will made a charge upon the property and that therefore Ex. I which is not registered is not valid as a receipt. This contention is unfounded because there is no charge created by the will. The clause relating to payment of maintenance is, in the usual form, directing the testator's son to pay the plaintiff maintenance at a certain rate. As is pointed out in *Narayanrao Ramchandra Pani* v. *Ramabai* (1) this does not create a specific charge on the inheritance but merely imposes an obligation upon the son to make a payment for the maintenance of the person specified.

Granting for a moment that a charge was created, even then Ex. I does not require registeration: see my judgment in *Gopalaswami Aiyar* v. *Kalyana Rangappa* (2). There are no words in the receipt purporting to extinguish the charge; and it does not, therefore, require registration. The second appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 3 Bom. 415 (P. C.).
(2) A. I. R. 1925 Mad. 348.

A. I. R. 1926 Madras 1167 (2)

WALLACE AND MADHAVAN NAIR, JJ.

Ramasami Kavundan and *another*—Appellants.

v.

Tirupathi Gounden—Respondent.

Letters Patent Appeals Nos. 143 to 146 of 1924, Decided on 6th November 1925, from the judgments of Devadoss, J., reported in *A.I.R.* 1925 *Mad.* 477.

(a) *Grant—Jagir—A village cannot become a jagir only becuse it is so called.*

To call a village a jagir is not sufficient to constitute a jagir. [P. 1169, C. 1]

Where the granting authority was the Government who presumably at the time of the grant were perfectly aware of the nature and constituent elements of a jagir and the Government styled the villages in the grant deed as a jagir, and its own officers consistently adopted that nomenclature : *Held* : there were strong grounds for holding that the grant was the grant of a jagir.

(*b*) *Grant—Jagir and inam—Distinction—Jagir is grant of landed property for life in lieu of military services—"Jagir" points to occupancy.*

That distinguishing feature of a jagir in olden days was that it was a grant of landed property for life or for a definite number of lives in lieu of pension for services, usually military, rendered to Government in order that the grantee may maintain a certain dignity and state : 40 *Mad.* 664, *Rel. on.*

The word "jagir" primarily points to occupancy: (1918) *M.W.N.* 384 (*P.C.*) *Foll.* [P. 1169, C. 1]

(*c*) *Madras Estates Land Act, S.* 3 (2) (*c*)—*"Jagir" is not limited only to jagirs before East India Company.*

The term "jagir" in S. 3 (2) (c) cannot be limited only to jagirs granted before the advent of the East India Company. [P. 1169, C. 1]

(*d*) *Madras Estates Land Act, S.* 3 (2) (*c*)—*"Unsettled" governs also jagirs.*

The word "unsettled" in S. 3 (2) (c) governs not only "palaiyam" but it also governs "jagir." [P. 1169, C' 2]

(*e*) *Madras Estates Land Act—All cultivating tenants in possession when the Act came in force obtained occupancy rights although they had no such rights before.*

The Madras Estates Land Act (1908) intended not only to confirm existing occupancy rights, but all the cultivating tenants in possession at the time of the coming into force of the Act acquired occupancy rights even though they did not have such rights before : *A.I.R.* 1922 *P.C.*, 292, *Ref.* [P. 1170, C. 1]

(*f*) *Practice—New plea—New point amounting to abandoning of original case cannot be allowed in Letters Patent appeal.*

A party cannot be allowed to raise for the first time in Letters Patent appeal a new plea amounting to abandonment of the original case. [P. 1168, C. 2]

A. C. Sampath Aiyangar—for Appellants.

T. R. Ramchandra Aiyar and *M. S. Venkatarama Aiyar*—for Respondent.

Wallace, J.—The appellant urged two distinct lines of argument before us, first that the villages in which the suit property is situated are not an estate within the meaning of the Madras Estates Land Act, but that nevertheless the plaintiffs had occupancy rights in their lands, and secondly, that the villages are an estate and the plaintiffs had occupancy rights in their lands before the Act came into force, or at least obtained it by virtue of S. 6 of the Act.

As to the first line of argument it appears to me that it has been raised in this form for the first time in this Letters Patent appeal. I have no doubt that before the trial Court and the lower appellate Court and at the hearing in second appeal the only case on which the plaintiffs took their stand was that the suit villages form an estate and on that case the defendant took up the position that they were not an estate. A few stray observations in the District Munsif's judgment do not persuade me to the contrary, and the Subordinate Judge's finding is perfectly clear, namely, that the plaintiffs have occupancy rights in an estate. There is no unambiguous indication that in either of the first two Courts the plaintiffs put forward any alternative case. I am clear that we should be wrong in permitting the plaintiffs to abandon their original case, adopt what was the defendant's plea and raise it, for the first time in a Letters Patent Appeal. The discussion of the plaintiff's case in the first Court is all on the assumption that the principles of the Madras Estates Land Act will apply to the plaint lands, and there is no discussion of the question whether apart from that Act at all and on the assumption that the jagir is not an estate the plaintiffs possess occupancy rights in the plaint lands.

As to the second line of argument Devadoss, J., has held that the jaghir is not an estate within the meaning of the Madras Estates Land Act and, therefore, the plaintiffs on the case on which they came into Court must fail. Plaintiffs have not been able to persuade me that this decision is wrong so far it lays down that the jaghir is not an inam within the meaning of S. 3, Cl. 2 (5) of the Act. The problem has two aspects, whether the jaghir falls under S. 3 Cl. 2 (c) of the Act or whether it falls under 2 (d). To take the latter aspect first, the only point in plaintiff's favour is that the grant, Ex. A, seems to speak of a "beriz" and "ryots" from which the plaintiffs would argue that there must have been occupancy rights at the time of the grant. As to this the plaintiffs have not chosen to file the original grant itself which is in Marati. It is unsafe to base a decision on words merely used in a translation. On the other hand Ex. A speaks of handing over the whole cultivated ayacut, poramboke and waste lands in the villages

to the donee, and the Inam Commissioner further notes in Ex. XIV that the Jaghirdar had to repair the tanks. It is difficult to hold that such language would have been used if the intention of the grantor was only to hand over the land revenue.

Plaintiffs claim that they erected pucca buildings on the suit land and have alienated portions from time to time. As to this I note no act of this sort prior to the passing of the Estates Land Act in 1908 is proved so that no proof is afforded by these acts that the plaintiffs were ryots in possession when the Act came into force. The oral evidence as to long possession does not help much in view of the fact that in 1860 the Inam Commissioner remarked that there was no permanent cultivation in the villages. It is also a point against the plaintiff's contention that not a single patta or muchilika is produced from 1829, the date of the grant up to date. It is incredible that if the plaintiffs were occupancy ryots prior to the passing of the Estates Land Act they would not possess some such document. I am, therefore, not prepared to differ from Devadoss, J., in holding that the plaint villages are not an inam of which only the land revenue has been granted by the donor. The plaint jaghir does not, therefore, come under S. 3, Cl. 2 (3) of the Act.

As to whether the villages are an unsettled jaghir, it appears to me that the plaintiffs have a much stronger case and on this point I differ from the learned Judge from whose decision this appeal is filed. It has first of all to be decided whether they are a jaghir at all. The learned Judge has dismissed this claim merely on the ground that to call a village a jaghir is not sufficient to constitute it a jaghir. No doubt this is true, but when, as in this case, the granting authority is the Government who presumably in 1829 were perfectly aware of the nature and constituent elements of a jaghir and the Goverment styles the villages in the grant deed as a jaghir, and its own officers have consistently adopted that nomenclature (see the Inam Commissioner's Report Ex. XIV and the Salem District Manual, 1883, Vol. I, page 503, where the suit villages are, styled unenfranchised jaghirs) there are in my opinion, strong grounds for holding that the grant was the grant of a jaghir. Further it is plain from Ex. A as noted above that the grant was not of the village beriz but of the village as a whole, its cultivated ayacut, waste lands and poramboke and the ryots in it are directed to conform to the orders of the grantee. The learned Judge appreciates these points and emphasized them for the purpose of showing that the grant was not a grant of melwaram only. But it seems to me that he has failed to take these points into consideration when he discusses whether or not the villages are a jaghir. Ex. A further shows that the grant was made as an award for past services rendered to the Government.

Now the distinguishing feature of a jaghir in olden days, although the distinction between a jaghir and an inam in these days is becoming obscured, was that it was a grant of landed property for life or for a definite number of lives in lieu of pension for services, usually military, rendered to Government in order that the grantee may maintain a certain dignity and state: see Baden Powell's Land Systems of British India, Vol. 1 pages 189 and 257: Soundararaja Aiyangar's Land Tenures in the Madras Presidency, page 217; *Ram Narayan Singh* v. *Ram Saran Lal* (1) (a decision of the Privy Council) and *Sam* v. *Ramalinga Mudaliar* (2). The word 'jaghir' primarily points to occupancy as remarked by the Privy Council in *Sakina Bai* v. *Fatima Begum* (3). The mere fact that this jaghir fell within the scope of proceedings before the Inam Commissioner does not indicate that this was merely an inam, for the the Inam Commissioner was authorized to enfranchise even jaghirs: see Maclean's Manual of Administration, Vol. I, page 167. The Inam Commissioner in his report Ex. XIV throughout styles this property as a jaghir. Hence I find no difficulty in holding that the suit villages are a jaghir. The opinion of the lower appellate Court that the term 'jaghir' in S. 3, Cl. 2) (a), must be limited to jaghirs granted before the advent of the East India Company, appears to me to have no foundation either in statute or in authority.

(1) [1919] 46 Cal. 683=29 C. L. J. 332=56 I. C. 1=36 M. L. J. 344 (P. C.)
(2) [1917] 40 Mad. 664=34 I. C. 803=30 M. L. J. 600.
(3) [1918] 22 C. W. N. 377=47 I. C. 632=(1918) M. W. N. 384 (P. C.)

Ths suit villages being a jaghir, the next question is whether it is an unsettled jaghir. The appellant contends that the adjective 'unsettled' in the definition does not qualify 'jaghir;' but I cannot accept that view. If that had been the intention, one would have expected the definition to have run, : "any jaghir or unsettled palaiyam." A comparison of this definition with that in S. 4 (c) of Madras Proprietary Estates' Village Service Act II of 1894, which is almost identical, indicates that a "settled jaghir" would come under the heading of a permanently settled estate" already provided for in sub-S. (a) and, therefore, unnecessary for inclusion in sub-S. (c). I am clear that in the case of jaghirs sub-S. (c) applies only to "unsettled" jaghirs whatever that term may import.

Now there is no doubt that the term 'ordinarily' means in the case of a palaiyam. It is a palaiyam for which no sannad has been issued under Regulation XXV of 1802: vide Maclean's Manual of Administration, Vol. I page 120, para. 122. It is noted in that paragraph also that there were a few palaiyams held for police services which were treated as inam and enfranchised, but it does not appear that any of these survived unsettled until 1908. Hence the term 'unsettled' as applied to palaiyams in that Act means "not held under a permanent settlement:" see also *The Collector of Trichinopoly* v. *Lukkamani* (4). It is possible to argue that in the case of jaghirs it may mean also "not enfranchised by the Inam Commissioner," and this view obtains some support from some observations of Sadasiva Aiyar, J., in *Secretary of State* v. *Srinivasa Chariar* (5), where he quotes Bhashyam Aiyangar, J., from *Gunnaiyan* v. *Kamakchi Ayyar* (6). But it is not necessary to go furthar into this point since this jaghir is neither permanently settled nor enfranchised by the Inam Commissioner. The Inam Commissioner no doubt in Ex. XIV agreed to "settle" the jaghir in the name of one of the ten sharers who alone among the sharers was willing to have it enfranchised. But it appears that this proposal was not accepted by the Government and that the jaghir remains unenfranchised: see Salem District Manual at the page quoted above and the attempt of the Government to resume the jaghir noted by the Subordinate Judge in para 8 of his judgment in A. S. No. 30 of 1921. The villages therefore are prima facie an unsettled jaghir, and, therefore, an estate within the meaning of sub-S. (c).

Mr. Ramachandra Aiyar contends that it was not the policy of the framers of the Act to confer occupancy rights wholesale on all cultivating tenants in any unsettled jaghir, and he contends for the restriction of the definition, therefore, to jaghirs in which there were already occupancy rights, that is jaghirs in which the grantee did not hold the kudiwaram, in other words, that as regards jaghirs the Act intended not to confer new occupancy rights but only to confirm existing ones. But that theory I cannot accept, and it is opposed to the rulings of the Privy Council in *Sivaprakasa* v. *Veerama Reddi* (7). Had that been the idea a jaghir would have fallen more appropriately into sub-Cl. (d). Whatever may be predicated or negatived regarding the unsettled palaiyam must equally be so regarding the unsettled jaghir, and the palaiyam, as I have indicated above, at any rate when the Act I of 1908 was passed, was never a grant of land revenue alone nor could it be enfranchised. The only form of settlement applicable to it was a permanent settlement. It is, therefore, clear that in any palaiyam not permanently settled it was the intention of the framers of the Act to lay down that the cultivating tenants in possession at the time of the coming into force of the Act should acquire occupancy rights even though they did not have such rights before. There is no difficulty, therefore, in accepting such an intention in the case of unsettled jaghirs also. It follows that on the date of the coming into force of the Act all ryots in possession of ryoti land—not old waste—in unsettled jaghirs acquired occupancy rights in their holdings.

The suit villages have been held to be an unsettled jaghir. The plaintiffs in O. S. Nos. 63, 64 and 84 have been found by both the Judges of fact in this case

(4) [1873] 1 I. A. 282=21 W. R. 358=14 B. L. R. 115=5 M. H. C. 303=3 Sar 318 (P. C.)
(5) [1914] 15 M. L. T. 277=23 I. C. 144.
(6) [1903] 26 Mad. 339.
(7) A. I. R. 1922 P. C. 292=45 Mad. 586.

to have been in enjoyment of their present holdings at the time Act I of 1908 came into force. Therefore by that Act they gained occupancy rights whether or not they possessed them before. I would therefore allow the appeals and set aside the judgment of Devadoss, J., and restore that of the Subordinate Judge in all four suits with costs to the appellants throughout.

Madhavan Nair, J.—These are appeals under S. 15 of the Letters Patent against the judgment and decree of Devadoss, J., which set aside the decree of the Subordinate Judge of Vellore in A. S. Nos. 30, 31 and 32 of 1921 and dismissed the plaintiff's suit.

The facts necessary for the decision of these appeals are very simple. The plaintiffs (appellants) claimed permanent rights of occupancy in the two suit villages. Before us they claimed such rights on the ground (1) that they had the rights before the passing of the Estates Land Act and (2) if that claim was found against them, they stated that such rights were granted to them by the Estates Land Act either under Cl. (c) or Cl. (d) Sub-S. (2) of S. 3. According to these clauses, "estate" means any unsettled palaiyam or jaghir (See Cl. (c)) or any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been confirmed or recognized by the British Government or any separated part of such village-(see cl. (d)). According to their latter claim, the plaintiffs state that the suit villages form an unsettled jaghir Cl. (c) or an inam as mentioned in Cl. (d).

I am satisfied from the pleadings and the judgments of the Courts below and the absence of an issue on the question that the first ground of their claim, viz., that they had perfected rights of permanent occupancy before the Estates Land Act came into force was not specifically put forward for consideration in the Courts below, though the mention of some incidents of the right claimed on that basis may be detected in the judgments. We cannot allow the question to be raised for the first time before us in Letters Patent appeal. As regards the second ground of their claim, Devadoss, J., has held that the suit villages do not constitute a jaghir and also cannot be considered to be an inam within Cl. (d). I agree with the learned Judge in his view that the lands do not fall within Cl. (d), but, I differ from him on the question whether the suit lands form a jaghir within the meaning of Cl. (c) and the plaintiffs are, therefore, entitled to claim permanent rights of occupancy.

The short question for our consideration is whether the suit villages constitute an "unsettled jaghir" within the meaning of Cl. (c) Sub-S. (2) of S. 3 of the Estates Land Act. The sannad, Ex. A describes that suit villages were granted to Muhammad Moosa Sahib as "jaghir for three generations" as:

> the person who rendered help to the Government of the Honourable East India Company.

Originally the grant seems to have been an assignment of Rs. 1,710-3-7 from the collections of several villages. It appears that afterwards on account of a request from the grantees the grant was converted into a grant of two villages as shown by the following extracts from the sannad:

> You have made a request that Kollankuttai village may be left in your possession and that the village of Vellakuttai might be given in exchange for the other six villages, and we have received the order of Government .... We have therefore entered as belonging to Government the aforesaid six villages and have assigned as jaghir the two villages, namely, Kollankuttai as previously and Vellakuttai in their stead having an average beriz of Rs. 1,544-12-2 .. the total ayakat under cultivation including the porambokes, jamabandi, kattumaniyam and inam excluding therefrom the money profits, the six items namely, mangavari, profession taxes .. you may take possession of the aforesaid two villages namely Kollankuttai as before and Vellakuttai and obtain receipt.

I agree with Devadoss, J., in his opinion that by the sannad was granted not merely the land revenue but the entire lands of the two villages as well and that there were cultivating tenants in possession of the villages at the time of the grant.

Mr. Ramchandra Aiyar argues (1) that the term 'jaghir' in Cl. (c) Sub-S. (2) of S. 3 of the Estates Land Act is confined to assignments of land revenue alone of lands in which tenants had already existing rights of occupancy, meaning thereby, as I understand him, that under the Act it was not intended to grant any new right of occupancy to cultivating tenants in a jaghir; (2) that even if the villages in this case constitute a 'jaghir' the jaghir cannot be called an unsettled jaghir. As regards the meaning of the

term, 'jaghir' and the description of its incidents, we have been referred to Maclean's Manual of Administration, Vol. I, p. 167, paragraph 203, Glossary Vol. III, p. 308, various passages in Baden Powell's Land Tenures, Vol. I, pp. 189, 190, and 257, *Mt. Sakina Bai* v. *Kaniz Fatima Begam* (3) and also to *Sam* v. *Ramalinga Mudaliar* (2) in which there is an exhaustive discussion of the nature of the jaghir and its incidents. From the authorities referred to above it appears that (1) by the mere use of the term 'jaghir' a village cannot be said to be an 'estate", (2) the Jaghir must be taken prima facie to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary; obviously its duration can be limited as in the case before us; (3) in its origin the jaghir was connected with some special public service, such as the maintenance of troops and the like, or at least, if no such condition is imposed, it was a reward of land for some service to the State conferred upon some State official in recognition of his position: see *Sam* v. *Ramalinga Mudaliar* (2); and (4) the jaghir primarily points to occupany: (see *Mt. Sakina Bai* v. *Kaniz Fatima Begam* (3).

Having regard to these features, it cannot be disputed that what was granted to Moosa Sahib under the sannad was a jaghir. The grant was so treated by the officers of Government also. The Inam Commissioner (see Ex. XIV) refers to these villages as jaghir and to the grantees as jaghirdars. The fact that they were subjected to proceedings under the Inam Commissioner does not mean much as the Commissioner had jurisdiction to deal with jaghirs as well. In the Salem District Manual, Vol. II, these villages are described as 'jaghirs unenfranchised,' p. 503, Vol. II.

Devadoss, J., points out that the term 'jaghir,' does not signify much, but does not discuss the question any further, though, while discussing the question of whether the grant falls within Cl. (d) the learned Judge notes incidentally some features which would bring the suit villages within the term 'jaghir.' The description of a jaghir given by the authorities above referred to do not warrant the conclusion that jaghirs, as contended for by Mr. Ramachandra Aiyar, are mere assignments of land revenue only. I do not see any reason why the term 'jaghir' as used in Cl. (c) sub.-S. (2) of S. (3) of the Estates Land Act should be confined to mere assignments of land revenue alone; if that was the intention of the Legislature, appropriate words would have been used for that purpose. The Legislature probably recognized the claims made for permanent occupancy rights by cultivating tenants on jaghirs of the kind described above by including within the term 'estate' such jaghirs provided they were 'unsettled,' Such an assumption does not conflict with the policy of the Estates Land Act.

Apart from the rules relating to procedure and the jurisdiction of the revenue Courts it created one new right in order to settle the constant disputes between the landlord and tenants which had been going on for nearly a century: it gave occupancy rights to all ryots in occupation of lands within an 'estate' at the time of the passing of the Act." see *Sivaprakasa Pandarao Sannadhi* v. *Veerama Reddi* (7).

In my opinion, provided that the jaghir is unsettled, cultivating tenants in possession of jaghirs obtained permanent rights of occupancy under the Estates Land Act.

It is then argued for the appellant that 'unsettled' governs only 'palaiyam' and not jaghir as well and that if we should hold that it governs 'jaghir' as well then 'unsettled' means only 'not settled' under the Permanent Settlement Regulation whereas the respondent contends that the word 'unsettled, governs 'jaghir,' as well and that a jaghir cannot be described as an unsettled jaghir if it has been settled by the Inam Commissioner though it may not have been settled under the Permanent Settlement Regulation. I have no doubt that the term "unsettled" governs "jaghir" also. If the Legislature intended that the word "unsettled" should qualify only 'palaiyam' and not "jaghir" the words of Cl. (c) would have been more appropriately "any jaghir or unsettled palaiyam." There is a definition of 'Estates' in exactly similar terms in the Proprietary Estates Village Service Act (Act II of 1894) see S. 4 (c). and in giving illustrations of permanently settled estates in Cl. (a) a Zamindari, jaghir, mitta, or palaiyam is mentioned suggesting thereby that "jaghir" in Cl. (c) refers to an unsettled jaghir, as

"settled" jaghir has already been included in Cl. (a) : see alro surveys and Boundaries Act IV of 1897, S. 3 (i) Cl. (c).

The suit villages have admittedly not been settled under the Permanent Settlement Regulation ; nor have they been enfranchised under the Inam Rules. It is true that these were subjected to proceedings by the Inam Commissioner, but they do not seem to have been enfranchised finally—see the judgment of the Subordinate Judge in A. S. No. 30 of 1921, paragraph 8. These villages Vellakuttai and kollankuthai are as already pointed out described as "jaghirs unenfranchised" in the Salem District Manual—(see Vol. II, p. 503). In the case of palaiyams "unsettled" would mean not settled under the Permanent Settlement Regulation, XXV of 1802 (Maclean, Vol. I, p. 120, paragraph 122) Having regard to the fact that the two villages have not been settled either under the Permaneut Settlement Regulation or under the Inam Rules a consideration of the question whether "unsettled" in the case of jaghirs refers to settlement under the Regulation or under the Inam Rules also does not arise in this case, though it may be mentioned that the contention that "settled" may mean "settled under the Inam Rules also" receives support from the observations of Sadasiva Aiyar, J., in *Secretary of State* v. *Srinivasa Chariar* (5) to the fact that Inam Settlement has got the same effect as the Permanent Settlement.

In my opinion the two villages in this case from an "unsettled jaghir" and therefore fall within the definition of the term "estate" in S. 3, sub-S. (2) of the Estates Land Act, and the appellants who are the tenants of the villages can, therefore, claim rights of occupancy under the Estates Land Act. The judgment of Devadoss, J., is reversed and the Subordinate Judge's decree is restored with costs here and at the hearing before Devadoss, J.

L. P. A. No. 144 *of* 1924—The same order as in the above appeals.

Appeals allowed.

A. I. R. 1926 Madras 1173

PHILLIPS AND MADHAVAN NAIR, JJ.

Poothakka Nachiar and *others*—Appellants.

v.

Annamalai Chetty and *others*—Respondents.

Appeal No. 80 of 1924, Decided on 16th April 1926, from the decree of the Sub-J., Sivaganga, D/- 20th September 1923, in Original Suit No. 57 of 1918.

Transfer of Property Act, S. 3—Claim to future rent is actionable claim.

A claim to rent to fall due in future is an actionable claim ; 31 *I. C.* 473, *Foll.*

[P. 1173, C. 2]

S. Varadachari, T. M. Ramaswamy Iyangar and *K. V. Rajagopal Iyengar*—for Appellants.

C. V. Anantakrishna Iyer, K. Bashyam Iyangar and *A. Krishnasami Iyer* and *V. Ramaswami Iyer*—for Respondents.

Phillips, J.—This is an appeal from a mortgage decree. The mortgage was executed by Defendants 1 and 2, their elder sister, Vengu Nachiar for Rs. 43,500. It is admitted that the whole of this amount was not paid, and the suit is brought for the principal amount of Rs. 24, 936 and interest. The executants are gosha ladies and at the time of execution Vengu Nachiar and the last defendant were wives of one, Udayana Thevar alias Delhi Batcha. The 2nd defendant, sister of the other two executants, was living with her sisters under the protection of Delhi Batcha and subsequently married him.

The main objection taken by the appellants, Defendants 1 and 2 and the 8th defendant, is that the mortgage deed was not duly executed and attested. The mortgage property had been leased by the sisters to certain persons now represented by Defendants 4 and 8, of whom the 4th defendant has not filed an appeal. The contention for the appellants is that the mortgage deed was not properly attested. It purports to be attested by a large number of witnesses but inasmuch as the executants are gosha ladies it is admitted that all the attesting witnesses, except two, attested the document without actually seeing the execution which took place behind the purda. These two witnesses are P. Ws.1 and 2, viz., Arulammal, a dependant of the sisters, and Delhi Batcha, the husband of two of the sisters,

These two witnesses deny having witnessed the execution, but the Subordinate Judge has found that their evidence is untrue. The signature of the three ladies, both at the time of execution and at the time of registration is admitted, but in their statements Defendants 1 and 2 deny proper attestation and also deny receipt of consideration. Arulammal deposes that she did sign the document and that she was present at the time of registration as an identifying witness, but she denies having baen present at the execution. Her evidence is highly improbable, seeing that she pretends to know nothing whatever about execution. If that is so, it is extraordinary that she, a woman, should have been asked to attest the documents. Delhi Batcha also denies witnessing execution and puts forward as one ground for this assertion that the 2nd defendant was gosha to him.

This is a most improbable story considering the relations between them and it is flatly contradicted by the evidence of P. W. 3, the Sub-Registrar, who says that at the time of registraticn Arulammal and Delhi Batcha were the identifying witnesses of the executants. He also states that the male identifying witness, namely Delhi Batcha, must have been a person to whom the three executants were not gosha. There is no reason to disbelieve this statement ; for it is not essential that there should be two identifying witnesses ; but in this case the Sub-Registrar thought it advisable to have two witnesses and accepted Delhi Batcha as one of them as he was in a position to go behind the screen and identify the executants. This false statement of Delhi Batcha, namely that the 2nd defendant was gosha to him throws a great deal of doubt on his evidence, which has apparently been given with a view to protect the executants. As against the evidence of P. Ws. 1 and 2, we have the evidence of P. W. 4 who attested the document outside the place where it was signed. He, however, states that three ladies came into a place called 'Gowri Vilas' in the palace when Delhi Batcha took the mortgage deed inside the building and brought it out to the witnesses outside, and that it then contained the signatures of the three sisters, Delhi Batcha and Arulammal. If this witness is believed, and the Subordinate Judge has believed him and no reason is shown why he should not be believed, it is a strong piece of evidence that the two attesting witnesses, P. Ws. 1 and 2, did actually witness the execution. In a case of this sort, it is very easy for gosha ladies to pretend that execution was not duly carried out, and if the attesting witnesses can be induced to perjure themselves, it is difficult for the other side to prove satisfactorily that the document was properly attested. It is therefore legitimate in estimating this evidence to consider the circumstances of the case. The three ladies admit their signature, but neither the first nor the second defendant (Vengu Nachiar being dead), is prepared to go into the witness-box and swear that they signed in the absence of witnesses. They are the persons who have the best knowledge of what took place behind the screen and their omission to go into the witness box very strongly discredits their story. Delhi Batcha also states that he sent the document through one Karuppayi and asked her to get the signatures of the three ladies. This Karuppyi has not been examined. On the whole, therefore, the statement of P. W. 4 that the signatures of the three executants and the two attesting witnesses were placed on the document behind the screen is sufficient proof that it was duly attested.

The next point taken by the appellants is that the executants being gosha it is essential that the plaintiff should prove that they knew what they were doing when they executed the document. They are not illiterate persons, as is shown by their signatures, nor is there any evidence to show that they are in any way deficient in intellect, where as we do have evidence that the person in whom they would have the utmost confidence, namely Delhi Batcha, took an active part in the transaction. There is also the letter, Exhibit F, written by the three sisters on 23-10-1909, in which they request the plaintiff to get stamps for the execution of the hypothecation deed for Rs. 43,500. These facts are amply sufficient to prove that the executants knew what they were aboute when they executed the document. We also have the Sub-Registrar's statement that it was read to them before registration. It is next argued for the appellants that the items of consideration

have not been properly proved, and the fact that the plaintiff has not produced his accounts is strongly commented upon. The first item is a sum due upon a prior mortgage deed, and it is not disputed that the amount was due and would form good consideration ; but it is suggested that there is nothing to protect the defendants from the amount paid being claimed again. It, however, appears that a suit has since been filed upon the mortgage deed, whose interest was paid off by the first item of consideration, and in that suit credit has been given to the amount paid under the suit mortgage. The second item relates to an amount, of Rs. 7,450-10-6 borrowed for household expenses. Exhibit, B, C, D and E are put forward in support of this amount, but the amounts of these documents do not amount quite to Rs. 7,450. On this point P. W. 2 says that the amounts due under Exhibits B, C and D are included in Rs. 7450-10-6 referred in Exhibit A. He does not state that the balance was not borrowed by him, consequently the recital in the document as to the proper amount may be accepted. The third item relates to Rs. 3,600 paid for maintenance out of which only Rs. 1,200 is now claimed for receipts are produced.

The last item relates to a sum of Rs. 8,995-5-6 paid in cash. When P. W. 2 was examined he did not state that a lesser amount had been received. He said that out of Rs. 8,995-5-6, referred to in Exhibit A as received in cash, only about Rs. 2,000 had been recovered by him in sovoral instalments and that the plaintiff did not pay the balance. He thus denies the receipt of any cash at the time of execution, whereas we have the evidence of P. W. 4 that a bag of money was handed to P. W. 2 and taken by him behind the screen. He does not actually know the amount of money in this bag and says that it was about Rs. 7,000 and odd. This is somewhat vague ; but inasmuch as P. W. 2 does not suggest any definite amount as not having been paid out of the total cash consideration this evidence, coupled with the recital in the document, is sufficient to prove the amount.

The last point taken in appeal is that the decree which directs that

Ths plaintiff will in the first instance proceed to execute the decree against Defendants 4 and 8 or recovery of lease amounts due by them.

cannot be justified. Under the suit mortgage deed the amount of rent due by Defendants 4 and 8 to the executants is specifically hypothecated, and consequently it is urged for the 1st respondent that this amount can be claimed by him as mortgagee. It is very curious that Defendants 1 and 2 should have made common cause with the 4th defendant in putting forward this ground of appeal ; for if it succeeds Defendants 1 and 2, unless they are colluding with the 4th defendant, will undoubtedly be prejudiced in that it would be necessary to sell a greater portion of the mortgaged property. However, they have combined and it remains to be considered whether this is a valid order. The claim for rent appears to come within the definition of 'actionable claim' as defined in S. 3 of the Transfer of Proporty Act and consequently a transfer of such actionable claim is valid : vide *Chidambaram Pillai* v. *Doraisami Chetty* (1). The appellants, however, rely. on a case reported in *Reeves* v. *Pope* (2) but that case was concerned with quite a different question viz., whether a lessee against whom a usufructuary mortgagee claimed arrears of rent could set off damages which arose from a breach of contract by his lessor and it was held that he could not, because these damages were not an interest in the land. It does not appear from the judgment that the Court of appeal held that the claim to rent could not be transferred; for they were not concerned with that question at all. If the claim of rent is an actionable claim, then it would appear that S. 109 of the Transfer of Property Act would apply, under which the lessee cannot object to pay the arrears of the rent to the transferee of his lessor. In this cass it was admitted that no such payment has been made.

A further point has been raised that notice of the transfer was not given to the 4th defendant in accordance with the provisions of S. 131, Transfer of Property Act. In the plaint it was alleged as follows :

In pursuance of the hypothecation deed, notice has been given to the 4th defendant directing him to pay the lease amount to the plaintiff. On the very day of the execution of the suit hypothecation deed, a letter was written to

(1) [1915] 31 I. C. 478.
(2) [1914] 2 K. B. 284=83 L. J. K. B. 771=110 L. T. 503=58 S. J. 248.

the 4th defendant asking him to pay the lease amount to the plaintiff.

In answer to that, the 4th defendant in his written statement stated:

The allegation in paragraph 8 of the plaint that a notice was given to the elder brother of this defendant in connexion with lease amount is denied.

This reference to the elder brother is explained by the fact that the words "elder brother" appeared in the original plaints as drafted and were afterwards struck out. So far, therefore, as this notice is concerned, this may be taken as denied by the 4th defendant, but he does not deny that on the day of execution a letter was written to him asking him to pay the lease amount to the plaintiff. Consequently no specific issue on this point was framed and the plaintiff. did not adduce any evidence on the point because it had not been denied in the 4th defendant's written statement. This plea must also fail.

As the appellants have failed on all these points, the lower Court's decree must be confirmed and this appeal dismissed with costs of the 1st respondent's legal representatives.

Madhavan Nair, J.—I entirely agree. On the last point argued before us I would add a few words. The suit is brought on a hypothecation debt-bond, by which the property which had been already leased to the lessees (now represented by Defendants 4 and 8) and the future rent payable by them under the lease have been mortgaged by the lessors to the present plaintiff, the 1st respondent. The lower Court gave a decree for the sale of the property as well as a personal decree against the lessors for the lease amounts due by them, i. e., rent due for six years next prior to the suit. No objection is taken before us so far as the decree for the sale of the property is concerned ; but the learned vakil for the appellant argues that no decree should be given against the lessors for the future rent payable by them subsequent to the date of the suit mortgage deed. The point for determination is whether rent which is to fall due in future is not transferable or in other words whether it is not "an actionable claim" as defined in S. 3 of the Transfer of Property Act. This definition was substituted by Act II of 1900 instead of the one contained in the old S. 130 of the Act. Under the old Section "actionable claim" was defined thus:

A claim which the Civil Courts recognise as affording grounds for relief is actionable, whether a suit for its enforcement is or is not actually pending or likely to become necessary.

As could naturally be expected from the vague definition there was a conflict of judicial opinion as to its exact scope, and so far as the question in issue at present is concerned, it was held in *Shib Lal* v. *Azmat Ullah* (3) and *Arunachalam Chetti* v. *Subramaniam Chetti* (4), that the said definition does not included debts which are to fall due in future but it included only those which have already become due. Whatever doubt there may have been with regard to the question under the old S. 130 it seems clear that the present definition in S. 3 of the Act referring to "accruing debts" includes also debts which are also to fall due in future. The definition, so far as it is material for the present purpose is as follows :

Actionable claim means a claim to any debt, other than a debt secured by mortgage of immoveable property or hypothecation or pledge of movable property . . . . which the civil Courts recognise as affording grounds for relief, whether such debt be existent. accruing conditional or contingent.

That rent to fall due in future is an actionable claim has also been held by Mr. Justice Seshagiri Aiyar in *Chidambaram* v. *Doraiswami*(5) I agree with that view. In my opinion, the lower Court was right in giving a decree for rent also in this case.

I agree that the appeal should be dismissed with costs.

Appeal dismissed.

(3) [1896] 18 All 265=(1896) A.W.N. 80 (F.B)
(4) [1907] 30 Mad. 235=17 M. L. J. 87.
(5) [1915] 31 I. C. 473.

A. I. R. 1926 Madras 1176

DEVADOSS AND WALLER, JJ.

S. K. Karuppan Chetti—Plaintiff—Appellant.

v.

Maruthanayagam Pillai and *another* —Defendants 2 and 4—Respondents.

Letters Patent Appeal No. 36 of 1925 Decided on 18th Feburary 1926, from the judgment of Odgers, J., in Second Appeal No. 773 of 1922.

Limitation Act, S. 20—Authority of agent to pay total amount of bond includes authority to pay interest due also.

When an agent is authorised to pay an amount towards the total amount of the bond the authority extends to his paying an amount towards the interest due on the bond, and it cannot be held that the general authority to pay towards the total amount of the bond is confined to paying only towards the principal. But where the authority is specific, that is to say, where the agent is authorized only to pay towards the principal, the agent will not be justified in paying towards interest within S. 20. [P 1177 C 1]

Balasubramania Mudaliar—for Appellant.

Devadoss, J.—The only point in this Letters Patent Appeal is whether the authority given to Karuppanna Pillai, Muthukaruppa Pillai and Arumugam Pillai under Ex. A was such as would justify their paying any amount towards interest due on the bond. The learned Judge who heard the second appeal held that the authority did not extend to the payment of interest as such. The words in the Tamil document "Intha Pathirath thugaikku Neril Seluthumpadi." The words mean for paying towards the amount of the bond i. e., the principal and interest due on the bond. When an agent is authorized to pay an amount towards the total amount of the bond the authority extends to his paying an amount towards the interest due on the bond, for, the total amount of the bond includes principal and interest ; and when there is no restriction on the authority given to the agent that he should pay only towards the principal it cannot be held that the general authority to pay towards the total amount of the bond is confined to paying only towards the principal. Where the authority is specific, that is to say, where the agent is authorized only to pay towards the principal, the agent will not be justified in paying towards interest. But where there is a general authority to pay towards the total amount of the bond, the authority cannot be cut down to mean that the agent is authorized to pay only towards the principal and not towards interest.

In this case the agents have paid certain amounts towards interest and the payment is endorsed on the bond which is marked as Ex. A-1. As interest has been paid before the claim under the bond became barred, the appellant has a further period of limitation under S. 20 of the Limitation Act. The appellant's suit is not, therefore, barred by limitation and he is entitled to a decree against Defendants 2 and 4 who are respondents herein. The decrees of the learned Judge and the District Judge are, therefore, reversed and the appellant will have decree for the plaint amount and subsequent interest against Defendants 2 and 4. A decree has already been passed by the District Munsif against Defendants 1 and 3. The usual mortgage decree will be passed against all the defendants, i. e., Defendants 1 to 4. Defendants 2 and 4 who are respondents herein will pay to the appellant the costs of this appeal, as well as costs of the second appeal and appeal to the lower appellate Court. Time for redemption, six months.

(On the question of the rate of subsequent interest the Court delivered the following.)

Judgment.—Subsequent interest will be at the rate of 6 per cent. from the date of the decree of the District Munsif

Decree reversed.

A. I. R. 1926 Madras 1177

JACKSON, J.

Ponnuswami Goundan—Appellant.

v.

Vellayana Rowther and *another*—Respondents.

Appeal No. 112 of 1924, Decided on 29th July 1926, from the appellate order of the Sub-J., Dindigul, D/- 7th October 1924, in Appeal Suit No. 56 of 1924.

Minor—Negligence of guardian cannot be pleaded in the same suit by guardian in which the negligence is committed.

The minor cannot be made to suffer by the negligence of his guardian and it is always open to a minor to bring a suit claiming property lost through the negligence of his guardian, but it is not open to a guardian ad litem to plead his own default in the same suit as that in which he appears. [P 1178 C.1, 2]

Watrap Subramania Iyer—for Appellant.

S. T. Srinivasagopalachari and *Gopalaswami Iyengar*—for Respondents.

Judgment.—Second Appeal from the order of the Subordinate Judge of Dindigul in A. S. No. 56 of 1924, in E. A. No. 104 of 1924. In the Court of the District Munsif of Palni a minor Ponnu-

swami Goundan applied by his guardian Devakkal for a declaration that certain property was not assets of his grandfather and was not liable to attachment.

The District Munsif ordered notice to the attaching decree-holder on 8—3—1924. On 15—3—1924 the petitioner's vakil took a further adjournment to 1—4—1924 paying for the costs of that hearing. On 1—4—1924, the vakil failed to appear and the case adjourned to 8—4—1924 and again to 9—4—1924, when arguments were heard. On 11—4—1924 the case was posted for evidence on 26—4—1924. On that day the petitioner's Dindigul vakil wrote that he was not ready with documents and another vakil moved for adjournment. The Munsif dismissed the petition for non-prosecution. The petitioner appealed and the Subordinate Judge had dismissed the appeal holding that she should have appeared and presented her case through a local vakil if the vakil from Dindigul would not appear. Considering that she raised this question in March, the petitioner ought with due diligence to have had her documents by the end of April, and as she was employing a local vakil to apply for adjournment she might have given him the documents.

On the merits there is no ground for interference nor indeed is such ground taken in this second appeal. On the contrary the appellant, the same guardian, now urges that the worse her behaviour is found to have been in the Munsif's Court, the better will be her case on appeal. The minor whom she represents cannot be made to suffer by the negligence of his guardian and such negligence cannot afford ground for ex-parte proceedings analogous to those under O. 9. The Court must grant adjournments until the minor's suit may be said to be properly conducted. Obviously if such a plea were valid a minor suing through a guardian would be master of the proceedings. He could delay the trial by laches of every description, and when at last the patience of the Court was exhausted and an adverse order was passed against him, he could have that order set aside on account of the same laches.

Mr. W. S. Subramania Iyer relies upon the ruling reported in *Dada Saheb* v. *Gayaraja Singh* (1), for this extraordinary proposition but it does not help him. There one Kollapuram Gajaraj Singh had sued a minor Dada Saheb for possession of a shop. The suit was decreed ex-parte. The minor then brought a fresh suit for recovery of the property on the plea that the previous suit was not binding upon him owing to the negligence of his guardian. The Munsif held that the guardian had, the Subordinate Judge on appeal that he had not, been guilty of negligence and this Court on second appeal restored the Munsif's finding. It is always open to a minor to bring a suit of this character, but it is not open to a guardian ad litem to plead his own default in the same suit as that in which he appears. I may add that there is nothing in the face of this record to warrant a conclusive presumption that the guardian has been guilty of such negligence as would justify the minor in repudiating the decree. Suppose for instance that as a matter of fact there are no relevant documents and the guardian in applying for an adjournment was merely clutching at a last resource and playing for time. Such questions of fact must be decided in the appropriate proceeding.

The appeal is dismissed with costs two sets.

Appeal dismissed.

(1) A. I. R. 1925 Mad. 204.

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* A. I. R. 1926 Madras 1178

PHILLIPS AND MADHAVAN NAIR, JJ.

M. Krishna Pattar—Petitioner—Appellant.

v.

K. Seetharama Pattar—Respondent.

Appeal No. 120 of 1923, Decided on 11th March 1926, from the appellate order of the Sub-J., South Malabar, in Appeal Suit No. 38 of 1923.

* (a) *Limitation Act, Art.* 182 (5)—*Step-in-aid—Decree-holder's application objecting to judgment—Debtor's application to record satisfaction; is not.*

A statement by the decree-holder objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution : *A. I. R.* 1922 *Mad.* 79, *Foll* ; 37 *Bom.* 317, *Diss. from* ; (*Case law considered*). [P 1180 C 2]

(b) *Limitatton Act, Art.* 182 (5)—*Step-in-aid.*

An application to be a step-in-aid of execution must be one in furtherance of execution proceedings. [P 1182 C 1]

* (c) *Limitation Act, Art.* 182 (5)—*Limitation is to be computed from date of applying for step-in-aid.*

The date of applying to the Court asking it to take some step-in-aid of execution of the decree or order is to be taken as the date from which the period of limitation should be computed and not the date of the petitioner s taking some step-in-aid of execution. [P 1180 C 1]

K. P. Ramakrishna Aiyar—for Appellants.

K. R. Narayana Aiyar—for Respondent.

Judgment.—This is an appeal against an order of the Subordinate Judge of South Malabar at Calicut who, reversing the order of the District Munsif, held that the decree-holder appellant's application to transfer the decree in O. S. No. 226 of 1916 from the Alatur District Munsif's Court to the District Munsif's Court of Vaiyitri for execution was barred by limitation. A prior petition for execution, E. P. No. 458 of 1919, had been presented on the 4th of July 1918. In the course of that petition an application was put in by the judgment-debtor to record satisfaction of the decree on the 1st of August 1919. A statement was then filed by the appellant on the 18th of August 1919 praying that the judgment-debtor's petition to record satisfaction of the decree should be dismissed. The present application for transfer was made on the 26th of August 1922. If time is calculated from the date of E. P. No. 458 of 1919 it is admitted that the present application is barred by time; but it was contended before the Subordinate Judge that the written statement of objections filed on the 18th of August 1919 should be taken as "a step-in-aid of execution" under Art. 182 (5) of the Limitation Act and that if time is calculated from the date the present application is not barred. In *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) it was held that a statement filed by a decree-holder objecting to the judgment-debtor's application to enter up satisfaction of the decree is not a step-in-aid of execution. Relying on that decision the learned Subordinate Judge overruled the appellant's contention and dismissed his petition.

The same contention has again been pressed before us; and the learned vakil for the appellant has tried to distinguish the case in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) on the ground that there was no pending execution application in that case, arguing from this fact that if there was a pending application in that case the learned Judges would have arrived at a different conclusion. He has also argued on the authority of various decisions that a statement of objections filed by the decree-holder in circumstances like the present should be held to be a step-in-aid of execution under Art. 182 (5) of the Limitation Act.

The facts of the case in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) were as follows:

The decree was dated the 2nd May 1916 and the only prior execution petition presented by the appellant-decree-holder was dismissed on the 7th of September 1916. Admittedly the execution petition out of which the appeal arose was presented out of time, but it was said, as in the present case, that prior to the application for execution the judgment-debtor had put in a petition for entering up satisfaction of the decree and that in connexion therewith the decree-holder had filed a counter-statement denying the receipt of money and praying that the petition should be dismissed. It was contended that the application to reject the petition to record satisfaction of the decree was a step-in-aid of execution, but this contention was overruled. In the course of his judgment, Ayling, J. (who delivered the leading judgment) stated thus:

The Art. 182 (5) classes together an application for execution and an application to take some step-in-aid of execution and the latter words appear to be intended to cover an application, which is not an initial application for execution, but is an application to take some step to advance an execution proceeding, which is already pending, e. g., application to bring to sale properties already under attachment (p. 469).....But whatever case may be made out for an application made in connexion with a pending execution petition as one for taking a step-in-aid or furtherance of it, an application made at a time when no execution petition is pending stands on an obviously different footing.

It is argued that two conclusions follow from these extracts: (1) that an application to be a step-in-aid of execution should be one made in pending execution application; and (2) that if there was a pending execution application in that case as in the one before us, then the learned Judges would have certainly held that the statement of objections filed by the decree-holder to the recording of satisfaction would be a step-in-aid of execution. As regards the first conclusion sought to be deduced from the judgment, no doubt the decision in *Balaguruswami Naicken* v. *Gurusamy Naic-*

(1) A. I. R. 1922 Mad. 79=45 Mad. 466.

ken (2) supports the appellant's contention; but it is not necessary to discuss the correctness of that conclusion in this case as admittedly here there is a pending execution application. If we really had to decide the question we should hesitate to accept this decision without further consideration of the matter in the light of all the decided cases of our Court which have not been referred to in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). It seems to us that the remarks referred to were made by the learned Judge only to distinguish those cases, wherein questions of a similar nature arose in connexion with pending execution applications. As regards the second conclusion sought to be deduced from that judgment, we have no doubt that the appellant's contention cannot be accepted because the learned Judge's decision is based upon an interpretation of the decree-holder's objection petition in view of what he considers should be the meaning of the expression "applying to take some step-in-aid of execution," for the learned Judges state at p. 470:

> Ths petition, Ex. E, may tend to prevent the Court placing an obstacle in the way of future execution of the decree, but it does not ask the Court to take any step-in-aid of execution; Supposing it to be successful, execution of the decree is no further advanced than it was before the petition was presented.

This shows that even if there was a pending execution application, the learned Judge would have come precisely to the same conclusion because in his view the decree-holder did not by filing his objection statement ask the Court to take any step-in-aid of execution. We respectfully accept this view. According to the third column of Art. 182 (5) of the Limitation Act, time for execution is to be calculated from

> the date of applying in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree or order.

The latter part of this clause specifies the date of applying to the Court asking it to take same step-in-aid of execution of the decree or order as the date from which the period of limitation should be computed and not the date of the petitioner's taking some step-in-aid of execution. If this distinction is well kept in mind, much of the diversity of the views among the various High Courts as regards the meaning of the expression "applying to take some step-in-aid of execution" can easily be explained. As pointed out by Oldfield, J., in *Rangachariar* v. *Subramania Chetti* (3):

> It is material that the starting point under Art. 182, Sch. I of the Limitation Act is not the taking of a step-in-aid of execution, but the application to take such a step.

In the same judgment Seshagiri Aiyar, J., refers to the same matter thus:

> Two things are essential. There must be an application and that application must ask the Court to take a step-in-aid of execution.....The fact that a party took some steps would not be enough.

The distinction we are referring to is nowhere better pointed out than in *Raghunundan Misser* v. *Kallydut Misser* (4). In that case the learned Judges were considering whether an application by a decree-holder for leave to bid at a sale in execution of the decree is a step-in-aid of execution within the meaning of the Limitation Act (XV of 1877), Sch. II, Art. 179 (corresponding to Art. 182 of the present Limitation Act). In coming to the conclusion that it is not such a step the learned Judges state:

> We do not think an application of this kind is an application seeking the action of the Court in execution of a decree. It may be in one sense a step-in-aid of execution of the decree, but it is not a step by the Court. Before a judgment-debtor can get any benefit he must show that he asks the Court to take some step-in-aid of execution. A step taken by the judgment-debtor himself is not sufficient.

This case has been followed in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). If this distinction is borne in mind, it is obvious that a statement of objections filed by the decree-holder objecting to the recording of satisfaction cannot in any way be considered to be a step-in-aid of execution. By filing the statement the decree-holder does not ask the Court to take any step-in-aid of execution. In the words of Ayling, J., in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1):

> Supposing it to be successful, execution of the decree is no further advanced than it was before the petition was presented.

We will now discuss the cases referred to by the learned vakils on both sides.

In *Kewal Ram* v. *Khadim Hussain* (5) it was held that:

> An applicatiou by a decree-holder praying that the objections taken by the judgment-debtor to the sale of property belonging to him in execution of the decree should be disallowed and the sale be confirmed is an application from the date of which the period of limitation for a subsequent

(2) A. I. R. 1925 Mad. 703.

(3) [1920] 12 L. W. 9=58 I. C. 536.

(4) [1896] 23 Cal. 690.

(5) [1883] 5 All. 576=(1883) A. W. N. 112.

application for execution of the decree may be computed.

This judgment simply records this opinion and does not contain any discussion of the question. It is conceded that the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) is opposed to this view. This decision was followed by the Allahabad High Court in *Shugan Chand* v. *Ramjas* (6). In *Tamiz-un-nissa Bibi* v. *Najju Khan* (7), brought to our notice, it was held that an application to the Court executing a decree asking that certain objections to the execution of the decree be rejected is a step-in-aid of execution within the meaning of Art. 182 (5) of the First Schedule of the Limitation Act. Here also the judgment does not contain any discussion of the question. In *Langtu Pande* v. *Baijnath Saran Pande* (8) it was held that the mere filing of an answer by the decree-holder resisting an application of a declaration of insolvency filed by the judgment-debtor cannot be deemed to be an application to take a step-in-aid of execution within the meaning of Art. 179. This view is opposed to the earlier and later decisions of the same Court.

In *Umesh Chunder Dutt* v. *Soonder Narain Deo* (9) it was held that the appearance of a decree-holder by his pleader to oppose an application made by the judgment-debtor to set aside a sale in execution of the decree is not an application within the meaning of Art. 179 of Sch. II of the Limitation Act to take a step-in-aid of execution. The learned Judges stated that:

> The application contemplated by that article of the Limitatton Act is an application to get some order of the Court in furtherance of the execution of the decree. The appearance of the pleader cannot be regarded as such an application.

The decisions in *Rghunandan Pershad* v. *Bhugoo Lall* (10) and *Raghunandan Misser* v. *Kallydut Misser* (4) also take a similar view of Art. 179, Sch. II of the Limitation Act. These cases have been followed in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) as regards the interpretation of the article in question: see also *Troylokya Nath Bose* v. *Jyoti Prakash Nandi* (11). On the facts, the decision in *Gobind Pershad* v. *Rung Lal* (12) can be distinguished. In that case it was held that an application by a decree-holder, praying that a petition of the judgment-debtor to set aside the sale of property belonging to him should be rejected and the sale be confirmed is an application falling within the meaning of Art. 179 (4) of Sch. II of the Limitation Act of 1877. The facts of the case show that after the sale was confirmed the judgment-debtor applied for a review of the order confirming the sale and the review was granted in spite of the objections of the decree-holder who appeared and opposed it. Subsequently the decree-holder put in an application praying that the judgment-debtor's application to set aside the sale might be rejected at the same time applying for confirmation of the sale. In view of the "review order" that was passed against the decree-holder, we are inclined to think that the decree-holder's application was in furtherance of execution proceedings. The decision in *Kedar Nath Dey Roy* v. *Lakhi Kanta Dey* (13) is also distinguishable. In that case the judgment-debtor raised objections to the delivery of possession by the Commissioner and the Court found it necessary to determine the standard of measurement and for that purpose to take evidence in the matter. An application was then made by the decree-holder for summoning witnesses. It was held that this was a step-in-aid of execution within the meaning of Art. 182 (5).

It is clear from the facts that in the opinion of the Court execution could not proceed without determining the standard of measurement. In this view the application to file a list of witnesses may be deemed to be a step-in-aid of execution. The learned Judges in arriving at this conclusion follow the prior decisions of their Court already referred to. In *Brojendra Kishore* v. *Dil Muhmud Sarkar* (14), when the decree-holder applied for execution of his decree the judgment-debtor put in an objection to its execution. Both the parties having been directed by the Court to adduce evidence in support of

(6) [1910] 5 I. C. 292.
(7) [1918] 40 All. 668=48 I. C. 38=16 A. L. J. 704.
(8) [1906] 28 All. 387=3 A. L. J. 143=(1906) A. W. N. 54.
(9) [1889] 16 Cal. 747.
(10) [1890] 17 Cal. 268.
(11) [1903] 30 Cal. 761=8 C. W. N. 251.
(12) [1894] 21 Cal. 23.
(13) [1917] 21 C. W. N. 868=40 I. C. 1005=26 C. L. J. 115.
(14) [1918] 22 C. W. N. 1027=44 I. C. 604.

their respective cases, the decree-holder filed a list of witnesses and intimated to the Court that he was ready to proceed with his case. The Court held that the filing of the list of witnesses and intimating to the Court that he was ready to proceed with the case implied an application on the part of the decree-holder to the Court to take the evidence which he was prepared to adduce and repel the objection taken by the judgment-debtor and in effect this should be taken to be an application to the Court, to take some step-in-aid of execution. This decision to some extent supports the appellant. Excepting this decision the Calcutta High Court has taken a view consistently opposed to the contentions of the appellant.

The Bombay cases relied upon by the appellant need not be discussed in detail. The latest decision of that Court is reported in *Laxmiram Lallubhai* v. *Balashankar Veniram* (15) in which it was held that an appeal against an order adjudging the judgment-debtor an insolvent was a step-in-aid of execution. This has been expressly dissented from in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1). In *Seshadasacharya* v. *Bhimacharya* (16) an application filed by the decree-holder for extension of time to produce an extract from the Collector's record ordered by the Court to be filed within a particular date but which was not so filed was held to be a step-in-aid of execution. With all deference to the learned Judges, we cannot accept this conclusion or the reasoning on which it is based.

Thus far we have discussed the decisions of the other Courts brought to our notice. Our own High Court has always held the position that an application to be a step-in-aid of execution must be one in furtherance of execution proceedings. We have already indicated the interpretation put upon the article by the learned Judges in *Rangachariar* v. *Subramani Chetti* (3). Having reference to the facts of the case, the decision in *Kunhi* v. *Seshagiri* (17) does not really help the appellant. In that case it was held that an application by a judgment-debtor to the Court which passed a decree for a certificate and thereupon to execute the decree by attaching the land, is a step-in-aid of execution within the meaning of Art. 179 (4). Innes, J., pointed out that :

> the production of the copy of the register was a necessary preliminary to execution and the application made by the decree-holder to the Subordinate Judge's Court would enable him to obtain it.

In this view the application was one in furtherance of execution proceedings and was a step-in-aid of execution.

The decision in *Abdul Kader Rowther* v. *Krishnan Malaval Nair* (18) no doubt supports the appellant. There it was held that an application by a decree-holder for an adjournment to enable him to adduce further evidence was a step-in-aid of execution. We may point out that Ayling, J., in *Masilamani Mudaliar* v. *Sethusami Aiyar* (19) found it impossible to concur with this view. The latest decision of our own Court is the one in *Balaguruswami Naicken* v. *Guruswami Naicken* (2) already referred to in another connexion. The facts of the case are as follows :

> A mortgage decree in favour of the plaintiffs was passed on the 14th of September 1916, and an execution application was filed on the 25th of September 1917. It was dismissed on the 17th of October 1918. The application that gave rise to the appeal was dated the 9th of March 1923. A certain sum of money in Court was paid to the decree-holder by order, dated the 31st of March 1920, and a cheque was actually issued on the 1st of April 1920. The money in Court had been paid by a mortgagee of the joint-debtor who had been directed to pay off the decree amount. The decree-holder relied to save his application from the bar of limitation on the date of the order for payment to him of the money in Court.

The learned Judges held that the application of the decree-holder is not a step-in-aid of execution. They base their decision on two grounds : (1) that in the circumstances of the case an application for an order for payment out by the Court is not a step-in-aid of execution, and (2) that as there was no pending execution application the order relied upon could not be considered to be a step-in-aid of execution. As regards the latter ground, we have already expressed our opinion. It is not necessary to discuss the first ground either as the

(15) [1914] 39 Bom. 20 = 26 I. C. 262 = 16 B. L. R. 612.
(16) [1912] 37 Bom. 317 = 17 I. C. 969 = 14 Bom. L.R. 1204.
(17) [1882] 5 Mad. 141.
(18) [1915] 38 Mad. 695 = 1 L. W. 271=(1914) M.W.N. 563=23 I.C. 533=26 M.L.J. 433.
(19) [1918] 41 Mad. 251 = 33 M. L. J. 219=41 I. C. 701=(1917) M. W. N. 502.

decision, if correct, certainly supports the view that the application we have got to deal with in the present case is not a step-in-aid of the execution. If we hold that the application in that case amounts to a step-in-aid of execution our opinion cannot help the appellant because as we have already pointed out his objection application cannot in any sense be deemed to be one in furtherance of execution proceedings.

The cases examined above show that there has been much diversity of opinion as regards the interpretation of the expression "applying to take some step-in-aid of execution." In our opinion, the decision in *Kuppuswami Chettiar* v. *Rajagopala Aiyar* (1) interprets that expression correctly, and the weight of authority is in support of that interpretation. That decision must govern the present case. In this view the filing of statement by the decree-holder in this case objecting to the judgment-debtor's application to record satisfaction of the decree is not a step-in-aid of execution and cannot therefore save his last application from being barred by limitation. We therefore dismiss this appeal with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 1183

PHILLIPS AND MADHAVAN NAIR, JJ.

(*Katragadda*) *Ramayya* and *another*—Defendants—Appellants.

v.

Katragadda Bapayya—Plaintiff—Respondent.

Appeal No. 294 of 1925, Decided on 10th March 1926, from the order of the Sub-J. Bapatla, D/- 27th July 1925, in O. S. No. 92 of 1923.

* *Civil P. C., Sch. 2, Para. 17 (1), 19 and 4—Agreement to refer to 3 arbitrators—One party filing agreement under Para. 17 (1)—Court cannot modify the reference by adding that in case of difference among arbitrators, opinion of majority will prevail.*

When a reference is made to two or more arbitrators the award is not valid unless it is concurred in by them all: (1896) 1 Q. B 567, *Foll.* [P. 1183, C. 2]

Where parties agree to refer a certain dispute to 3 arbitrators and one of them filed the agreement under Para. 17 (1), Court has no power to change the original agreement between parties and order that in case of disagreement among arbitrators the opinion of the majority should prevail. [P. 1184, C. 1 & 2]

Ch. Raghava Rao—for Appellants.

B. Somayya for *Ganti Lakshmanna*—for Respondent.

Judgment.—The parties in this case referred their disputes to the arbitration of three named arbitrators. One of them, the plaintiff, then applied to the Court under paragraph 17 (1) of the Second Schedule to the Civil Procedure Code to have the agreement filed in Court. This has been done and under paragraph (4) an order of reference has been made, but the Court added a further direction that in case of disagreement among the arbitrators the opinion of the majority should prevail. The appellants contend that such an order is illegal because it is inconsistent with the apreement to refer to arbitration. It is well settled that when a reference is made to two or more arbitrators the award is not valid unless it is concurred in by them all. This was laid down in *United Kingdom Mutual Steamship Assurance Association* v. *Houston and Co.* (1) and was assumed in *Cameron* v. *Cuddy* (2). It is also laid down in *Baboo Surubjeet Narain Singh* v. *Baboo Gouree Pershad Narain Singh* (3); In the *matter of Jungtee Ram* v. *Ram Heet Sahoy* (4); and *Nem Roy* v. *Bharut Roys* (5). It is true that in these cases one or more of the arbitrators did not sign the award and on that ground it was held not to be valid, but the reason given for such a conclusion is that all the arbitrators had not concurred in the award. Prima facie, therefore, the order of the Subordinate Judge would appear to be inconsistent with the reference to three named arbitrators.

It is, however, contented for the respondent on the authority of *Bal Pattabhirama Chetti* v. *Seetharama Chetti* (6) that this order is good. That was a case in which the agreement was filed in Court and one of the arbitrator refused to act. The District Judge appointed another arbitrator under the provisions of paragraph 5 of the Second Schedule and it was held that this order

(1) [1896] 1 Q. B. 567=65 L. J. Q. B. 484.
(2) [1914] A. C. 651=83 L. J P. C. 90=110 L. T. 89.
(3) 7 W. R. 269.
(4) 19 W. R. 47.
(5) 22 W. R. 129.
(6) [1894] 17 Mad. 498.

was valid. It was argued that under paragraph 19 all the provisions of the Second Schedule are made applicable to proceedings on reference out of Court which is afterwards filed in Court and that consequently, when such a reference is filed in Court the parties must be deemed to submit to all the rules and procedure prescribed in the Second Schedule. It was there held that the words in paragraph 19 " so far as they are consistent with any agreement filed " do not mean that the agreement must contain in every case an express provision as to what ought to be done if any arbitrator is unwilling to act and that the reasonable construction is that the action of the Judge should not be inconsistent with the agreement if it contains any special provision on the subject. The argument in support of this was that the order of reference made in a suit pending should not prove abortive but result in an award according to the original intention of the parties and it was consequently held that the provisions of the Civil Procedure Code relating to arbitration must be taken to be intended by the parties to the agrement to apply and that this order was not inconsistent with the terms of the agreement.

Whether that decision is correct on its facts it is not necessary to express any opinion ; for the question must be decided in this case on whether the order appealed against is inconsistent with the agreement of the parties. If it is understood, as it must be, that a reference to three arbitrators implies an agreement to be bound by the decision of all the three and not merely of a majority, then this order is inconsistent with the agreement. If all the parties had agreed to file the reference in Court, it can possibly be argued that they did so with full knowledge of the provisions of the Code and with the intention that these provisions should be applied to their arbitration ; when, however, only one of the parties applies and drags the others to Court no such presumption can be drawn, and when an order is made inconsistent with the original agreement, such an order is not valid. In the present case the defendants agreed to abide by the concurrent award of three persons and consequently there can be no presumption of an agreement to abide by the opinion of a mere majority. This order therefore, directing that the opinion of the majority shall prevail appears to be inconsistent with the original agreement and consequently the provisions of paragraph 4 under which the order has been made cannot be applied in the present case.

The appeal is, therefore, allowed and the order that the opinion of the majority shall prevail must be struck out of the order of reference. The respondent will pay the appellants' costs of this appeal.

Appeal allowed.

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* A. I. R. 1926 Madras 1184

RAMESAM AND VENKATASUBBA RAO, JJ

Mandavilli Seetharamamma and *another*—Defendants—Appellants.

v.

Attivilli Suryanarayana —Plaintiff—Respondent.

Second Appeal No. 708 of 1923, Decided on 26th April 1926, from the decree of the Dist. J., Vizagapatam, D/- 26th September 1922, in A. S. No. 408 of 1920.

* *Hindu Law—Adoption—" Express authority " meaning of—Process of adoption by giving and taking begun in lifetime of adopting father—Authority to widow can be implied.*

The phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband.

The word " express " is not used in opposition to the word " implied " and an authority can be implied from the facts of a particular case.

In all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father, there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. [P. 1185, C. 1, 2]

* (b) *Hindu Law—Adoption—Boy taken from natural father to adopting father—Terms settled —Day fixed—Adopting father dying in the meantime—Authority can be inferred—Datta homam may be performed subsequently.*

Where the adoptee living with his natural father was taken to the adopting father with a view to his being adopted. Letters passed between adopting father and the natural father of the boy and in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for a particular day. In the meantime the

adopting father died. The ceremony of adoption was performed subsequently.

Held : that the only reasonable inference is that the husband gave his consent to his widow making the adoption and that the secular act of giving and taking the boy having been completed in the lifetime of the husband, the religious act of datta homam essential to complete the adoption may be performed subsequent to his death. [P 1186 C 1, 2. P 1187 C 1]

G. Lakshmanna and *A. Satyanarayana* —for Appellants.

B. Satyanarayana and *C. Rama Rao*— for Respondent.

Ramesam, J.—I have had the advantage of perusing the judgment of my brother Venkatasubba Rao, J. I will add a few reasons for agreeing with it. In the first place I agree with him in thinking that the phrase "express authority of the husband" so often used in decisions means nothing more than an affirmative indication enabling the widow to adopt, which can be traced to the mind of the husband. The word "express" is used in opposition to the state of the law in Bombay where non-forbidding of adoption by the widow is taken as equivalent to authorisation. In *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo* (1) we have got the words "express authority" in two places at page 77, and at page 78 "express permission." The Judicial Committee then referred to Justice Holloway's opinion in the Ramnad case and to the manner in which it was dealt with by the Judicial Committee, They said :-

It pointed out that on the question—who are the kinsmen whose assent will supply the want of a positive permission from the husband, ect.

Thus it is clear that the word "express" is not used in opposition to the word "implied" and an authority can be implied from the facts of a particular case. In *Subbarayar* v. *Subbammal* (2) their Lordships say :

In the circumstances of the case the direction in the will most clearly implied that datta homam should precede the upanayanam.

Secondly, there are two essentials requisite for the validity of an adoption : (1) giving and taking (2), datta homam (only in certain cases.) Where only the giving and taking is complete but the case is one which requires datta homam, it may be said that process of adoption has begun but is not completed until datta homam is performed. In such cases it has been held that the datta homam may be performed later on even if both the natural parents of the boy are dead. *Venkata* v. *Subhadra* (3). It is true that in the ceremony of datta homam there is always a formal giving and taking even if previously there had been an informal giving and taking and because of this Mr. Satyanarayana contends for the respondent that the first giving and taking is nothing and the second giving and taking is everything and it cannot be said that the process of adoption has begun, for, he asks, if the first giving and taking has any significance why should it be repeated in the datta homam ceremony ? The reply to this argument is that the repetition is a purely formal matter and if the giving and taking in the course of datta homam is the only real giving and taking, it could not be held that the datta homam can be performed by a relation after the death of both the parents as has been held in *Venkata* v. *Subhadra* (3), for an orphan cannot be given away.

It follows, therefore, in all cases where the process of adoption has begun by a giving and taking in the lifetime of the adopting father there is a clear indication of his desire and no further authority is needed to enable the widow to adopt. It should be necessarily implied in such taking by the adoptive father. In the practical application of this rule no doubt some caution will have to be observed. There may be cases where a boy is brought merely for trial, that is, kept on probation. It cannot be said in such cases there is a complete giving and taking on account of the temporary parting of the parent's custody. But where it has been settled that the boy should be adopted and his custody has been parted with by the parents finally and a date is fixed for the datta homam ceremony and a few days before that the adopting father dies by a sudden attack of colic or other disease and nothing has happened after the bringing of the boy to show that the adoptive father has changed his attitude towards the boy, such facts constitute a cogent indication of the husband's wishes which enable the widow to adopt. It is said that this point was not raised in the Courts below. In the similar case of *Subbarayar* v. *Subbammal* (2)

(1) [1876] 1 Mad. 69=3 I. A. 154=25 W. R. 291=3 Sar. 583 (P. C.).

(2) [1898] 21 Mad. 497.

(3) [1884] 7 Mad. 548.

also, there was no issue but on the ground that all the facts were known and there was no prejudice, their Lordships affirmed the decree on the ground of a taking and acceptance at a different date from that found by the lower Court. In the present case the facts were pleaded in the written statement and found by the Courts below.

I agree with the order proposed by my learned brother. The memo of objection is dismissed. No order as to costs.

Venkatasubba Rao, J.—The plaintiff is the daughter's son of one Kurmanadham, deceased and he files the suit for a declaration that the 2nd defendant has not been validly adopted by the 1st defendant, the widow of Kurmanadham. The defendants relied upon oral authority said to have been given by Kurmanadham some four hours previous to his death on the 10th of June 1916. Both the lower Courts have disbelieved the specific case set up and have allowed the plaintiff's claim. This is a finding of fact and we cannot interfere with it in second appeal. On behalf of the defendants, however, the case has been presented to us from a somewhat different standpoint. In regard to the facts upon which depends the question of law raised there is no dispute. The 2nd defendant was living with his natural father at Cocanada and Kurmanadham was a resident of Anakapalli. On the 1st June 1916, the boy was taken from Cocanada to Anakapalli with a view to his being adopted. Three letters passed between Kurmanadham and the father of the boy between the 2nd and the 7th June 1916, which show that in respect of the contemplated adoption all the terms were settled. An auspicious day was chosen and the adoption was fixed for the 16th of June 1916. Unfortunately, in the meantime on the 10th of June, Kurmanadham died. The ceremony of adoption was performed on the 24th of June, the boy was formally given and taken and there was also the performance of datta homam.

These facts are clearly set forth in the written statement of the defendants and are found to be true by the learned District Judge. We are not therefore called on to deal with the evidence in the case the only question to be decided being what is the legal effect of the facts found Mr. Lakshmanna, the learned vakil for the defendants, puts his case in two ways. He says first, from the facts found, the husband's consent to his wife making the adoption may be implied. Secondly, that the secular act of giving and taking the boy having been completed in the lifetime of the husband, the religious act of datta homam essential to complete the adoption may be performed subsequent to his death.

If either of these contentions is accepted, the appeal must be allowed and in my opinion both these propositions are sound.

In regard to the first contention, the question resolves itself into this: Can a husband's consent or authority be implied from his conduct? If in law it can be implied, the facts of the present case lead almost to an irresistible conclusion that the wife did have the necessary authority. While the law says that the widow must have her husband's consent, it does not restrict the manner in which that consent may be given. Whether consent was given is a question of fact and I fail to see why it cannot be implied from conduct. The plaintiff's learned vakil points out that what is recognized in the decisions is the husband's "express consent." It is undoubtedly true that in the decisions of the highest authority, the expression used is "express consent." But what does that expression mean? In the leading case on the subject, *Collector of Madura* v. *Muthuramalinga Sethupathi* (4), the Privy Council point out how the various schools in India, accepting the same text as their authority, have developed different rules of law in regard to the widow's power of adoption. Their Lordships observe:

> All the schools accept as authoritative the text of Vasishta, which says: 'Nor let a woman give or accept a son unless with the assent of her lord.' But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and therefore that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha, Kaustubha, and other treatises which govern the Mahratta School, explain the text away by saying, that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul.

(4) [1868] 12 M. I. A. 397=1 B. L. R. 1=10 W. R. 17=2 Suther 135=2 Sar. 361 (P.C.

It is now settled that in Southern India, as in Bengal, the husband's assent is required and in the passage quoted above that assent is described as "express permission." These words are used to mark the contrast between the law as accepted by the Bengal School and the Mahratta School. The Mahratta doctrine proceeds upon the view that the adoption being beneficial to the husband's soul, where he has not intimated his prohibition, assent may be assumed. In Bengal and Soutern India, on the other hand, assent cannot be inferred from the mere absence of prohibition; something more is required: there must be positive or affirmative consent given by the husband. Putting it in other words, according to the Mahratta School, if there is no dissent, assent may be assumed. In Bengal and Southern India the absence of dissent or prohibition is not sufficient, but positive assent must be proved. If the judgment of the Privy Council in *Collector of Madura* v. *Muthuramalinga Sethupathi* (4) is carefully read, it will be seen that it is to bring out this distinction their Lordships use the expression "express consent." This distinction is of great importance and cannot be ignored when the law obtaining in different provinces is under discussion. Now it will be observed that in the same judgment besides the word "express," two other words are used in this connexion, namely, "formal" and "positive." The expression "express consent" means nothing more than "positive consent". What then is the true rule deducible? If from the circumstances you can infer that the husband did not prohibit the adoption and nothing more, that is not sufficient; but if you can infer that he assented to or authorized the adoption that is clearly sufficient. The following passage in West and Buhler, 3rd Edn. at page 957, supports my view:

> Any unequivocal indication of his assent would probably be taken as equivalent to an express command.

In this case the only reasonable inference from the proved facts is that the husband gave his consent to his widow making the adoption and on this ground I would hold the adoption to be valid.

In regard to the second contention of Mr. Lakshmanna, it is clearly borne out by authority. *Venkata* v. *Subhadra* (3) is the converse of the present case. It was the natural father of the boy that died after the gift and the acceptance. At the datta homam, which was performed subsequent to his death the elder brother of the boy made the formal gift. The learned Judges holding that there was giving and taking in the lifetime of the natural father, upheld the adoption on the ground that the religious rite was essential only to complete the adoption. *Subbarayar* v. *Subbammal* (2) is, however, a parallel case. The boy was given and taken and subseqnently the adoptive father died. The ceremony of datta homam was performed by his widow and the adoption was held valid. The principle underlying these cases is, that giving and taking is of the essence of the adoption and the religious part of it can be deferred to a subsequent period. I am prepared to follow these cases and on this ground also I confirm the adoption.

The result is the appeal is allowed and the plaintiff's suit is dismissed The defendants will have their costs of this appeal, but the parties will bear their own costs in the lower Courts.

Appeal allowed.

A. I. R. 1926 Madras 1187

PHILLIPS AND MADHAVAN NAIR, JJ.

Municipal Council, Mangalore—Appellant.

v.

Parry & Co.—Respondent.

Letters Patent Appeal No. 147 of 1925, Decided on 12th March 1926, from the judgment of Waller, J., D/- 20th April 1925, in Civil Suit No. 551 of 1924.

(a) *Madras District Municipalities Act* (1920), S. 98—*Liability to tax.*

A firm is not liable to pay the professional tax under the Act, except at their principal place of business. [P 1187, C 2]

(b) *Madras District Municipalities Act* (1920) *Sch. 4, Para.* 18—*Principal.*

The natural construction of the word "principal" is that it qualifies both "office" and place of employment." [P 1188, C 1]

K. Y. Adiga and *K. Sundara Rao*—for Appellant.

R. N. Iyengar—for Respondent.

Phillips, J.—The learned Judge has held that the respondent's firm are not liable to pay the professional tax under the Madras District Municipalities Act.

except at their principal place of business. The section which imposes the tax is S. 93, and reading that section by itself it would seem to include all places of business in which the firm carries on trade. That this is not so is clear from Cl. 3. of the same section which shows that if a tax is paid in one Municipality that amount may be deducted from the income-tax that may fall due in another and we have further the provision under S. 18 of Sch. 4 which states what persons shall be deemed to have exercised a profession or trade or calling, and there it is distinctly laid down that he shall be deemed to have exercised a profession, art, trade, or calling, if his principal office or place of employment is within the Municipality. The argument that the word 'principal' only qualifies 'offices' and not 'place of employment' must certainly be negatived for otherwise the last sentence of that section would be entirely meaningless. The natural construction of the word is that 'principal' qualifies both 'office' and 'place of employment.' If that is so the decision of the learned Judge is right and we agree with his conclusion.

The appeal is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 1188

BEASLEY, J.

A. R. A. R. S. M. Arunachallam Chetty—Plaintiff.

v.

C. Jagannatha Pillai—Defendant.

Civil Suit No. 592 of 1924, Decided on 18th August 1926.

* (a) *Registration Act, S. 17 (1) (b)—Agreement to deposit title-deeds—Actual deposit next day with letter in accordance with terms—Both must be taken together and require registration.*

Where the first agreement was an agreement to deposit the title-deeds and the second, a letter sent the next day, was the actual deposit in accordance with the terms of the agreement.

Held: that both the agreements have to be taken together and that taken together, the contract purports to create a charge upon immovable property under S. 17 (1) (b) and requires registration: 31 *M. L. J.* 347, *not Foll.* *A. I. R.* 1923 *P. C.* 50, *Foll.* [P. 1189 C 1]

(b) *Hindu Law—Joint family—Promissory note in favour of manager for money advanced out of joint funds—Surviving member can sue on it without succession certificate under Succession Certificate Act, S. 4.*

A surviving member of a joint Hindu family can sue and take the benefit of a promissory note given to the managing member in respect of moneys advanced by the managing member out of the joint family funds without a succession certificate under Succession Certificate Act, S. 4: *A. I. R.* 1921 *Mad.* 68 (*F. B.*), *Foll.* [P. 1190, C 2]

S. Rangaswami Iyengar—for Plaintiff.

Vere Mockett and *T. S. Viswanatha Iyer*—for Defendant.

Judgment.—The facts in this case are briefly as follows: The defendant was indebted to the plaintiff in the sum of Rs. 62,000 odd in respect of partnership dealings, that being his alleged ascertained share of losses of the partnership. In respect of that Rs. 62,000, the defendant executed a promissory note and having executed the promissory uote on 26th May 1923 he entered into an agreement which is called memorandum of agreement relating to the deposit of title-deeds and in that agreement it is recited amongst other things after setting out the ascertained liability of the defendant:

Whereas the said C. Jagannatham Pillai has further agreed to deposit the title deeds relating to his properties his properties are then described by way of equitable mortgage to secure the repayment of the amount and interest covered by the promissory note dated 25th May 1923 executed by him.

It further recites that:

C. Jagannatham Pillai shall deposit the title-deeds set out in the schedule to the agreement to create thereby an equitable mortgage to secure the repayment of the amount and interest covered by the promissory note.

These, I think, are the only words which it is necessary in this document to refer to. It is an agreement to deposit the title-deeds to secure the repayment of a sum owing on the promissory note. On the next day namely on the 27th May the defendant wrote the following letter to the plaintiff:

I have the honour of herewith sending you with the intention of delivering and depositing the same with you as per the memorandum dated the 26th May 1923 executed by me in your favour the title-deeds and papers relating to the property.

It is common ground that this letter was accompanied by the title-deeds. There was a clear contract on the 26th May to deposit the title deeds by way of security for the repayment of the money advanced or money owing and on the 27th May the actual deposit of title deeds in accordance with the memo-

randum of agreement was made. I think it is very important that the memorandum of agreement a day before was set out in the letter which accompanied the title-deeds. On behalf of the defendant, it is contended that this claim is not maintainable because neither the memorandum of agreement nor the letter on 27th May can be given in evidence as neither have been registered.

It is argued that both the documents must be taken together as forming the contract between the parties, that you cannot take either the document of 26th May or the document of 27th May by itself but that you have got to take the two together and the two together, it is argued, are the contract between the parties. The whole question is whether the documents have got to be taken together. In my view they have. The first agreement was an agreement to deposit and the second was the actual deposit in accordance with the terms of the agreement. In my view both have to be taken together. The next thing that has got to be considered is what the effect of them is when they are taken together. If taken together, if the contract is a contract which purports to create a charge upon immovable property, then clearly under S. 17, (1) Cl. (b) of the Registration Act it is a document which requires registration. Admittedly in this case there has been no registration. The contract between the parties has been reduced to writing and therefore under the Evidence Act the contract being in writing the question arises whether or not the contract has got to be registered.

I have been referred to *Velauakauya Krishnayya* v. *Ponnuswami Ayyar* (1) by the plaintiff and that, it is argued, is a decision against this view. But in that case all that the Court held was that the document in question being a document subsequent to that which created a charge was merely a document which recorded the charge and the learned Chief Justice in that case emphasized very strongly the fact that it was in the past tense. That is not this case. This case is an agreement to create something and in this case the memorandum of agreement is an agreement to create something followed by a letter which actually carries it out. This case, in my view, is concluded by the decision of the Privy Council reported in *Subramaniam* v. *Lutchman* (2). It is true that there is a distinction between the words appearing in the document in that case and the words in this but in my view the distinction is so slight as to be immaterial. The document under consideration in that case read as follows:

> We hand you herein title-deeds relating to 5th class Lot Nos.—then the property is described —also his promissory note for Rs. 63,000, due by us. This please hold as security against advances made to us.

The only difference is that in the document of 26th May the agreement is to deposit the title-deeds by way of equitable mortgage to secure the repayment, whereas in the Calcutta case, title-deeds were handed over to be held as security against advances. I cannot myself see any distinction between the two. These words in the judgment of the Privy Council were quite sufficient to create a charge upon immovable property and in my view following that decision the words in this case, taking these two documents together, are words which did create a charge upon immovable property and therefore the documents, memorandum of agreement of 26th May and letter of 27th May taken together, require registration and without registration cannot be received in evidence. I was referred to a decision in *Muthiah Chetty* v. *Kothandaramaswami Chetty* (3) but that seems to me to be somewhat in conflict with the Calcutta decision and as this decision was a decision prior to the decision in the Calcutta case and moreover as the Calcutta case is a decision of the Privy Council I am bound by that, I need not follow this decision.

The plaint has now been amended and asks for a personal decree against the defendant for the sum of Rs. 71,837-5-6 due on the promissory note set out in paragraph 4 of the plaint. The defence raised to this by the defendant in his further written statement in answer to the amended plaint and really the one which I need consider is that the plaintiff cannot sue on the promissory note because the promissory note is in the name of A. R. A. R. S. M. Somasundaram

(1) A. I. R. 1924 Mad. 547=47 Mad. 398.

(2) A. I. R. 1923 P. C. 50=50 Cal. 338=1 Rang. 66.

(3) [1916] 31 M. L. J. 347=4 L. W. 472=35 I. C. 864=(1916) 2 M. W. N. 321.

Chettiar and has not been endorsed to the plaintiff. One argument put forward is this : that this is a negotiable instrument; and under the Negotiable Instruments Act it cannot be sued upon except by the person to whom it has been endorsed over or in certain instances by the legal representatives of the plaintiff; and furthermore that a succession certificate will in any case be necessary before it can be sued upon by the plaintiff. It is quite clear from the plaint put in in C.S. No. 358/ 24 in which the present defendent was the plaintiff and the present plaintiff was the defendant from paragraphs 2 and 3 of that, that this was a joint Hindu family and Somasundaram Chettiar was the managing member of it and was carrying on the joint family business and in the course of carrying on that family business the moneys claimed in the suit were advanced. It is now said that there is no evidence that this was a joint family. It is perfectly clear from the plaint which has been marked and put in as an exhibit in this case that even, according to the defendant's own case when he was the plaintiff in that suit, his was a joint Hindu family being carried on by Somasundaram Chettiar as managing member of it and this was a debt incurred in respect of the joint family business. What is the position then ?

The question is whether without anything more, without any endorsement, the managing member of the family having died, the surviving members of the family can sue upon a negotiable instrument without anything further, without an endorsement and without a succession certificate. I think that the case in *Vyravan Chettiar* v. *Sreenivasa Chariar* (4), is a case very much in point. That case held that no succession certificate was required where a suit is brought on a document by the surviving members of the joint Hindu family unless it is in respect of separately acquired property. I think that shows quite clearly that where it is not separately acquired property no such succession cartificate is required and obviously applies to the case where there has been no endorsement of the document. Two cases are quoted in 28 *M. L. J.*: *Kuttia Pillai* v. *Ranganadham* (5), and *Ramanatham Chetti* v. *Subramanyam Chetti* (6). I think it is quite clear on the authority of these cases that the plaintiff in this suit being a surviving member of a joint Hindu family can sue and take the benefit of the promissory note given to the managing member in respect of moneys advanced by the managing member out of the joint family funds.

The other point taken in the written statement is that the defendant is at any rate entitled to take credit for the three promissory notes amounting in all to Rs. 17,700 which were executed in his favour and endorsed by him to the plaintiff in this suit. But it is clear from the document executed by him at the time when he so endorsed over the promissory notes that the plaintiff was given full liberty to deal with the promissory notes as he desired. He was entitled not to bring a suit at all upon it or if he brought a suit or claimed the amount he could claim an amount less than that set out in the promissory note and only if any sum was collected on the promissory note or on those promissory notes, would such a sum be applied pro tanto in diminution of any claim the plaintiff might have against the defendant. The promissory notes are admittedly valueless, and upon the plaintiff getting a decree in this suit will be handed back to the defendant.

There will be a decree for the plaintiff for Rs. 86,293-10-8 with costs and interest at 6% from this date till date of realization.

Suit decreed.

(4) A. I. R. 1921 Mad. 68=44 Mad. 499 (F.B.).

(5) [1915] 28 M. L. J. 323=28 I. C. 490=17 M. L. T. 264.

(6) [1915] 28 M. L. J. 372=28 I. C. 688=17 M. L. T. 266.

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* A. I. R. 1926 Madras 1190

DEVADOSS AND WALLACE JJ.

Narayana Naicken—Appellant.

v.

Venkataswami Naicken and *others*—Respondents.

Second Appeal No. 1191 of 1924, Decided on 2nd September 1926, from the decree of the Dist. J., Coimbatore, in Appeal Suit No. 70 of 1923.

(a) *Hindu Law—Alienation by father—Elder son attaining majority but not questioning it—Suit by younger son within three years of his attaining majority is not barred—Limitation Act, Art. 7.*

A suit brought by the son within three years of his attaining majority to avoid the sale effected by his father is not barred by limitation although the elder son attained his majority more than three years earlier and had taken no steps to question the alienation: *A. I. R.* 1926 *P. C.* 16, *Foll.* [P. 1191, C. 2]

(b) *Limitation Act, Art.* 12—*Suit by son for setting aside sale in execution of decree against father comes under Art.* 12.

A suit brought by the son after attaining majority for setting aside the sale of his share in Court auction in execution of a decree against the father is governed by Art. 12 [P. 1191, C. 2]

(c) *Limitation—Pleadings and not the result of suit is to be seen for deciding limitation.*

When the law of limitation is to be applied the Court must look at the pleadings and not at the result of the suit. [P. 1192, C. 1]

(d) *Hindu Law—Alienation by father.*

The alienation of a widow stands on a different footing from the sale by a Hindu father. [P. 1192, C. 2]

(e) *Hindu Law—Auction sale of family property—Son's share also passes—Son must challenge it within limitation if he wants to avoid.*

The auction sale of family property covers not only the father's share but the son's share as well and unless the son challenges the sale within the period allowed by law the sale would become unassailable. [P. 1192, C. 2]

(f) *Hindu Law—Decree against father—Auction-purchaser buying son's shares also—Before claiming shares sons must get the sale set aside.*

If the auction-purchaser buys the shares of the sons in execution of the decree against the father, the sons cannot claim their shares without setting aside sale. [P. 1192, C. 1]

Watrap Subramania Iyer—for Appellant.

T. M. Krishnaswamy Iyer and *S. Swaminathan*—for Respondents.

Devadoss, J.—The plaintiff's suit is for a declaration that the decree and execution proceedings in O. S. No. 327 of 1907 are not binding upon him and that his share of the family property did not pass to the vendee under the Court sale and for the possession and incidental reliefs. The Subordinate Judge dismissed the suit as being barred by limitation. On appeal the District Judge of Coimbatore held that the plaintiff's suit was barred under Art. 12 of the Limitation Act as regards Items 1 to 4, and that the suit was not barred in respect of Item No. 5, and remanded the suit for trial of the issues relating to Item No. 5. The plaintiff has preferred this second appeal.

The facts are: the plaintiff and the 2nd defendant are the sons of the 1st defendant. Items 1 to 4 were sold in execution of a money decree obtained against the 1st defendant in O. S. No. 327 of 1907 and were purchased by the 3rd defendant who took delivery of them in August 1908. The 5th item was sold by the 1st defendant to one Rangaswami Naicken by a registered sale deed dated 2-4-1907 and Defendants 8 to 10 who purchased it from Rangaswami Naicken have been in possession from 21-6-1909. Neither the plaintiff nor the 2nd defendant were parties to O. S. No. 327 of 1907. The plaintiff attained majority recently and has brought this suit within three years after attaining majority. The question is whether his suit is barred by limitation. So far as Item 5 is concerned the suit is not barred by limitation as it has been brought within three years of the plaintiff attaining majority. It has been recently held in *Jawahir Singh* v. *Uddi Parkash* (1) that a suit brought by the son within three years of his attaining majority to avoid the sale effected by his father is not barred by limitation although the elder son attained his majority more than 3 years earlier and had taken no steps to question the alienation.

The question in this appeal is: What is the article of the Limitation Act applicable to a suit brought by the son after attaining majority for setting aside the sale of his share in Court auction in execution of a decree against the father.

It is well settled that a father can sell the family property including the share of his son for an antecedent debt, and sons can challenge the alienation by a suit on the ground that the debt was incurred by the father for immoral or illegal purposes. If they do not challenge the alienation by a suit or if they fail to establish that the debt of the father was incurred for illegal or immoral purposes the sale would be good to the extent of their shares as well. It is also well settled that a person who obtains a money decree against him can bring the family property to sale without impleading the sons, and the auction purchaser would get a good title to the property sold including the shares of the sons who are not parties to the decree. It is open to the sons to have the sale

(1) A. I. R. 1926 P. C. 16=48 All. 152.

set aside on the ground that the debt for which their shares were sold was incurred by the father for illegal or immoral purposes; but so long as they do not challenge the sale by a suit, or if they bring a suit and fail the auction purchaser would get a good title to the property purchased by him: vide *Brij Narain* v. *Mangal Prasad* (2); *Nanomi Babuasin* v. *Modhun Mohan* (3); *Sripat Singh Dugor* v. *Prodayat Kumar Tagore* (4).

If the auction-purchaser buys the shares of the sons in execution of the decree against the father can they claim their shares without setting aside the sale. If the alienation is void no doubt the sons need not sue to set aside the sale but the sale is not void but is only voidable at the suit of the sons. So long as it is not avoided the sale would be good. That being so, the sons are bound to set aside the sale if they want to recover their share of the family property. Article 12 begins as follows:

To set aside any of the following sales (a) sale in execution of the decree of a Civil Court.

If a sale in execution of a decree by a civil Court is to be set aside a suit will have to be brought within one year of its confirmation or its becoming final and conclusive. It is urged for the appellants that if the son shows that the debt was incurred for illegal or immoral purposes the Court would hold that the son's share is not bound and therefore the proper article of limitation applicable to the case wauld not be Article 12. When we have to apply the law of limitation we must look at the pleadings and not at the result of the suit. Could the plaintiff get back his share of the property without setting aside the sale? The case would be different if the sale was void in which case the plaintiffs need not pray for setting it aside. But as I have already observed the sale is not void. It can only be avoided on the proof of certain facts by the plaintiff and only so far as his share is concerned. The case in *Bijoy Gopal Mukherji* v. *Krishna Mahishi Debi* (5), has no application to the present. It was held in that case that a reversioner could sue for possession of the property sold by a Hindu widow within 12 years of her death. The alienation of a widow stands on a different footing from the sale by a Hindu father. The widow can give a good title if the consideration for the sale be for any of the purposes which would bind the reversioners and so long as she is alive, the reversioners are not bound to sue to set aside the alienation; but the moment the widow dies the reversion opens and the nearest reversioner is entitled to sue for possession of the property and need not seek to set aside the alienation which is not binding on him. The reversioner is not affected by anything that the widow may do during her lifetime; if her alienation is such as would bind the reversion it cannot be impeached; if it is not, the reversioner need not sue to have it set aside. The reversioner has not a present interest, in the property in the possession of the widow. It is only after the widow's death that the nearest reversioner would be entitled to the property. The auction sale of family property covers not only the father's share but the son's share as well and unless the son challenges the sale within the period allowed by law, the sale would become unassailable.

In considering what article of the Limitation Act should be applicable to cases of this kind the Court should have regard to the observations of their Lordships of the Privy Council in *Malkarjan* v. *Narhari* (6).

The Limitation Act protects bona fide purchasers at judicial sales by providing a short limit of time within which suits may be brought to set them aside. If the protection is to be confined to suits which seek no other relief than a declaration that the sale ought to be set aside and is to vanish directly some other relief consequential on the annulment is sought, the protection is exceedingly small. . . . . What is the justification for refusing to construe Article 12 (a) according to its obvious meaning whenever a suitor goes on to pray for that relief which is the object, perhaps the only object, of setting aside the sale? Their Lordships hold that both the letter and the spirit of the Limitation Act require that this suit, when looked on as a suit to set aside the sale should fall within the prohibition of the article.

In *Bhola Jha* v. *Lala Kali Prasad* (7) it was held that the period of limitation

(2) A. I. R. 1924 P. C. 50=46 All. 95.
(3) [1886] 13 Cal. 21=13 I. A. 1=4 Sar. 682 (P. C.).
(4) [1917] 44 Cal. 524=39 I. C. 252=44 I. A. 1 (P. C.).
(5) [1907] 34 Cal. 329=34 I.A. 87=11 C.W.N. 424=5 C. L. J. 334 (P. C.).
(6) [1901] 25 Bom. 337=27 I. A. 216=2 Bom L. R. 927=7 Sar. 739 (P. C.).
(7) [1915] 1 Pat. L. J. 180=34 I. C. 288=2 Pat. L. W. 413.

was one year under Art. 12 of the Limitation Act for a suit for the redemption of the son's share of the family property sold in execution of a mortgage decree against their father. Ross, J., observes that

If a suit to redeem is maintainable, the first step necessary for redemption is a declaration that the sale should be set aside.

The plaintiff cannot get possession without getting the sale set aside and the article applicable to the case is Art. 12. In this view, the judgment of the learned District Judge is right. The second appeal fails and is dismissed with costs.

Appeal dismissed.

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* A. I. R. 1926 Madras 1193

DEVADOSS AND WALLER, J.

Jamni Hanmantha Rao—Plaintiff—Appellant.

v.

Aratala Latchamma—Defendant—Respondent.

Appeal No. 491 of 1923, Decided on 23rd March 1926, against the order of the Dist. J., Ganjam, Dl- 8th August 1923, in O. S. No. 35 of 1922.

* *Probate and Administration Act* (1881), *S.* 69—*Person entitled to a portion of the testator's estate or a right to maintenance therefrom is "a person having interest"—It is not necessary that person opposing should claim through the testator.*

Per Devadoss, J.—A person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of S. 69. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of a forged Will or an invalid Will he has sufficient interest to enter a caveat. (*Case Law discussed*).

[P 1196 C 1]

Per Waller, J.—The words "claiming to have any interest in the estate of the deceased" are intended to bear the same meaning as the words in the English Act "having or pretending interest in the (personal) estate affected by a Will," : 28 *Cal.* 441, *Foll.* [P 1196 C 2]

B. Jagannadha Doss—for Appellant.

T. A. Anantha Aiyar—for Respondent.

Devadoss, J.—The appellant applied for the probate of the Will of one Narasamma, dated 4th June 1920, the grant of probate was opposed by the respondent who is the widow of the brother of Narasamma's husband, and the District Judge held that it was not proved that Narasamma executed the Will and dismissed the application.

Mr. Jagannadha Doss for the appellant raises the contention that the respondent was not entitled to oppose the grant of probate as she had no interest in the estate of the deceased so as to be entitled to enter caveat under S. 69 of the Probate and Adminstration Act, V of 1881. As there is a conflict of authority on this point, and as the respondent has not appeared to oppose the appeal, we asked Mr. Anantha Aiyar to appear as amicus curiae and we are thankful to him for bringing to our notice the cases opposed to the contention of the appellant. Under S. 69 :

In all cases it shall be lawful for the District Judge, if the thinks fit, to issue citations calling upon all persons claiming te have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. . . .

What is the nature of the interest which a person should have in order to entitle him to enter a caveat ? The contention of the appellant is that the person whe enters a caveat should claim a right to the property under the testator and if he claims the property adversely to the testator he is not entitled to oppose the grant of probate, for his right would not be affected by the grant of probate or letters of administration with the Will annexed. The respondent claims the right to maintenance out of the income of the property devised under the Will as she is the widow of the undivided brother of the testatrix's husband. The relationship is not denied, and the only question whether the claim to maintenance against the property devised by the will, granting that the allegation of the respondent is true, would entitle her to oppose the grant of probate. In *Garabini Dassi* v. *Partap Chandra Shaha* (1) it was held that the right to maintenance was not such an interest as would entitle a person to oppose the grant of probate. This is a direct authority in favour of the appellant. In *Abhiram Dass* v. *Gopal Das* (2), it was held by a Bench of the Calcutta High Court that :

a person not claiming any of the property of the testator but disputing the right of the testator to deal with certain property as his own has not such an interest in the estate of the testator as entitles him to come in and oppose the grant of probate.

(1) [1899] 4 C. W. N. 602.
(2) [1890] 17 Cal. 48

The learned Judges observe at page 52:

The term (meaning interest in S. 69) does not necessarily refer to any particular property, but to the claim of any person to succeed by inheritance or otherwise to any portion of the estate of the deceased by reason of an interest, not on an adverse title to the testator to any particular property, but in the estate itself, whatever that may consist of; the form of the caveat too would seem to show that the person who enters a caveat admits that the particular property forms a portion of the estate of the testator, but objects either to the execution of the Will or to the proposed manner of dealing with any portion of the estate

The learned Judges declined to follow the two previous decisions of the same Court, in *In the matter of the petition of Bhobosoonduri Dabee* (3) and *In the matter of the petition of Hurro Lall Shaha* (4). The case in *Abhiram Dass* v. *Gopal Dass* (2) has been followed by other High Courts. In *Pirojshah Bikhaji* v. *Pestonji Merwanji* (5) it was held following *Abhiram Dass* v. *Gopal Dass* (2) that a person who wishes to come in as the caveator must show some interest in the estate derived from the deceased by inheritance or otherwise. The Patna High Court takes the view in *Kalajit Singh* v. *Permeshar Singh* (6).

The words of S. 69 are 'claiming to have any interest in the estate of the deceased.' There is nothing in the wording of the section to show that the caveator should claim interest through the testator. All that is necessary to entitle a person to enter caveat is to claim interest in the estate of the deceased. The words 'interest in the estate' do not necessarily convey the idea that the interest should be claimed through the testator. If that was the intention of the Legislature, the clause could have been differently worded so as to make the meaning clear. In India under the Hindu Law the widow of a co-parcener is entitled to maintenance and if a person disposes of the property as his self-acquisition in favour of the legatees the widow of a co-parcener will be driven to the necessity of filing a suit against the executor or legatee and proving that it is joint family property. A person claiming to be the undivided brother of the testater claims an interest not through the deceased but independently of him. Can he enter a caveat on the ground that the property devised is the joint property of himself and the testator? It has been consistently held that a reversioner is entitled to oppose the grant of probate. In *Syama Charan Baisya* v. *Prafulla Sundari Gupta* (7) it was held by Mookerji, J., and Chapman, J., after an examination of the authorities:

that although a reversioner under the Hindu Law has no present alienable interest in the property left by the deceased he has substantial interest in the protection or devolution of the estate and as such is entitled to appear and be heard in a probate proceedings.

See also *Akhileswari Das* v. *Haricharan Mirdha* (8). Can it be said that a reversioner claims through the testator? If the principle of law enunciated in *Pirojshah Bikhaji* v. *Pestonji Merwanji* (5) and *Abhiram Dass* v. *Gopal Dass* (2) is correct, a reversioner who does not claim through the testator cannot oppose the grant of probate. A Hindu Will may contain a power to adopt. A reversioner who has interest in preventing the estate from going to a third person by reason of a forged Will containing a power to adopt is entitled to protect the estate from going to strangers. If a reversioner who has no present interest in the estate is entitled to come in and oppose the grant of probate it is difficult to see how a person who claims right to maintenance from the estate devised by the testator is not entitled to oppose the grant of probate. Under the English law the personal estate is his absolute property and nobody has any right to it till he dies. But under the Hindu Law a widow has the right to claim maintenance and the widow of an undivided co-parcener is entitled to maintenance if the property devised is joint family property, the reversioner is entitled to see that the reversion is not endangered. *In the matter of the petition of Bhobosoonduri Dabee* (3), Field, J., after very exhaustive examination of the authorities held that under S. 242 of the Succession Act any person who can show that he is entitled to maintain a suit in respect of property over which probate would have effect, possesses a sufficient interest to entitle him to enter a caveat and oppose the grant. In that case the testator left his widow and two sons and purported to give the entire property to

(3) [1881] 6 Cal. 460.
(4) [1882] 8 Cal. 570=10 C.L.R. 409.
(5) [1910] 34 Bom. 459=6 I.C. 523=12 B.L.R. 366.
(6) [1917] 1 Pat. L.W. 308=39 I.C. 573.
(7) [1914] 19 C.W.N. 882=30 I.C. 161=21 C.L.J. 557.
(8) A.I.R. 1925 Cal. 223.

his widow for her life and after her death to his two sons. A mortgagee of the son's share and a decree-holder against the other son opposed the grant of probate. Both the Judges who heard the case (White and Field, JJ.) held that the mortgagee of the son's share was entitled to oppose the grant of probate as by the Will they would be left without a remedy.

In the Court of Probate Act 20 and 21, Vict. Ch. 77, S. 61, the wording is:

Others having or pretending interest in the personal estate affected by a will should be cited or amended and may be permitted to become parties or intervene for their respective interests.

A portion of that section is practically copied in S. 69 of the Probate and Administration Act, V of 1881, and in S. 242 of the Indian Succession Act, X of 1886, with slight modifications. Instead of the words 'having or pretending interest in the personal estate' the wording in the Indian enactments is 'claiming to have an interest.' Field, J., observed at p. 471:

As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to this; that any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of S. 242 of the Indian Succession Act.

The learned judges who decided *Abhiram Dass* v. *Gopal Dass* (2) differed from *In the matter of the petition of Bhobosoonduri Dabee* (3), on the ground that the rule laid down by Field, J., was not adopted by White J. Though White, J., did not lay down the rule in such broad terms as Field, J., yet he held that the mortgagee of the son's share was entitled to oppose the grant of probate of the father's Will. In *In the matter of the petition of Hurro Lall Shaha* (4), it was held that a presumptive reversioner to property with which a Will deals has a sufficient interest in the property to entitle him to maintain a suit in respect of such property and that he is entitled to maintain a case for the revocation of probate. The learned Judges followed the decision in *In the matter of the petition of Bhobosoonduri Dabee* (3). In *Kishen Dai* v. *Satyendra Nath Dutt* (9), a Bench of the Calcutta High Court held that:

the words 'interest in the estate of the deceased' in S. 69 of the Probate and Administration Act mean 'interest in the estate left by the deceased' and that a judgment-creditor who but for the Will would in execution of his decree have a right to seize the property or that share of it which should descend to his debtor and who alleges that the Will has been set up for the purpose of defrauding the creditors is a person claiming an 'interest in the estate of the deceased' and as such has a locus standi in opposing the grant of the probate of the Will.

It cannot be said that a Hindu son claims through his undivided father. If the father devises his property as his self acquisition, is not the son entitled to oppose the grant of probate on the ground that it is a perjury? And it cannot be said in such a case that he claims through the father. In *Arakal Bastian Ansap* v. *Narayana Ayyar* (10), it was held that the judgment-creditors of the son of the deceased who had attached the son's interest in his deceased father's estate before the application for probate were entitled to oppose the grant of probate. It is contended the Privy Council in *Nilmoni Singh Deo* v. *Umanath Mookerjee* (11), disallowed the contention that an attaching creditor of a son's share was entitled to oppose the grant of the probate of the father's Will. Their Lordships did not decide the point but only expressed a doubt. They observe at p. 28:

They entertain grave doubts whether an attaching creditor can do so, at least in a case which is not founded on the ground that the probate has been obtained in fraud of creditors.

They give no final opinion upon it. If a testator purports to devise his property as his self-acquisition in order to defeat his undivided brother or to defeat the claim for maintenance of the widow of his co-parcener, does he not commit fraud? and is not the brother or the widow entitled to question genuineness of the Will? In *Rahamtullah Sahib* v. *Rama Rau* (12), it was held that a legatee under a Will or a creditor of the testator had not such interest as to entitle him to oppose the grant of probate. In the case of a creditor the estate is liable whether the Will is genuine or not. The executor, and if there is no executor the administrator, is bound to pay the debts of the testator out of the estate and the creditor will not ordinarily suffer in any way by a false will being propounded and probate thereof being obtained. There

(9) [1901] 28 Cal. 441.

(10) [1910] 34 Mad. 405 = 8 I.C. 351 = (1910) M.W.N. 819.

(11) [1884] 10 Cal. 19 = 10 I.A. 80 = 13 C.L.R. 314 = 4 Sar. 449 (P.C.).

(12) [1894] 17 Mad. 379.

may be cases where it may be to the interest of the creditor to oppose the grant of probate if by obtaining probate unscrupulous person or a person of no means is baseless to make away with the property of the deceased and thereby defeat the creditor. If the probate proceedings are fraudulent any person who would suffer thereby is entitled to object to such proceedings. In *Crispin* v. *Doglione* (13), the natural son of the testator objected to the grant of probate on the ground that by the law of Portugal he was entitled to the whole of the deceased's property and that he had instituted a suit in Portugal against the executor in which he obtained a decree that he should be put into possession of the property. The declaration did not state the nature of the suit, nor the questions involved in it, nor did the judgment show that the plaintiff was in the same position as a legitimate son. The learned Judges held that the foreign judgment alone did not show such an interest in the party in whose favour it was made as to entitle him to dispute the will. If the judgment of the foreign Court had given the property to him the learned Judges might probably have allowed him to contest the grant of probate. In *Brinda Chowdhrain* v. *Radhica Chowdhrain* (14), it was held that the widow of a Hindu testator who had died leaving sons had sufficient interest to call upon the executor to prove the will in solemn form per testes. At page 494 they observe :

> She is entitled to maintenance and if she pleases to institute a suit, to have her maintenance made a charge upon the estate of her deceased husband.

The true principle deducible from the cases is that a person who is entitled to any portion of the estate left by the deceased or a right to claim maintenance from the estate of the deceased has an interest within the meaning of S. 69 of the Probate and Administration Act. It is not necessary that he should claim through the testator in order to enable him to oppose the grant of probate of the Will of the testator. If a person is likely to suffer by the grant of the probate of a forged Will or an invalid Will he has sufficient interest to enter a caveat. (His Lordship then dealt with the question of the genuineness of the Will and after examining the evidence proceeded.) We see no reason to differ from the finding of the learned Judge that it has not been satisfactorily proved that the Will was executed by Narasamma or that at the time of the alleged execution of the Will she was in a sound disposing state of mind.

Waller, J.—On both points I agree. I think that the words in S. 69 of the Probate and Administration Act " claiming to have any interest in the estate of the deceased " are intended to bear the same meaning as the words in the English Act " having or pretending interest in the (personal) estate affected by a Will." That is the view taken in *Kishen Dai* v. *Satyendra Nath Dutt* (9), which I would follow.

On the merits I see no reason to dissent from the conclusion of the District Judge. The appeal must be dismissed.

Appeal dismissed.

(13) 2 S. & T. R. 17.
(14) [1885] 11 Cal. 492.

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* A. I. R. 1926 Madras 1196

COUTTS-TROTTER, C. J.

Nadupi and *others*—Defendants 5 to 8—Appellants.

v.

Subbaraya Chetty and *others*—Plaintiffs 1 and 2 and Defendants 1—4 and 10—14—Respondents.

Second Appeal No. 1271 of 1923, Decided on 22nd March 1926, from the decree of the Dist. J., Chingleput, in A. S. No. 151 of 1922.

* *Transfer of Property Act, S. 53—Person cannot set up his own fraud even though fraud proved infructuous.*

If a person enters into a transaction the object of which was to defraud his creditors he is debarred even though the creditors are not defrauded from relying upon that transaction and setting up his own fraud whether the fraud did in fact prove infructuous or not : 32 *M. L. J.* 484, *Expl.* [P 1197, C. 1]

S. Rangachariar—for Appellants.

C. V. Subramania Aiyar—for Respondents.

Judgment.—I am very dissatisfied with the findings arrived at by the learned District Judge, but I see no option but to take his findings as they are. The suit was brought by two persons who were not at the time of this suit in possession. They, therefore, could not merely rely

upon their possessory title and say : "We are in possession. These people must be ejected and they must go." They had not been in possession from a very long time and, therefore, they could only eject the defendants by showing that they had some sort of what I may conveniently call a paper title. In order to do that, they had ultimately to rely on Ex. A. That was a sale of house and lands and the plaintiffs' case was that although the sale of the lands was a genuine enough transaction, the sale of the house was benami. If the matter had stood there all might have been well. But the parties raised a further question on which the learned Judge has given a finding. His finding is that the sale was taken benami to screen the property from creditors. It is quite obvious that those who claim under a document cannot succeed if it is necessary to their case to show that the facts surrounding it were such as to make it a fraud on creditors. The learned Judge in paragraph 17 of his judgment confuses himself on this point ; but so far as I can make him out—it is not a very clear judgment—he says that this case does not come within the mischief of that rule because there is nothing on record to show that any creditors were defrauded so as to bring the plaintiffs within the bar. As I understand the law a party cannot set up his own fraud whether it proved fruitful or not and if he entered into a transaction, the object of which was to defraud his creditors, he is debarred from relying upon that transaction and setting up his own fraud whether the fraud did in fact prove infructuous or not. In my opinion the learned Judge has entirely misapplied his mind to the real question in the case, and his first finding is conclusive against the plaintiffs.

I should like to point out that as at present advised I see no justification for the words that have got into the headnote of the case of *Kamayya* v. *Mamayya* (1) in which the late Chief Justice, Sir John Wallis, and myself gave judgment. The words introduced are, "where the fraud introduced has been effected." If that means merely that the fraudulent thing has been done, namely, the execution of a document with the intention to defraud creditors, I have no further criticism to make but if it means that the fraud must not only have been carried out in the sense of the transaction entered into with the parties but that the fraud must have de facto resulted in defeating the creditors' rights and causing loss to them. I am of opinion that that headnote is not warranted by that decision.

The appeal must be allowed with costs throughout.

Appeal allowed.

(1) [1918] 32 M. L. J. 484=43 I. C. 352.

A. I. R. 1926 Madras 1197

PHILLIPS AND MADHAVAN NAIR, JJ.

Katifi Mahamed Hamidudin and *others*—Plaintiffs 1 and 2 and 4-8—Appellants.

v.

Muhamad Ghouse and *others*—Defendants 1, 4 and 6—8—Respondents.

Appeal No. 134 of 1923, Decided on 11th March 1926, from the appellate order of the Dist. J., South Arcot, in A. S. No. 197 of 1922.

Limitation Act, Art. 182 (5)—*Step-in-aid—Request for extension for filing necessary papers is not.*

A decree-holder's request for the extension of time for filing the necessary papers cannot be deemed to be an application for a step-in-aid of execution : *A. I. R.* 1922 *Mad.* 79, *Foll.*

[P. 1198, C. 1]

A. Vishwanatha Aiyar—for Appellants.

M. Patanjali Sastri—for Respondents.

Judgment.—This civil miscellaneous second appeal also raises a question of limitation similar to the one dealt with in the judgment in *Krishna Pattar* v. *Seetharama Pattar* (1) just now pronounced. The appeal was also heard along with the last one. The decree-holders are the appellants. The execution petition out of which the appeal arises was presented on 21st October 1921. The previous execution petition presented on 28th September 1918 was returned by the Court for being represented with the sale papers and encumbrance certificate, the time allowed for representation being three weeks from 30th September 1918. The petition was re-presented on 21st October 1918, without the necessary papers called for, but with a request inscribed in the petition for extension of time by two weeks for

(1) A. I. R. 1926 Mad. 1178.

obtaining the necessary papers. Though the request was granted the execution petition was not re-presented afterwards. It has however been filed in Court along with the execution petition which has given rise to this appeal.

Prima facie the present petition is barred by limitation, but the appellants contend that it is not time barred because it was filed within three years of the re-presentation of the former petition with a request for the enlargement of time and that this request amounts to an application for a step-in-aid of execution. It is conceded that the case falls within the scope of the ruling in *Kuppuswami Chettiar* v. *Rajagopal Aiyar* (2), discussed in the prior case. On the reasoning of our judgment in that case it must be held that the decree-holders' request for the extension of time for filing the necessary papers cannot be deemed to be an application for a step-in-aid of execution. The learned vakil for the appellants has quoted a few more cases in addition to those already referred to those being *Vishvanath* v. *Narsu* (3) and *Raghunath Prasad Singh* v. *Lachhmi Narain Singh* (4). In view of what we have already stated regarding the decision of the Bombay and Allahabad High Courts, it is unnecessary to discuss these cases any further.

On the merits a special plea has been put forward to the effect that we should treat the petition re-presented on 21st October 1918, as a fresh petition for execution. This clearly cannot be done; neither can we accept the contention that the date of re-presentation with a request for time should be treated as the date on which the application for execution was presented.

This appeal also must be dismissed with costs.

Appeal dismissed.

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(2) A. I. R. 1924 Mad. 19=45 Mad. 466.
(3) A. I. R. 1921 Bom. 33.
(4) A. I. R. 1925 All. 394=47 All. 637.

A. I. R. 1926 Madras 1198

KRISHNAN, J.

Yaramath Khan—Defendant 1—Appellant.

v.

Amir-ul-Umra Bahadur and *others*—Plaintiffs 1, 3 and 4—Respondents.

Misc. Second Appeal No. 2 of 1926 Decided on 23rd March 1926, from an order of the Dist. J., Kurnool, D/- 17th October 1925, in A. S. No. 66 of 1925.

Civil P. C., O. 21, R. 15 (2)—No objection raised by judgment-debtor to execution by some of many decree-holders in executing Court—Objection cannot be raised in appeal.

Where four only out of eleven joint decree-holders applied for execution and no objection was raised by judgment-debtor in executing Court which therefore passed no orders under the rule.

Held: that he cannot contend in appeal that the executing Court's order allowing execution is bad. [P 1198 C 2, P 1199 C 1]

L. S. Veeraraghava Ayyar—for Appellant.

T. Kumaraswamiah—for Respondents.

Judgment.—This is an appeal against an order allowing execution against the judgment-debtor in O. S. 1310 of 1921 on the file of the District Munsif of Kurnool The District Munsif allowed execution to proceed, overruling the objection raised and the District Judge has confirmed the order.

It is contended in second appeal that the lower Courts have not complied with the provisions of O. 21, R. 15 (2) and, therefore, their orders are bad.

There are eleven decree-holders and one judgment-debtor, the 1st defendant, who is the appellant before me. The execution application was put in by four of the decree-holders, the other decree-holders being counter-petitioners, to the application. No objection seems to have been taken by the 1st defendant under R. 15 (2) that execution should not be allowed on an application of some only of the decree-holders. The learned Judge has, therefore, not passed any definite order under Cl. (2).

The application itself was professedly by the applying decree-holders under Rr. 15 and 66 of O. 21, Civil P. C., thereby indicating that they were executing the decree not only on behalf of themselves, but on behalf of all. Evidently, the District Munsif thought it unnecessary to pass any special orders

for the protection of the interests of those who did not join in the application as no objection was taken. In appeal also this objection has not been dealt with by the District Judge. He says: "No other points arise."

It is urged by the learned vakil for the appellant that the point was raised before the District Judge, but it seems to be very doubtful if this was so, from the way in which the learned Judge has written his judgment. However, not having taken the point in the first Court, it is not a ground for setting aside the order for execution now.

It is said that there are certain minors involved in the case. But these minors are persons applying for the execution of the decree, through their guardian. If, after realizing the money by the sale of properties, there is any difficulty in the distribution of the sale-proceeds and the payment over of the money to the adult decree-holders, under O. 32, R. 6, the Court will, no doubt, take care that security is furnished before money is paid. But at this stage that objection is not valid.

The Civil Miscellaneous Second Appeal is dismissed with costs.

Appeal dismissed.

A. I. R. 1926 Madras 1199

SPENCER, J.

Krishnaswami Naidu and *others* — Defendants 2 and 3—Appellants.

v.

S. Varnikalingam Pillai and *others*— Plaintiffs—Respondents.

Second Appeal No. 71 of of 1923, Decided on 4th November 1925, from a decree of the Dist. J., East Tanjore, in A. S. No. 182 of 1921.

(a) *Trusts—Trustee borrowing money on pro-note—Presumption is that he is personally bound to pay.*

Whether a bond executed by a trustee binds the trust property must be determined from the wording of the document itself and without reference to other evidence.

When a trustee borrows money for purposes of a trust upon a promissory note, the creditor cannot be given decree charging the amount against the trust property: 41 *Mad.* 815 and 32 *M. L. J.* 259, *Foll.* [P. 1200, C. 1, 2]

(b) *Religious endowment—Manager and trustee —Powers are different as regards borrowing.*

The powers of the manager of a mutt are something more than those of a trustee of a temple in respect of borrowing money for trust and charging it on trust property: 25 *All.* 296; 43 *Mad.* 795; 31 *Mad.* 47 and *A. I. R.* 1922 *Mad.* 402, *Dist.* [P. 1200, C. 2]

(c) *Trusts Act, S. 48—More trustees than one —One cannot borrow money for trust without express authority from the others.*

Where there are two or more trustees of a temple, in a transaction in which it is intended to pledge the credit of the temple or to borrow money upon the security of temple property, it is certainly necessary for all the trustees to join together. There is nothing improper in one of the trustees being permitted to supervise the routine work in the temple; but there can be no general authorization by the other trustees permitting the so-called managing trustee to incur debts on behalf of the temple and create a charge on the temple properties. For so doing, the express consent and authorization of the other trustees beforehand is certainly essential. [P. 1201, C. 1]

(d) *Trusts — Money borrowed by trustee — Trustee held personally liable—Trustee dead— Creditor seeking to recover from trust property by subrogation cannot do so in absence of trustee's legal representatives.*

Where a trustee of a temple borrows and the money is intended to be charged on the trust property by subrogation, the claim cannot be disposed of in the absence of the legal representatives of the trustee to whose rights the creditors claim to be entitled to be subrogated, and it is impossible to give a decree against the trust property without evidence that the trustee who borrowed the money was himself entitled to receive any money from the trust at the time when the money was advanced: 32 *M. L. J.* 259, *Rel. on.* [P. 1201, C. 2]

K. V. Krishnaswami Iyer and *N. Swaminatha Iyer*—for Appellants.

S. Muthiah Mudaliar and *Narasimha Iyengar*—for Respondents.

Judgment.—This appeal has been argued at considerable length, but the points of law which have been raised are really quite straightforward and covered by authority. The suit was brought by two creditors to recover money from Sri Subramaniaswami temple at Perambur represented by the trustees who are Defendants Nos. 2 and 3. The cause of action is the execution of a simple money bond, Ex. A, for Rs. 5,800 on the 15th November 1911, by a former trustee, Mutha Pillai, who is now dead. Ex. A consolidates certain prior promissory notes, Ex. B series. The Subordinate Judge dismissed the suit holding that Mutha Pillai had no power to borrow money on behalf of the devasthanam and that

these debts had not been proved to be either necessary or beneficial to the devasthanam. The District Judge reversed the decree of the Sub-Court and granted a decree for the sum claimed with interest recoverable from temple properties in the hands of the defendants.

The first question is whether the bond, Ex. A, created any liability against the temple. This must be determined from the wording of the document itself and without reference to oral evidence. The suit bond is signed by Mutha Pillai who styles himself as the panchayatdar of Sri Subramaniaswami temple. He contracted as follows:

As the said temple has received the sum of Rs. 5,800 as per particulars given above, I shall pay the same to you with interest at 10 annas per cent. per mensem from this date, each year's interest being payable on the 15th November of the same year. I shall pay the principal on or before 15th November 1925, get an endorsement of payment upon this and take this back.

This is followed by certain undertaking as to what is to happen if the principal and interest are not paid on the due date. It is signed "Mutha Pillai, panchayat" and witnessed by three witnesses. On the face of it, this document creates a personal liability against Mutha Pillai. There are no express words creating a charge on the income of the temple or its properties. The District Judge states in his judgment that a consideration of the evidence leaves the impression that what the parties intended was that payment should be made out of the temple funds, that temple funds alone should go in liquidation of the debt, and that a charge was intended to be created. As I have said, the intention of the parties must be gathered from the document and here not only are there no words making the trust liable, but the presumptions are all against that being the intention of the parties. I observed in *Palaniappa Chettiar* v. *Shanmugham Chettiar* (1) that there is a presumption that when a trustee signs a promissory note, he intends to incur an individual responsibility, because he does not reprsent any other person in law. What was said there about a promissory note holds good also for a bond in the term of Ex. A, in which the executant personally undertakes to pay what is due. In *Swaminatha Aiyar* v. *Srinivasa Aiyar* (2) Abdul Rahim, J., and I held that when a trustee borrows money for purposes of a trust upon a promissory note, the creditor cannot be given decree charging the amount against the trust property. We observed that it would be clear injustice to pass a decree making the property liable for the debt when the creditor lent money on the personal security of the trustee.

The plaintiffs in the present case have not made the legal representatives of Mutha Pillai parties to this suit or asked for a decree against them. So, there is no question now of giving a decree in any other form than a decree for payment out of temple funds against the present trustees, who were the parties to the suit document. Three cases *Parsotam Gir* v. *Dat Gir* (3), *Lakshmindrathirtha Swamiar* v. *Raghavendra Rao* (4) and *Srimath Daivasikamani Pandarasannidhi* v. *Noor Mohammed Routhar* (5) have been quoted for the respondents as instances where decrees have been granted against the income of mutts on account of debts contracted by the heads of mutts. The manager of a mutt is something more than a trustee, and I, therefore, consider that those cases are not strictly in point in dealing with trust property.

In *Sundaram Chhettiar* v. *Viswanatha Pandarasannadhi* (6) the trustee of a temple borrowed money for temple purposes and the creditor was given a decree against temple funds besides a personal decree against the trustee. The trustee in that case happened to be also the head of a mutt. Apparently, he was the sole trustee. The suit, however, was based upon a contract, the trustees having contracted to discharge the debt out of temple funds. There is no such undertaking in Ex. A and, therefore, the present trustees cannot be compelled to perform the contract entered into by their predecessor. In C. R. P. No. 541 of 1921, it was held that a decree in a small cause suit, which directed certain trustees to pay a debt out of temple properties did not require to be revised,

(1) [1918] 41 Mad. 815=8 L. W. 317=49 I. C. 23=35 M. L. J. 90.

(2) [1917] 32 M. L. J. 259=(1917) M. W. N. 278=38 I. C. 172=5 L. W. 323.

(3) [1903] 25 All. 296=(1903) A. W. N. 50.

(4) [1920] 43 Mad.795=39 M. L. J. 174=12 L. W. 139=59 I. C. 287=(1920) M.W.N. 568.

(5) [1908] 31 Mad. 47=17 M. L. J. 553.

(6) A. I. R. 1922 Mad. 402=45 Mad. 703.

seeing that there was a finding that the agent of the trustees had pledged the credit of the institution and that he was competent to do so.

In the present case, the plaintiffs would have to meet a further difficulty before they could obtain a decree for payment of the debt out of temple properties and that is that Mutha Pillai, who executed Ex. A, acted alone and not in conjunction with the other two trustees. One of those other trustses was one Ramaswami Iyer who resigned office in 1913 or 1914 after the execution of Ex. A, and the third, Doraiswami Chetti, is the present Defendant No. 1. These two trustees may, as a matter of fact, have been active or inactive trustees; but in a transaction in which it was intended to pledge the credit of the temple or to borrow money upon the security of temple property, it was certainly necessary for all the trustees to join together. This is the law under S. 48 of the Trusts Act. S. 47 prohibits the delegation of the duties of a trustee, unless the instrument of trust so provides or the delegation is, in the regular course of business, necessary.

In *Ramanathan Chetty* v. *Murugappa Chetty* (7), *Kumban* v. *Moorthi* (8) and *Shanmugha Mooppanar* v. *Subbayya Moopanar* (9) the law was clearly stated by three Benches that co-trustees form, as it were, one trustee and must exercise the powers of their office in their joint capacity and cannot act separately. It has been suggested that Mutha Pillai was the managing trustee, and that as manager he could have borrowed money for necessary proposes such as repairing the temple buildings without getting the other trustees to join with him. On this point, I am thoroughly in accord with the observations of the Subordinate Judge who said that there would be nothing improper in one of the trustees being permitted to supervise the routine work in the temple, but that there would be no general authorisation by the other trustees permitting the so-called managing trustee to incur debts on behalf of the temple and create a charge on the temple properties. For so doing, the express consent and authorization of the other trustees beforehand is certainly essential, and in this case it is absolutely wanting.

Another suggestion is that the plaintiffs are entitled to a decree against the temple properties by subrogation to the rights of the trustee, but although in the plaint, in para. 14, the claim by way of subrogation has been raised, the claim could not be disposed of in the absence of the legal representatives of Mutha Pillai to whose rights the plaintiffs claim to be entitled to be subrogated. The whole question of subrogation where a creditor claims to stand in the shoes of a trustee is a difficult one as was pointed out in *Swaminatha Aiyar* v. *Srinivasa Aiyar* (2). It would be impossible to give a decree against the trust property without evidence that the trustee who borrowed the money was himself entitled to receive any money from the trust at the time when the money was advanced. It would be necessary to have a settlement of accounts as between the deceased Mutha Pillai and the trust funds.

The decree which the plaintiffs ask for in the present case and the District Judge has given them, namely, that the amount of the debt should be recoverable from the temple property in the hands of the defendants, is such a decree as properly could not be given except on the footing of the money having been borrowed on the security of the temple properties. Upon the frame of the present suit, I am clearly of opinion that the plaintiffs are entitled to no such relief against the present trustees or the trust which they represent.

Lastly, it was suggested that the plaintiffs might be given a decree against the trust properties on the footing that they were entitled to be paid for necessaries supplied. If that had been the plaintiff's case in the plaint, they would have had to meet objections that would arise out of the dates when each of the several items of debt became payable. The appeal is allowed with costs here and in the lower appellate Court and the decree of the Subordinate Judge dismissing the suit with costs is restored.

Appeal allowed.

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(7) [1904] 27 Mad. 192.
(8) [1910] 34 Mad. 406=20 M. L. J. 951=7 I. C. 422=(1910) M. N. W. 359.
(9) A. I. R. 1922 Mad. 317.

✻ A. I. R. 1926 Madras 1202

ODGERS, J.

David Cutinha—Plaintiff—Appellant.

v.

Salvadora Minazes and *others*—Defendants 1, 2 and 4 to 13—Respondents.

Second Appeal No. 1701 of 1923, Decided on 25th August 1926, from the decree of the Dist. J., South Kanara, in A. S. No. 239 of 1922.

✻ (a) *Transfer of Property Act, S.* 111 (9)—*Forfeiture clause must be construed strictly.*

It is an axiom of the law that a forfeiture clause should be very strictly construed.

[P 1202 C 1]

✻ (b) *Transfer of Property Act, S.* 10—*Alienation of whole property restrained—Alienation of part is not prevented unless so provided specifically.*

There is ample authority in the English Law and in the Indian Law too to show that unless there is a restriction against the assignment of any portion of the demised property, the restraint on the alienation of the demised premises will not prevent the alienation of a portion.

The grant of a mulgeni lease is clearly an alienation. [P 1202 C 2 ; P 1203 C 2]

J. A. Pinto—for Appellant.

B. Sitarama Rao—for Respondents.

Judgment.—This is a case which has taken some time to argue as it involves the question of forfeiture of a mulgeni lease. The lease is contained in a decree (Ex. A) of the 30th August 1910. It sets out :

If there is necessity to alienate the said mulgeni right and the right of improvement, the same should be surrendered to plaintiff only on receiving from him the value of improvements fixed by four wise men, and it should not be alienated to any other person by means of mortgage, sale, etc. in any manner whatever. If the plaintiff refused in writing to take the property on paying the value of the improvements in that manner, the defendants may alienate the same to other persons. If in contravention to this the defendants alienate their right, the said alienation and also the mulgeni right should be cancelled and the property should come under plaintiff's possession.

The alienations complained of consist of the grant of a mulgeni lease by some of the tenants and also the grant of a simple mortgage, Ex. J. Both the lower Courts have held that none of these matters falls within the clause restricting alienation. The tenants, i. e., the persons in possession at the present moment seem to be descendants of the original lessees and their alienees. Mr. Pinto for the appellant has strenuously argued that these lessees are entitled by arrangement among themselves to some kind of definite shares in the leased lands. The plaint, it is true, does allege, and in fact was obliged to allege that the defendants have alienated portions of the leased property. The plaintiff also alleges that by arrangement among themselves Defendants 4 to 6 are in possession of a particular portion of the leased property. But he is careful to add that the said arrangement does not bind him. There is some allegation in the written statement that the rent was paid in shares. But in one of the written statements it is admitted that the mulgar is entitled to receive rent in one lump sum. This theory seems to have been started for the first time in this Court and there seems to be no evidence and no finding in either of the lower Courts that the mulgar ever recognized this division or partition, or whatever it may be called, among these Indian Catholics.

A distinction has been attempted to be applied by Mr. Pinto in considering cases which I shall shortly notice. It is an axiom of the law that a forfeiture clause should be very strictly construed. As long ago as 1808 in *Church* v. *Brown* (1) Lord Chancellor Eldon said :

These covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.

It is admitted and indeed found by the lower appellate Court that these alienations have been not only of portions of the leased property, but even adopting what I may call the partition theory, extend only to a portion of the defendants' share. That I think at once distinguishes the case from the well-known case of *Varley* v. *Coppard* (2), which was a case of assignment to a partner and the case of *Langton* v. *Henson* (3), which is a similar case of assignment between partners. There is ample authority in the English Law and in fact in the law here too to show that unless there is a restriction against the assignment of any portion of the demised property, the restraint on the alienation of the dismised premises will not prevent the alienation of a portion. I am not impressed with the reasoning of the learned District Judge as to the grant of a mulgeni lease not

(1) [1808] 15 Ves. 258.
(2) [1872] 7 C. P. 505=20 W. R. 972=26 L. T. 882.
(3) [1905] 92 L. T. 805.

being an alienation. It clearly is an alienation. But I think that the respondents must succeed on the ground that the restriction on alienation of a portion of the demised premises is not contained in the words of the lease which I have set out above. It is perhaps not necessary to multiply examples, but there are some cases which have been cited and which lend support to the contention for the respondent, for instance, in *Grove* v. *Portal* (4), Joyce, J., quotes the passage already cited from *Church* v. *Brown* (1) and says that the dictum of the lower Court has never been disapproved of; and again in *Russell* v. *Beecham* (5) Scrutton, L. J. says quoting Lord Eldon again that

a covenant not to part with possession of premises would not restrain the tenant from parting with a part of the premises, these covenants having been always construed by Courts of law with the utmost jealousy to prevent the restraint from going beyond the express stipulation.

In *Chatterton* v. *Terrel* (6) Lord Wrenbury says:

It is said and said with truth, that if there be a covenant not to assign or underlet the permises, it is not a breach to assign or sub-let part of the premises. It was not so stipulated, if those be the words, for the words 'or any part thereof, are not found in the covenant.

See also *Venkataramana Bhatta* v. *Krishna Bhatta* (7). The covenant here, I think, does not restrain the alienation of a portion or portions of the property. In that view the decree of the lower appellate Court was right.

This Second Appeal must be dismissed with costs.

Appeal dismissed.

(4) [1902] 1 Ch. D. 727 =71 L. J. Ch. 299 =18 T. L. R. 319 =86 L. T. 350.
(5) [1924] 1 K. B. 525.
(6) [1923] A. C. 578.
(7) A. I. R. 1925 Mad. 57.

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* A. I. R. 1926 Madras 1203

PHILLIPS AND MADHAVAN NAIR, JJ.

Sundaramma—Appellant.

v.

Venkatasubbier and *others*—Respondents.

Letters Patent Appeal No. 129 of 1925, Decided on 12th March 1926, from the judgment of Devadoss, J., reported in *A. I. R.* 1925 *Mad.* 340.

* (a) *Hindu Law—Adopted son can inherit the relations of his adoptive father's wife deceased before adoption.*

An adopted son can inherit to the relations of the wife of his adoptive father even when that wife was dead at the time of his adoption. [P. 1205, C. 1]

(b) *Hindu Law—Adoption — Husband can validly adopt without or against wife's consent.*

It is well settled that a man can adopt without the consent of his wife and even against her consent and in either case the adoption is valid. [P. 1204, C. 2]

* (c) *Hindu Law—Adoption—Wife not actually receiving can be adoptive mother.*

There appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually receives the boy. [P. 1205, C. 1]

Per Madhavan Nair, J.—The wife becomes the adoptive mother, not because she receives the boy in adoption, but because she is the wife of the adopter, her husband, who takes the boy in adoption. [P. 1205, C. 2]

Per Phillips, J.—A Hindu son has to offer oblations not only to his father's ancestors, but also to his mother's ancestors. When, therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all, although this may possibly be necessary in the case of an adoption by a bachelor. Wherever possible, therefore, a mother should be found for the boy, and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption: *Case law considered.* [P. 1204, C. 1, 2]

C. V. Ananthakrishna Ayyar—for Appellant.

A. Krishnaswamy Ayyar—for Respondents.

Phillips, J.—The question in this appeal is whether the adopted son of a man whose only wife had died before the adoption becomes the son of that wife so as to be her legal heir. This question does not seem to have been directly decided in any case and, therefore, it will be necessary to see how far the authorities support the proposition. In the first place, it is necessary to consider the principles which govern the adoption under the Hindu Law. In *Uma Sankar Moitro* v. *Kali Komul Mozumder* (1) Romesh Chunder Mitter, J. observes:

The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born both in respect to the paternal and the mater

(1) [1881] 6 Cal. 250 =7 C. L. R. 143 (F. B.)

nal line, and his complete substitution into the adopter's family, as if he were born in it.

This theory has been upheld by the Privy Council in *Nagindas Bhugwandas* v. *Bachoo Hurkisandas* (2). The theory then appears to be that the adopted boy by a legal fiction becomes the natural son of the adoptive father and presumably also of his wife. The question here is not complicated by the existence of two or more wives. In *Venkata Narasimha* v. *Parthasarathy* (3) their Lordships of the Judicial Committee observe:

> Only one wife can receive the child in adoption so as to step into the position of being its adoptive mother.

and again

> to hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law.

This conclusion appears to be based on the theory of adoption, namely, that the adopted son becomes the natural son of the father and the only way in which he can be deemed to be the natural and legitimate son of his father is by a fiction that he is the son of that father's wife also. A Hindu son has to offer oblations not only to his father's ancestors, but also to his mother's ancestors. When, therefore, he is adopted into a new family, he becomes the son of that family and presumably he would offer oblations not only to his adoptive father's ancestors but to his father's wife's ancestors as well. It would be straining the legal fiction of adoption too far to hold that the boy need have no mother at all, although this may possibly be necessary in the case of an adoption by a bachelor, but that is an exceptional case with which we are not concerned now. In a family in which there were two wives, it was held that the wife who joined with the father in making the adoption although the junior wife was the mother of the boy in preference to her senior co-wife. *Annapurni Nachiar* v. *Collector of Tinnevelly* (4). This was upheld by the Privy Council in *Annapurni Nachiar* v. *Forbes* (5). Wherever possible, therefore, a mother should be found for the boy and the fact that such a mother died before the adoption can be no obstacle in view of the fictitious character of the whole principle of adoption.

It is contended for the respondent that even when the adoptive father's wife is alive, she does not become the adoptive mother unless she actively participates in the adoption by receiving the adopted boy. This contention is apparently based on the literal meaning of the word प्रतिगृहीता which is ordinarily translated as adoptive. Its literal meaning is "receiving" and it is contended that unless the boy is actually received by the woman, she does not become his adoptive mother. It is well settled that a man can adopt without the consent of his wife and even against her consent, and in either case the adoption is valid. If the adoption is valid and the principle is recognized that the adopted boy ought in theory to have a mother, it is difficult to accept the proposition that he is not to have any mother at all, unless she actually receives him in adoption. The argument that the wife becomes the adoptive mother is based en the texts of Nanda Pandita in Dattaka Mimamsa, Part 1, verse 22

> in consequence of the superiority of the husband by his mere act of adoption, the affiliation of the adopted, as son of the wife, is complete in the same manner as her property in any other thing accepted by the husband.

In this text there is no qualification of the words "son of the wife" such as is sought to be put upon it by the respondent. He contends that it only means son in a tertiary sense, as laid down by Sarkar Sastri in his Commentary on Adoption (page 227). When pressed for an interpretation of this tertiary sense, the learned vakil had to adopt the conclusion in Sarkar Sastri's book, namely, that he was not really a son for any purpose.

This seems to be a quite unnecessary deduction for it destroys the apparent meaning of the text. If he is not really the son of the wife in any sense, why should the text declare that his affiliation as such is complete. No doubt Sarkar Sastri, in his commentary, supports the proposition put forward for the respondent, but there are very many contradictory statements to be found in his commentary. For instance, his observations at page 200 are altogether contradicted by those at page 419E. Apart, therefore, from this commentary

(2) [1916] 40 Bom. 270=32 I. C. 403=43 I. A. 56 (P.C.).
(3) [1914] 37 Mad. 199=23 I. C. 166=43 I. A. 51 (P.C.).
(4) [1895] 18 Mad. 277=5 M. L. J. 121.
(5) [1900] 23 Mad. 1=26 I. A. 246=9 M. L. J. 209=7 Sar. 591 (P.C.).

there appears to be no authority for the proposition that the wife does not become the adoptive mother unless she actually receives the boy. It may also be observed that it is only in very rare cases that the wife receives the boy as well as the father, and consequently in most cases, if this contention were to be upheld, the result would be that an adopted son who was adopted by the father would have no mother at all ; for admittedly he is no longer considered to be the son of his natural mother and consequently he would be in the anomalous position of a man who has no mother at all. If this anomalous position of a man without a mother can be avoided, I think it should be as being opposed to laws of nature to which the theory of adoption is assimilated. The text of Dattaka Mimamsa is undoubtedly an authority to the contrary. I may observe that the late Sir Bhashyam Iyengar, J., accepted this proposition in an article in 9 *M. L. J.* 231 and there appears to be no reason why it should not be adopted. If, therefore, the wife becomes the adoptive mother, whether she takes part in the ceremony or not, then there can be little difficulty in pressing the fiction a little further so as to include the deceased wife of the adoptive father. The whole theory being a fiction the impossibility of a woman becoming the mother after her death must be explained away by the fictitious nature of adoption. As her consent is not necessary, the fact that the consent cannot be obtained after her death is immaterial. I would, therefore, hold that the deceased wife of the adoptive father can become the adoptive mother and the adopted son becomes her heir.

The learned Judge from whose decision this appeal is preferred has adopted the arguments of Sarkar Sastri in favour of his view, but, as I have observed above, these arguments seem to be based on incorrect principles and an incorrect reading of the text. The appeal must, therefore, be allowed and the plaintiff's (respondent's) suit dismissed with costs.

Madhavan Nair, J.—The question for decision is whether an adopted son can inherit to the relations of the wife of his adoptive father when that wife was dead at the time of his adoption. Devadoss, J., answered the question in negative, basing his judgment on the ground that

> adoption being after the death (of the wife) it cannot be said by any fiction that she took part in the adoption.

According to this view an adopted son can be heir only to the wife of the adoptive father who joins in the ceremony of adoption and who is termed "the receiving mother." The correctness of this view is challenged in this Letters Patent appeal.

There is no direct authority on the point ; but two texts in Dattaka Mimamsa have a bearing on the question. These are Dattaka Mimamsa, S. 1, verse 22, and S. 6, verse 50, and are thus translated by Stokes :

> In consequence of the superiority of the husband, by his mere act of adoption the affiliation of the adopted, as son of the wife, is complete in the same manner as her property, in any other thing accepted by the husband.
>
> The forefathers of the adoptive mother only are also the maternal grandsires of sons given, and the rest ; for the rule regarding the paternal is equally applicable to the maternal grandsires (of adoptive sons).

Respondent relies strongly on the latter of the above-mentioned texts in support of his contention. This text shows that the relations of the adoptive mother only are the maternal relations of the adopted son. It is pointed out th at the Sanskrit word प्रतिगृहीता माता corresponding to the term "adoptive mother" means "mother who accepts in adoption" and, therefore, only the relations of a "receiving mother" are the maternal relations of the adopted son. It is difficult to accede to the argument that effect should be given to the literal meaning of the word प्रतिगृहीता माता and that it should be understood in the sense of physical acceptance by the mother ; for it is well-known that the wife of the adopter is regarded as the adoptive mother even if she is not present at the adoption. The wife becomes the adoptive mother, not because she receives thee boy in adoption, but because she is th wife of the adopter her husband who takes the boy in adoption. The context in which the passage occurs does not seem to require that the word should receive its primary meaning. The author mentions that the ancestors of the adoptive father are the paternal ancestors of the adopted son and then points out in the same way that the forefathers of the adoptive

mother only are also the maternal grandsires of the sons given "as distinguished from the ancestors of the natural mother." To illustrate this position there is no need to emphasize "acceptance" by the adoptive mother as a necessary feature in the ceremony of adoption. Sirkar Sastri in his "Tagore Law Lectures on Adoption" interprets the term प्रतिगृहीता माता literally. He says at page 419E.:

> but it should be observed that although the husband's son is deemed by courtesy to be the wife's son, yet acceptance by the wife is absolutely necessary to constitute the husband's adoptee her legal son ; see also page 237.

These passages support the contention of the respondent. But the same learned author at page 200, para. 4 of the same volume expresses the following contrary view relied on by the appellant,

> when theadopter is a widower, it might be said that his deceased wife's ancestors will be the maternal ancestors of the adopted son.

This opinion of Sirk r Sastri is, therefore, not very helpfu in deciding this question.

In support of the theory that there should be a "receiving mother" to enable the husband to make a valid adoption, the learned Judge refers to *Annapurni Nachiar* v. *Collector of Tinnevelly* (4), but that was a case where a conflict arose between the two married wives of the holder of an impartible zemindari as regards the right to succeed to the impartible estate, the property of the infant adoptive son of their late husband. It was held that the junior wife having taken part in the adoption was entitled to preference over her co-wife who was not associated by the husband in the act of adoption. In the course of his judgment Mr. Justice Shephard points out that :

> Where, however, there are several wives it is said that the husband is at liberty to designate the one who shall take place of the mother, and that by this means the anomaly of assigning several mothers to the adopted son may be avoided.

As regards the association by the husband of one of the wives in the act of adoption, the Privy Council in affirming the decision of the High Court observes thus :

> It certainly is a reasonable law that the head of a family should be able to take action likely to prevent disputes between his widows relative to adoption and the consequences of it. To unite one wife with himself in adopting is one way ; and it is satisfactory to find that besides the one direct judicial decision there is so much reason and opinion in its favour and so little against it : see *Annapurni Nachiar* v. *Forbes* (5).

What has thus been said as regards the "acceptance" by one mother when there are several wives to the adopter does not lead to the conclusion that the "receiving mother" is necessary to validate the adoption by the husband. It is conceded that if the husband had only one wife the act of adoption, inasmuch as it concerns him alone, may be performed independently of her.

The first of the two texts referred to above does not in any way support the suggestion that the adoptive mother, to have the same relation as the natural mother, should be one who actually receives the boy in adoption. On the other hand, inference drawn from it strongly supports the appellant. It is undisputed that adoption can be made by the husband without the consent of his wife. It may be made even against her wishes ; her association with the husband in the act of adoption is a religious rmality which does not show any legal signification.

> The ceremonial of adoption utterly ignores the wife, who need not be present and to whom no part is assigned if she is present : (Mayne's Hindu Law, 229).

When the adoption is made whether with or without her consent, the wife becomes the adoptive mother of the child by the mere fact of adoption. Adoption is but a notion in law. As observed by Mahmood, J., in *Ganga Sahai* v. *Lekhraj Singh* (6) :

> Adoption is itself a 'second birth' proceeding upon the fiction of law that the adopted son is 'born again' into the adoptive family by the rites of initiation. According to Hindu Law, an adopted son occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son...The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect to the paternal and the maternal line, and his complete substitution in the adopter's family, as if he were born in it : See *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1) quoted with approval in *Nagindas Bhagwandas* v. *Bachoo Hurkissandas* (2).

As his adoption puts the adopted son in the place of a legitimate son as regards the rights of inheritance in the family of the adopter, he must be considered to be heir to any rights arising after the adoption from his father's wife's position

(6) [1887] 9 All. 253.

in his adoptive family, though she was not alive at the time of the adoption. To give full effect to the fiction of adoption and to assimilate the fact to an imitation of nature, the adopted boy should have a mother. I do not think it is impossible to conceive the deceased wife as the fictional mother of the adopted child. The theory of a "receiving mother" being discarded I cannot find any difficulty in holding that the wife of the adoptive father, though she was dead at the time of adoption, can be considered as the adoptive mother.

It is true that when a bachelor adopts, the adopted boy can have no adoptive mother. Fiction cannot be heard to assimilate to nature in that case. But there is no reason why we should extend that analogy to cases like the present when it is possible to give full effect to the fiction by ascribing the deceased wife of the husband as the adoptive mother of the child.

For these reasons, I hold that the Letters Patent appeal should be allowed and the plaintiff's suit be dismissed with costs throughout.

Appeal allowed.

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* A. I. R. 1926 Madras 1207

PHILLIPS, J.

S. Suryanarayana Sastrigal—Plaintiff—Petitioner.

v.

K. S. Viswanatha Aiyar—Defendant—Respondent.

Civil Revision Petition No. 1048 of 1924, Decided on 16th April 1926, from the order of the Sub-J., South Malabar, in Revised Small Cause Suit No. 374 of 1923.

* *Civil P. C., S. 20—Loan borrowed at B—Creditor residing at P—Debtor permanently residing at P and temporarily at B—P Court can try suit to recover the loan.*

The ordinary principle of law is that the debtor shall find out his creditor and pay him: ordinarily therefore the debtor has to pay the debt at the creditor's place of residence or place of business. [P. 1207, C. 2]

Where the creditor resided at P and the debtor had a permanent family house at P, but the loan was borrowed at B, where the debtor had a temporary residence:

Held: that the Court at P had jurisdiction to try the suit in respect of the loan: 31 *Mad.* 223, *not Appl.* [P. 1208, C. 1]

P. R. Ramakrishna Aiyar—for Petitioner.

S. Subrahmania Aiyar—for Respondent.

Judgment.—This suit to recover a sum of money acknowledged to be due by the defendant to the plaintiff has been rejected on the ground that the Subordinate Judge of Palghat had no jurisdiction to try the same. This acknowledgment and promise to pay, Ex. A., was executed at Bombay where the defendant was temporarily a clerk in the Bombay Secretariat. The plaintiff resides at Palghat and alleges that the defendant's permanent place of residence was in Palghat, and inasmuch as the money had to be repaid at Palghat part of the cause of action arose there. Under S. 20, Expl. 1, of the Civil Procedure Code:

> Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

It is not disputed that the defendant's family house is at Palghat and no enquiry has been held as to whether that is his permanent place of residence. If it is his permanent place of residence, this suit could be instituted at Palghat under S. 20, Expl. 1. Apart from this the question as to whether a part of the cause of action has not arisen within the jurisdiction of the Palghat Subordinate Judge has not been considered. The ordinary principle of law is that the debtor shall find out his creditor and pay him: ordinarily therefore the debtor has to pay the debt at the creditor's place of residence or place of business. This principle was held not to be applicable in *Raman Chettiyar* v. *Gopalachari* (1) because in S. 17, Expl. 3, of the Civil Procedure Code (XIV of 1882) there was a special definition of the place where the cause of action arises. It was there held that this special definition overruled this provision of law and the principle of S. 49 of the Contract Act. That provision has been omitted in the present Code of 1908; not only that, but S. 17, Cl. (a) of the old Code reads "the cause of action arises," whereas in the present Code S. 20, Cl. (c), we have "the cause of action wholly or in part arises."

(1) [1908] 31 Mad. 223.

There has been considerable modification in the new Code and there is certainly no definition of the place where the cause of action may be said to arise. This being so the principle on which *Raman Chettiyar* v. *Gopalachxri* (1) is decided does not seem to be applicable and the ordinary principle that the debtor must seek out his creditor and pay him would appear to be applicable here. It is also possible from the terms of Ex. A to read into it an implied promise to pay to the creditor at his residence. The money was not apparently borrowed at the time Ex. A was executed; for it refers to an anterior debt and is a promise to pay off that debt within a certain time. Owing to this reason, namely, that a part of the cause of action arose in Palghat the Subordinate Judge's order rejecting the plaint is wrong. The order is set aside and the Subordinate Judge is directed to receive the plaint and dispose of it according to law.

The respondent will pay the petitioner's costs.

Order set aside.

A. I. R. 1926 Madras 1208

PHILLIPS, J.

V. Rama Rao—Plaintiff—Appellant.

v.

Chellayya Pillai—Defendant—Respondent.

Appeal No. 127 of 1923, Decided on 17th December 1925, from the appellate order of the Sub-J., Dindigul, D/-14th July 1923, in A. S. No. 57 of 1922.

Deed—Construction.

Intention of parties should be looked to in construing documents containing repugnant words. [P 1208 C 2]

Watrap S. Subramania Ayyar—for Appellant.

K. Rajah Ayyar—for Respondent.

Judgment.—The only question for decision in this appeal is whether the tender made by the defendant of Rs. 950 on the 24th of August 1919 was within the time allowed by the compromise entered into between him and the plaintiff. The compromise petition is dated 24th June 1912, and recites that

if within 23rd August 1919, i. e., within two months from this date, defendant should pay to plaintiff . . . . Rs. 950 . . . . Otherwise, the full amount of Rs. 1,500 should be recovered with interest at 1 per cent. per mensem from this date. . . . .

That compromise was put into Court by the parties on 27th June and a decree was passed in terms of the compromise. The question now is whether the date, 23rd August 1919, was the date within which the payment had to be made, or whether the payment had to be made within two months from the date either of the compromise or of the decree thereon. It is certainly not at all free from ambiguity and the only way in which the question could be settled is to ascertain the intention of the parties.

I have been referred to several cases in which documents with repugnant sentences have been considered. *Browne* v. *Burton* (1); *Jayne* v. *Hughes* (2) and *Sharplus* v. *Hankinson* (3). I think that the principle set forth in all these cases is that when it is held that repugnant words " should be struck out, it means words " repugnant to the intention of the parties." In the present case the payment was made by the defendant after borrowing on a date which was within two months, namely, 24th August. The plaintiff does not appear to have taken any exception to the payment until he brought this execution application on 3rd December 1920, more than a year after the payment. Interest from this date is provided in the compromise and in that execution petition he calculated interest from 27th June 1919, the date of the decree and not from the 23rd of June 1919, which he contends was the important date.

In these circumstances, I am not prepared to differ from the view of both the lower Courts that the parties intended that the money should be paid within two months and not on the 23rd of August 1919. The appeal, accordingly, fails and is dismissed with costs.

Appeal dismissed.

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(1) [1848] 17 L. J. Q. B. 49=2 B. C. Rep. 220=5 D. and L. 289.

(2) [1854] 10 Ex. 430=24 L. J. Ex. 115=3 W. R. 65=3 C. L. R. 188.

(3) 78 E. R. 661.

A. I. R. 1926 Madras 1209

RAMESAM, J.

Mir Mahomed Noorulla—Plaintiff—Appellant.

v.

Hasarath Kibulai Sayyad Ghulam Ghouse Sha—1st Defendant — Respondent.

Appeal No 14 of 1925, Decided on 13th August 1926, from the appellate order of the Dist. J., West Tanjore, D/- 24th April 1924, in A. S. No. 159 of 1923.

(a) *Limitation Act, Art.* 182 — *Transferee Court returning decree to parent Court according to R.* 161 (a) *after six months—Application made to transferee Court after return, is not made to "proper Court" and does not save limitation Madras High Court Rules of Civil Practice, R.* 161 (a).

A decree was obtained in Sub Court and was transferred to the District Court for execution on 25th February 1926. After waiting for six months the District Court returned the decree with a certificate that the decree-holder did not apply for execution on 11th September 1918. Apparently in ignorance of this fact, the decree-holder applied to the District Court on 8th January 1919, when he was informed that the decree had already been returned under R. 161 (a) of the Rules of Practice.

Held: that this application of 8th January 1919, was not made to the proper Court. Remarks of Seshagiri Iyer, J., in 39 *Mad.* 485, *Disapprd.* [P 1209 C 1 & 2]

(b) *Civil P. C., S.* 41—*Madras Civil Rules of Practice* 161 (a) *is not inconsistent with S.* 41, *nor is ultra vires.*

R. 161(a) is only a rule of detail giving further guidance to Court in the carrying out of the provisions of S. 41, Civil P. C., and the two provisions are not inconsistent with each other, nor is R. 161(a) ultra vires.

All the rules of the Rules of Practice are supplemental to the Civil P. C. R. 161 (a) is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred: 20 *All.* 129 and *A. I. R.* 1923 *Bom.* 396, *Dist.* [P 1209 C 2]

V. S. Vaidyanatha Aiyar and *T. S. Srinivasan*—for Appellant.

T. R. Ramachandra Aiyar and *S. Muthuvel Mudaliar*—for Respondent.

Judgment.—This is a second appeal arising in execution. The decree was obtained in the Sub-Court of Tanjore. The decree-holder applied to have it transferred to the District Court on 25th February 1916, and it was so transferred. After waiting for six months the District Court returned the decree with a certificate that the decree-holder did not apply for execution on 11th September 1918. Apparently, in ignorance of this fact, the decree-holder applied to the District Court on 8th January 1919, when he was informed that the decree had already been returned under R. 161 (a) of the Rules of Practice. The next petition filed was in the Sub-Court on 12th April 1921. He was asked how it was in time, but he did not re-present it with the information. The present application was filed on 8th February 1923. The Courts held that it was barred. The decree-holder appeals.

If the application of January 1919, was in time, then the application of April 1921 was also in time; then the present application also would be in time. The question, therefore, reduced itself to this, whether the application of January 1919, was in time. This again depends upon whether it was presented to the proper Court. The decree-holder applied to the District Court after the decree had been returned by that Court. The case *Velliappa* v. *Sulramanyam* (1) does not help the appellant. All that was held there was that where a Court to which a decree was transferred did not return the decree though six months have elapsed without an application for execution, then an application would still lie in that Court. But in this case the decree had been returned. Mr. Vaidyanatha Aiyar for the appellant argues that such a return is not a return within the meaning of S. 41 of the Code of Civil Procedure. I think it is. It seems to me that R. 161 (a) of the Civil Rules of Practice is only a rule of detail giving further guidance to the Court in the carrying out of the provisions of S. 41, Civil P. C. I do not think they are inconsistent with each other. I cannot therefore hold, as the appellant argues, that R. 161 (a) of the Rules of Practice is ultra vires. He relies on a remark, in the above decision of Seshagiri Aiyar, J., that the rule was not an adjunct to the Civil P. C. I do not agree with this remark.

I think all the rules of the Rules of Practice are supplemental to the Civil Procedure Code. It is a rule within the power of the High Court, the object being to compel decree-holders to be prompt in filing execution petitions in Courts to which the decrees are transferred; and once a decree is returned by

(1) [1916] 39 Mad. 485=29 I. C. 119=29 M. L. J. 172.

the Court to which it was transferred, it cannot be said that that Court is the proper Court. Mr. Vaidyanatha Aiyar argues that there is no failure to execute the decree within the meaning of S. 41. Nothing having been done for seven months, it seems to me it is a failure. He relies on the explanation of the word "failure" in *Abda Begam* v. *Muzaffar Husein Khan* (2) and *Vithu* v. *Ganesh* (3) I do not understand that the definition in these cases is quite an exhaustive definition of the word "failure." It does not appear that there was any Rule of Practice like R. 161 (a) at the time these cases were decided. Therefore any of these decisions cannot help us. The definition is only confined to the particular facts of those cases. I think the District Judge is right in the latter part of his judgment (which to some extent is inconsistent with the earlier part), where he holds that the District Court of Tanjore was not the proper Court after the decree was returned.

The decree is for a large amount and the result is no doubt hard on the appellant. But he must thank himself for the result and the law ought not to be made responsible for the result of gross laches on the part of the parties.

The appeal is dismissed with costs.

Appeal dismissed.

(2) [1897] 20 All. 129=(1897) A. W. N. 218.
(3) A. I. R. 1923 Bom. 396.

A. I. R. 1926 Madras 1210

PHILLIPS AND MADHAVAN NAIR, JJ.

Ananthalakshmi Ammal—Appellant.

v.

K. Narasimhacharlu—Respondent.

Letters Patent Appeal No. 196 of 1925, Decided on 17th March 1926, from a judgment of Reilly, J., D/- 22nd July 1925, in Second Appeal No. 39 of 1923.

(a) *Grant—Inam—Property attached to maniem office—Devolution is not governed by Hindu Law.*

In the case of property attached to a maniem office the devolution very frequently does not follow the rules laid down by the Hindu Law. The appointment rests with the Government and very frequently the appointment is made on other grounds than direct heirship alone. [P 1210, C 2]

(b) *Grant—Inam—Enfranchisement confers title.*

Where the plaintiff had been given the inam on enfrachisement.

Held: that such a grant conferred title on the grantee and he need not prove his title by succession under Hindu Law: *A. I. R.* 1925 *Mad.* 726, *Foll.* [P 1210, C 2]

(c) *Civil P. C., O.* 41, *R.* 19—*Absence of knowledge of date of hearing—Appeal dismissed for default may be re-admitted.*

Where the appellant did not know the date of the hearing of the appeal and the vakil with whom he had entrusted the case had died and in these circumstances the Subordinate Judge held there were sufficient reasons to excuse appellant's absence.

Held: that the restoration of the appeal after default was justified. [P 1211, C 1]

P. R. Srinivayan—for Appellant.

B. Somayya—for Respondent.

Judgment.—The learned Judge has declined to accept the finding of the lower appellate Court as to plaintiff's title and possession on the ground that the plaintiff has failed to prove his title. In this we think he was wrong and that his decision is apparently due to an idea that the plaintiff was bound to prove that he was the direct lineal descendant of the first holder Ramachari in accordance with the principle of devolution according to Hindu Law. No such allegation was set up in the plaint and the property in dispute in this case is the property attached to a maniem office and the devolution of such property very frequently does not follow the rules laid down by the Hindu Law. The appointment rests with the Government and very frequently the appointment is made on other grounds than direct heirship alone.

Apart from this, the plaintiff has been given the inam on enfranchisement and in *Ramakrishnayya* v. *Pitchayya* (1) it was held that such a grant conferred title on the grantee.

On these facts it was certainly open to the Subordinate Judge to base his finding as to plaintiff's title and as that finding was justified on the evidence, it is not open to this Court to interfere with it in second appeal.

The respondent's vakil does not seriously dispute the above but supports the decree on the ground that the subordinate Judge ought not to have re-admitted the appeal after dismissing it for default. The Subordinate Judge has

(1) A. I. R. 1925 Mad. 726.

stated that he believed the statement of the appellant that she did not know the date of the hearing of the appeal and in fact the vakil with whom she had entrusted the case had died and in these circumstances the Subordinate Judge held there were sufficient reasons to excuse her absence. In these circumstances we are not prepared to interfere with that order. This appeal must, therefore, be allowed and the decree of the lower appellate Court restored with costs both here and in second appeal.

Appeal allowed.

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* A. I. R. 1926 Madras 1211

SPENCER AND VENKATASUBBA RAO, JJ.

Belagodubal Virabhadra Gowd—Plaintiff—Appellant.

v.

Kalyani Gangamma and *others*—Defendants—Respondents.

Appeal No. 460 of 1922, Decided on 24th November 1925, from a decree of the Sub-J., Bellary, in O. S. No. 63 of 1921.

*(a) *Civil P. C., O. 23, R. 3—Award on private submission is compromise.*

Where the parties voluntarily refer their disputes to the decision of mediators without the intervention of a Court and their vakils present the award of the arbitrators for acceptance by the Court, such an award operates as a compromise of the dispute, and a consent decree may be passed in its terms: 45 *Bom.* 245 and *A. I. R.* 1925 *Mad.* 50, *Foll.* [P 1211 C 2; P 1212 C 2]

*(b) *Civil P. C., Sch. 2, Para. 1—Pending suit.*

A suit is not pending between the dates of its dismissal for default and its restoration.

[P 1213 C 1]

V. S. Narasimhachariar—for Appellant.

S. Ranganatha Ayyar—for Respondents.

Spencer, J.—The plaintiff claimed in this suit filed in forma pauperis the properties of one Kalyani Narasappa on the ground that he was an illatom son-in-law of that deceased person. After the suit had been once dismissed and while an application for restoration was pending, there was a reference to arbitration by the parties. The award of the arbitrators passed on the 22nd December, 1921, gave the plaintiff 2 acres of wet and and a sum of Rs. 1,500. The Subordinate Judge has found that the plaintiff accepted the award and received Rs. 1,500. Admittedly he signed Ex. VI in which reference is made to the award. It does not, therefore, very much signify that at the final trial of this suit the receipt for the sum of Rs. 1,500 was not forthcoming. Nor does it matter that Rs. 500 went into the hands of one Sakkara Gowd as there is evidence that that sum was paid to him in consideration of his assistance to the plaintiff in settling the dispute. As the decree of the lower Court is in accordance with the award the plaintiff cannot now claim to get any thing more than what was allotted to him through the said mediation of arbitrators.

The only question of law raised in this case at the hearing of the appeal is that the reference to arbitration out of Court was invalid and cannot constitute an adjustment of the subject-matter of the suit within the meaning of O. 23, R. 3, Civil P. C. In this respect I think we should follow the decision of this Court in *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna* (1) which adopted a decision of the Bombay High Court in *Manilal Motilal* v. *Gokaldas Rowji* (2). In *Peddapalayam Bodachari* v. *Peddapalayam Muniyachari* (3) Krishnan and Odgers, JJ., followed with some hesitation *Shavaksha Dinsha Davar* v. *Tyab Haji Ayub* (4) but which was held to be wrong in *Manilal Motilal* v. *Gokaldas Rowji* (2) by Macleod, C. J., who was a party to the earlier decision. *Amar Chand* v. *Banwari Lall* (5) is a decision of a single Judge of the Calcutta High Court and in *Gajendra Singh* v. *Durga Kumari* (6) two learned Judges recently took the same view as that in *Manilal Motilal* v. *Gokaldas Rowji* (2) and the dissenting Judge, Mukerji, J., who held that an award was not an adjustment by an agreement of parties within the meaning of O. 23, R. 4 did not have his attention called to the decision of this Court which followed *Manilal Motilal* v. *Gokaldas Rowji* (2). Where the parties voluntarily refer their disputes to the decision

(1) A. I. R. 1925 Mad. 50.
(2) [1921] 45 Bom. 245 [illegible] I. L. R. 104[illegible]
(3) [1921] [illegible] L. W. 686 = (1921) M. W. N. [illegible]
(4) [1916] 40 Bom. 386 = 37 I. C. 140 Bom. L. R. 559.
(5) A. I. R. 1922 Cal. 404 = 49 Cal. [illegible]
(6) A. I. R. 1925 All. 508 = 47 All. [illegible]

mediators without the intervention of a Court and their vakils present the award of the arbitrators for acceptance by the Court the proper view appears to be that such an award operates as a compromise of the dispute, and a consent decree may be passed in its terms. In the present case there is all the less reason for not applying the cases which have held differently for the reason that when this reference to arbitration was made there was no pending suit and, therefore, those cases, which held that reference to arbitration during the pendency of a suit without the intervention of the Court is not valid, do not strictly apply. For these reasons I would dismiss the appeal and confirm the lower Court's decree with costs.

Venkatasubba Rao, J.— I agree. The point to be decided is, whether the order of the lower Court giving effect to an adjustment between the parties contravenes any provision of the Civil, P. C. The plaintiff-appellant contends that while a suit is pending there cannot be a reference to arbitration without the sanction of Court and any award made in pursuance of such a reference not sanctioned, is a nullity. The facts are these. The plaintiff filed the suit in which the appeal arises, for recovery of certain properties and the suit was dismissed for default on the 5th of November, 1921. The plaintiff and the 1st defendant referred their disputes to the arbitration of certain persons on the 22nd of December 1921, who on the same day passed an award. I shall first assume that on the date of the reference, there was a suit pending. Schedule II to the Civil, P. C. deals with arbitration under two main divisions : see *Ghulam Khan* v. *Muhammad Hassan* (7).

(1) Where in a pending suit the parties desire to have any matter referred to arbitration. Paragraghs 1 to 16 relate to this and all proceedings are under the supervision of the Court. The reference shall be made by an order of the Court.

(2) Where the parties without having recourse to any litigation agree to refer their differences to arbitration. This is dealt with under two headings :

(*a*) Where it is desired that the agreement to refer should have the sanction of the Court ; in that case, all further proceedings are under the supervision of the Court. Paragraphs 17 to 19 deal with this.

(*b*) Where in pursuance of the reference an award has been made and any person then desires to get the award enforced by Court. Paragraphs 20 and 21 relate to this

It is now contended that the reference in question not having been made by an order of Court, the award passed in pursuance of it, cannot be recognized. The argument is put in this ways. S. 89 provides that all references to arbitration and all proceedings thereunder shall be governed by the provisions in the Second Schedule. It is said that any award made in pursuance of a reference not under those provisions is illegal as contravening the provisions of the section. I do not desire at present to enter into this large question, as the point arising in this case can be disposed of on a short ground. The award, after it was passed was accepted and acted upon by the parties concerned. The 1st defendant paid and the plaintiff received Rs. 1,500 under O. 23, R. 3, Civil P. C., where a suit has been compromised by a lawful agreement the Court is bound to direct the compromise to be recorded and to pass a decree in accordance with it. Now, has there been an adjustment by a lawful agreement ? The parties undoubtedly agreed to the terms of the adjustment and the mere fact and the compromise was the result of an award can make no difference. Supposing instead of there being a reference and an award, the parties settle the terms as the result of a mediation of friends, it cannot be contended that the compromise is for that reason unlawful. The effect of the reference and the award was merely to suggest to the parties the terms on which the matter might be settled and the final settlement was clearly the act of the parties themselves. The Court is not called on either to recognize the reference or to enforce the award as such. The compromise which it was asked to give effect to, falls within O. 23, R. 3 and is not opposed to S. 89. In this view, it is unnecessary to consider what the position would be if the parties had not entered into a compromise on the basis of the award.

So far I have dealt with the question on the footing that there was a pendin

(7) [1902] 29 Cal. 167=29 I. A. 51=6 C. W. N. 226=8 Sar. 154 (P. C.).

suit. In my opinion, however, there was no suit pending on the date of the reference. As I have said, the suit was dismissed for default on the 5th of November 1921, and the reference to arbitration was on the 22nd of December, 1921. Between these two dates, that is on the 12th November 1921, the plaintiff had filed an application for the restoration of his suit. It is contended that the suit must be deemed to have been pending by reason of that application having been filed. I see no reason to have recourse to this fiction and I hold that on the date of the reference there was no suit pending. I agree in the order proposed by my learned brother.

Appeal dismissed.

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* * A. I. R. 1926 Madras 1213

COUTTS-TROTTER, C. J.

Pootheri Illath Kuttikrishnan Nair—Petitioner.

v.

Kallil Appa Nair and *another*—Respondents.

Civil Revision Petition No. 820 of 1924, Decided on 22nd March 1926, from the decree of the Addl. Dist. Munsif, Calicut, in S. C. S. No. 435 of 1923.

* * * *Contract Act, S. 233—Liability of principal and agent is not joint but alternative.*

The liability of principal and agent is not joint but alternative: (1904) *A. C.* 11, *Rel. on.*

What S. 233, means is that the person dealing with the principal through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but he cannot get judgment against both of them jointly for the amount sued for. [P 1213, C 2]

K. Krishna Menon—for Petitioner.

O. T. Govindan Nambiar — for Respondents.

Judgment.—In this case a point of some little interest arises because the plaintiff on a contract for supply of timber sued two defendants, the first of whom he alleged to be the principal and the second he alleged carried the transaction through. What the learned Judge has done is to give judgment against both of them. In my opinion that cannot be done. The liability of principal and agent is not joint but alternative, see *Morel Bros. and Co., Ltd.* v. *The Earl of Westmorland* (1) which really confirms the very careful examination of the subject in the judgment of the Master of the Rolls in the Court below. Now it is said that the English Law has been altered by S. 233 of the Indian Contract Act together with its illustration. The section runs:

> In cases where the agent is personally liable, a person dealing with him may hold either him his principal, or both of them, liable.

and then the illustration is:

> A enters into a contract with B to sell him 100 bales of cotton and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.

In my opinion the wording of that section is very unfortunate because it gives rise to the argument and doubt as to whether it was not intended in cases of principal and agent to create by this section a joint liability in the action and that the section must be construed as meaning that he may get judgment against both of them on one and the same transaction. In my opinion that is so utterly contrary to all accepted principles of law that it cannot be right and I have come to the conclusion that what the section means is that the person dealing with the principal through the agent may at his election sue either or he may sue both of them alternatively in a case where he is not sure whom his exact remedy is against; but I am quite clear on this point that the section can only be construed as meaning that he may sue both principal and agent in the alternative and that he cannot get judgment against both of them jointly for the amount sued for. That would be to turn a liability which is clearly mutually exclusive into a joint liability, and, as pointed out by the House of Lords, the liability of an agent and principal cannot be joint. The whole conception of the law of principal and agent excludes all idea of liability.

The plaintiff in this case has [illegible] if he is forced to his alternative, his judgment against the princ[illegible] let that against the agent [illegible] was evidence on which the le[illegible] could find that the principal [illegible] in this case and the result by [illegible] the decree will be modifi[illegible] out that part which [illegible]

(1) [1904] A. C. 11=73 [illegible] 52 L. T. 702=20 T. L.

upon the agent and retaining that part of it which inflicts liability on the principal. It is quite true that the person who complains is the principal and the principal only and that he has failed, but I shall not give any costs in this Court because I think that the creditor invited this appeal by taking judgment against both principal and agent. So this Civil Revision Petition is dismissed without costs.

Decree modified.

A. I. R. 1926 Madras 1214 (1)

PHILLIPS AND MADHAVAN NAIR, JJ.

A. S. Palaniandi Chettiar — Defendant 1—Appellant.

v.

Kalyanarama Iyer and *another*—Respondents.

Appeal No. 155 of 1924, Decided on 8th March 1926, from an order of the Sub-J., Tanjore, in E. A. No. 9 of 1923.

Presidency Towns Insolvency Act, S. 8—Insolvent has no right of appeal—Civil P. C., O. 22, R. 8.

Under the Presidency Towns Insolvency Act, an insolvent has no right of appeal because he cannot be deemed to be a person aggrieved. Even assuming that the appeal is merely a continuation of the original proceedings properly instituted by the insolvent, he cannot himself continue them, for if the Official Receiver refuses or neglects to continue those proceedings, the Court may make an order dismissing the suit on the defendant's application.

[P 1214 C 2]

A. V. Viswanatha Sastri— for Appellant.

K. Bhasyam and *M. S. Vythinatha Iyer*—for Respondents.

Judgment.— When this appeal was filed, the appellant had been adjudicated an insolvent. A preliminary objection ar taken that he cannot institute this to peal. We think the case is governed supe he principle of the recent decision shall ull Bench in *Hari Rao* v. *Official* (2) e (1). It was there held that recours e Presidency Towns Insolvency their an olvent had no right of appealbe-dealt e he uld not be deemed to be a per (a ggrieved. The reason given was that men had no gal interest but has merely the Cpe or expctation. The same prin- (7) applies ually in the case of this appeal from the decision of the Subordinate Judge for, at the time the appeal was filed the insolvent had no legal interest in the subject-matter.

It is argued for the appellant that the appeal is merely a continuation of the original proceedings which had been properly instituted by the insolvent, but it is clear from O. 22, R. 8, that even when the proceedings have been properly instituted by the insolvent, he cannot himself continue them, for if the Official Receiver refuses or neglects to continue those proceedings, the Court may make an order dismissing the suit on the defendant's application.

Applying that principle to the present case the insolvent had no right to institute this appeal. The preliminary objection must, therefore, be sustained and this appeal dismissed with costs.

Appeal dismissed.

N. I. R. 1926 Mad. 556=49 Mad. 461 (F.B).

A. I. R. 1926 Madras 1214 (2)

SRINIVASA IYENGAR, J.

Official Trustee of Madras—Plaintiff

v.

Chevulah Kamalammah and *others*—Defendants.

Civil Suit No. 132 of 1925, Decided on 23rd September 1926.

Madras High Court, Fees Rules, O. 6. R. 1—Clauses (b) and (c)—" Disposed of " means adjudicated on merits.

The expression " disposed of " in Cl. (c) should be construed as meaning a disposal by an adjudication made by the Court itself on the merits of the case and not a disposal based on any agreeement between the parties such as settlement, withdrawal or compromise.

Where a case came on for settlement of issues and the defendants intimated that they were not pressing their defence and thereupon the Court took it that the case should be posted for final disposal and on the day of final disposal the parties agreed and a decree was passed,:

Held : that the case clearly fell under Cl. (b).

[P 1215 C 1 P 1216 C 2]

V. Radhakrishnaiyah—for Plaintiff.

P. Venkataramana Rao—for Defendants 1 and 3.

Judgment.—This is an application for review of taxation made on behalf of Defendants 1 to 3. The suit was on a mortgage and the applicants before me were the mortgagors. When the case came on for settlement of issues it was

Title [redacted]

Author [redacted] Today

Accession No. [redacted]

Call No. [redacted]

Borrower's No.	Issue Date	Borrower's No.	Issue Date
[redacted]	[redacted]		